



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HIGH COURT CRIMINAL MISCELLANEOUS APPLICATION NUMBER 17 OF 2014

ROBERT MBURUGU GITUMA APPLICANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

1. **ROBERT MBURUGU MUTUMA** alias **KABUITU** (hereinafter “the Applicant”), was arraigned before the Chief Magistrates Court, Meru on 1st February, 2001 on a charge of robbery with violence contrary to **section 296(2)** of the Penal Code. It was alleged that on 25th October, 2000 at Kiige village near Nkubu Township in Meru Central District within Eastern Province, jointly with others not before court and while armed with dangerous weapons namely, pistol and rungu, the Applicant robbed **SAMUEL CHOKERA** of Kshs.65,585/- and used personal violence on him. After trial, the Applicant was convicted as charged and sentenced to suffer death. His appeals to both the High Court of Kenya at Meru (*Juma and Mulwa JJ*) and the Court of Appeal of Kenya at Nyeri (*Tunoi, Okubasu and Githinji JJ.A*) were dismissed on 11th July, 2002 and 19th May, 2006, respectively.

2. On 15th April, 2014, the Applicant took advantage of the new Constitution and lodged a Petition under Article 50 of the Constitution of Kenya, 2010 and applied for a declaration that his constitutional rights had been breached for having been convicted and sentenced to an unlawful sentence. It is not clear under what provisions of the Constitution the Applicant was making the subject application as Article 50 is clear that it is applicable where a retrial is being sought. That is not the case before me.

3. The matter came up severally for hearing but on 21st March, 2017 when the matter came up before Kiarie J, the Applicant applied that he be supplied with an Advocate. The Court thereupon referred the matter to this Court to consider the Applicant’s application. When the matter came before me on 22nd May, 2017, the Applicant told the court that he needed to be supplied with an Advocate as he did not have money to afford one. Mr. Mulochi, learned Prosecutor left the matter to the Court.

4. I have looked at the entire record, the Applicant was convicted of the offence of robbery with violence in 2001. His two appeals to this and to the Court of Appeal at Nyeri were dismissed for lacking merit. The Appellant was sentenced to suffer death which, according to him, was later commuted by His Excellence the President of the Republic of Kenya to life. He is currently serving life sentence.

5. The Applicant’s application is predicated on the allegations that; the mandatory sentence meted out on him was excessive, arbitrary, inhuman and deprived him a right to a fair trial under Article 50(2) of the Constitution; that he has suffered inhuman and degrading punishment and right to life contrary to Article 26(1) (3) of the Constitution and finally that the law was not observed when convicting and sentencing him and it was in breach of Article 48 of the Constitution. He concluded that he has new and compelling evidence that he wished to adduce at the hearing hereof.

6. Although I have noted that the prayer