REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO. 8 OF 2015

DAVID MUCHIRI GAKUYA …..……………………..PETITIONER

VERSUS

REPUBLIC………………………………………. RESPONDENT

JUDGMENT

By a petition dated 18th March, 2016, and filed in court on 4th April, 2016 the petitioner sought for the following prayers: -

"

> ***1. That the honourable court declares the appeal the(sic) applicant at the first appeal was unconstitutional.***
>
> ***2. That this honourable court declares that the said subsequent appeal as dismissed by the Court of Appeal was without the benefit of the new and compelling evidence that all the appeals that had been presided over by judges not mandated to hear them were a nullity and that in this case the petitioner's appeal was and still stands to be a nullity.***
>
> ***3. That given the above position the only judgement remaining to be impugned is that of the subordinate court.***
>
> ***4. An order to be made preferring the second hearing of the appeal to the Superior Court.***
>
> ***5. Any other orders that the court may deem fair and just."***

These prayers are not all that clear but the affidavit the petitioner swore in support of the petition sheds some light on what he is seeking. According to this affidavit, sworn on 18th March, 2016, the petitioner was charged and convicted of the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code** in **Karatina Senior Resident Magistrates Court Criminal Case No. 5 of 2008.** Being dissatisfied with the decision of the subordinate court, the petitioner appealed to this Court vide **Nyeri High Court Criminal Appeal No. 52 of 2010.** This court **(Wakiaga and Ombwayo JJ),** dismissed the petitioner's appeal and upheld the subordinate court's verdict.

Not to be discouraged, the petitioner appealed further against the decision of this Court to the Court of Appeal sitting at Nyeri in **Criminal Appeal No. 67 of 2014**. By judgement dated 17th March, 2015 the Court of Appeal dismissed his appeal.

Having exhausted the two available appeal avenues, the petitioner has now invoked **article 50(6)** of the **Constitution** and petitioned this Court for hearing of his appeal afresh on the basis that new and compelling evidence has become available. The new evidence, according to the petitioner, is that Ombwayo, J having been appointed as a judge to the Employment and Labour Relations Court had no jurisdiction to hear and determine the petitioner's appeal in the High Court. According to the petitioner, under **section 359** of the **Criminal Procedure Code** all criminal appeals emanating from the subordinate courts can only be heard by judges of the High Court.

In a nutshell, therefore, the petitioner is seeking for a declaration that the appeal proceedings before this Honourable Court in respect of his appeal in **Criminal Appeal No. 52 of 2010** and the subsequent judgment were null and void for want of jurisdiction. To the extent that the question of jurisdiction of the two-judge bench was not considered when the petitioner preferred his second appeal to the Court of Appeal, the petitioner wants this court to declare the dismissal of his appeal by the Court of Appeal as having been done in ignorance of the law on this issue. He regards this issue as a new and compelling evidence that entitles him to a fresh hearing of his appeal in this Court.

The state did not file a response to the petitioner's petition perhaps because it conceded the petition and supported the petitioner's proposition that this Court hears the petitioner's appeal afresh in view of the various decisions that have so far been pronounced by the Court of Appeal in similar cases where the issue of the jurisdiction of judges of the courts of equal status to the High Court has arisen.

In his relatively lengthy submissions counsel for the petitioner dwelt extensively on this issue of jurisdiction arguing that a two- judge bench comprising Wakiaga and Ombwayo JJ was not properly constituted to hear his appeal since Ombwayo J is not a judge of the High Court. As I understand him, the proceedings before this particular bench and all the consequential orders it made were null and void for the reason that it had no jurisdiction to preside over the appellant's appeal.

One of the decisions the learned counsel for the petitioner cited in support of his submissions is the Court of Appeal decision in **Nyeri Criminal Appeal No. 45 of 2014 Peter Njoroge Muriithi & Another versus Republic** where a similar question arose; just like in the petitioner's case, Wakiaga and Ombwayo JJ had presided over an appeal from the subordinate court where the appellant had also been convicted of the offence of robbery with violence. When this matter was escalated to the Court of Appeal, it only dealt with the jurisdictional issue which it decided *in limine* and held that the two-judge bench was not properly constituted and therefore could not purport to hear an appeal that ordinarily ought to have been heard by judges of High Court. It held that the law envisages that judges of specialised courts shall be different from the judges of the High Court with the different jurisdiction though having the same status and that where a judge of a specialised court is appointed to such a court that is where their jurisdiction lies. The court concluded that a criminal appeal where a specialised court judge had participated is a nullity and for that reason it directed that the appeal be remitted back to the High Court for a fresh hearing before a properly constituted bench. In coming to this decision, the Court of Appeal cited its own previous decisions on the same issue in **Karisa Chengo & 2 Others versus Republic (2015) eKLR**, **Nyeri Criminal Appeal No. 27 of 2014 John Kabiro Kimonjo versus Republic** and **Nyeri Criminal Appeal No. 26 of 2014, Euticus Muchemi Gatundu versus Republic.** In all these cases the Court of Appeal nullified proceedings in which judges appointed to sit in special courts presided over appeals that are ordinarily conducted by the judges of the High Court.

It follows that going by these Court of Appeal decisions, the petitioner is right, and the state counsel rightly agrees, that his appeal to this Court against the decision of the subordinate court was heard and determined by a bench of judges that was not properly constituted for this particular task; his argument is, no doubt, representative of the position of the law as it currently stands.

The only concern I have with the petitioner's petition is that this important jurisdictional question was neither raised in this Court at the hearing of his first appeal nor in the Court of Appeal where he preferred a second appeal. I have noted that in most, if not all, of the decisions cited by counsel, the question of jurisdiction was raised in the Court of Appeal and that court was thereby seized of the opportunity to determine and indeed determined this issue whenever it was raised; as noted the Court has consistently

held that a judge appointed to a specialised court cannot assume the jurisdiction of matters reserved for a judge of the High Court.

The petitioner's appeal to the Court of Appeal was heard and determined on merits; the court was not invited to determine the issue of jurisdiction and therefore I suppose it proceeded and made its decision on the assumption that the petitioner's first appeal was heard by a court of competent jurisdiction. Whether the court should, on its own motion have enquired into the question of jurisdiction of the first appellate court particularly considering the position the court has itself adopted on this issue is not for me to say; suffice it to say that there is a valid judgment of the Court of Appeal on the petitioner's appeal against a judgment from this Court and in determining this petition, this court must be wary of the implications its orders would have on that judgment.

The petitioner has not stated so in clear and unambiguous terms but it is almost apparent that his petition is not only an attack on the judgment of this court but it also appears to me to represent a thin veiled assault on the judgment of the Court of Appeal to the extent that it upheld this court's judgment. His case, as I discern it, is that since the proceedings in this Court and its subsequent judgment were a nullity, the judgement of the Court of Appeal is equally a nullity. I suppose it is for this reason that in one of his prayers he has stated that *"the only judgment remaining to be impugned is that of the subordinate court"* and therefore this court should rehear afresh his appeal against this particular judgment. This simply implies that of the three judgments on record, it is only the judgment of the subordinate court the petitioner recognises.

The net effect of the petitioner's petition is therefore to have this court overturn its own judgment and that of the Court of Appeal and set down for hearing afresh his appeal against the judgment of the subordinate court. With due respect to the learned counsel for the petitioner, this is impracticable for various reasons; to begin with, this court cannot sit, hear and determine appeals arising from its own decisions; the petitioner was obviously aware of this legal position when he appealed to the Court of Appeal against this Court's judgment delivered on 4th day of April 2014. His appeal to the Court of Appeal was obviously consistent with **article 164 (3)** of the Constitution that clothes that Court with the jurisdiction to hear appeals from the High Court and **section 361 (1)** of the Criminal Procedure Code which entitles the appellant a second appeal from a decision of the High Court and further clarifies that such an appellant may only appeal to that Court on a matter of law.

I know not of any provision in law, and none was shown to me, where an appellant whose second appeal to the Court of Appeal against a decision of the High Court has been determined can come back to the High Court and regurgitate the same appeal afresh notwithstanding the fact that the Court of Appeal has pronounced itself on the same matter. Unless in its pronouncement the Court of Appeal has directed that the appeal be heard a fresh, this court cannot take it upon itself to hear an appeal for which it is functus officio.

It was submitted on behalf of the petitioner that this Court can entertain this petition and grant the prayers sought by virtue of **article 165** of the Constitution which gives this court unlimited original jurisdiction in criminal and civil matters and more relevant to this petition, the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Regardless of how much one would want to stretch the powers given to this court under this particular article, they are certainly not that elastic as to extend to the power to overturn Court of Appeal decisions or the freedom of this Court to sit on appeal over its own decisions.

There is no doubt that the petitioner was dissatisfied with this court's decision and that is why he appealed to the Court of Appeal; if, as counsel for the petitioner has suggested, the petitioner was dissatisfied with the decision of the Court of Appeal on the question of interpretation of the Constitution, then his next port of call should have been the Supreme Court. **Article 163 (4)** of the Constitution gives access to this court; it states as follows:

> ***(4) Appeals shall lie from the Court of Appeal to the Supreme Court—***

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) …

He simply cannot come back to this court merely because question of interpretation of the Constitution has emerged; as noted such a question would appropriately be catered for in an appeal to the Supreme Court.

In any event, **article 50(6)** of the **Constitution** under which the petitioner has sought refuge in his petition does not provide for the hearing of appeals afresh; that article provides for a limited window for this court to order for a fresh trial, and not appeal, upon discovery of new and compelling evidence. It states as follows:

50.(1)…

(2)…

(3)…

(4)…

(5)…

(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

(b) new and compelling evidence has become available.

The article is self-explanatory that the person may petition this court for a new trial if he has exhausted his available avenues for appeal and if he has new and compelling evidence.

The petitioner is not petitioning this court for a new trial; he is instead petitioning the court for the rehearing of his appeal which obviously is not within the scope of **article 50(6)** of the Constitution.

Secondly, it is doubtful that the petitioner has satisfied any of the two conditions prescribed in **article 50(a)** and **(b)** of the **Constitution**; I say so because, first, if his case is that his petition raises a fundamental constitutional question then that in itself should have been a reason enough for him to proceed to the Supreme Court where such a question should have been determined under article ***163 (4) (a)*** as question involving the interpretation or application of the Constitution; second, the question of whether Wakiaga and Ombwayo JJ had jurisdiction to entertain the appellant's appeal in this court cannot, by any stretch of imagination, be deemed as new and compelling evidence. I need not belabour the point here except to say that a question of whether a court has or does not have jurisdiction is a question of law and not a question of evidence. It is an issue that the petitioner or his counsel was all along aware of and which he was at liberty to raise either in the High Court in the Court of Appeal but, for whatever reason, did not raise it. It cannot be deemed to be new and compelling evidence that would merit a fresh trial. It follows therefore that even if the petitioner was seeking a fresh trial, as **article 50(6)** envisages, he would have been hard pressed to satisfy this court that he has met the threshold for such a trial.

In the ultimate, I am of the view that the petitioner's petition does not have any merit and I hereby dismiss it.

Dated, signed and delivered in open court this 13th day of January, 2017.

Ngaah Jairus

JUDGE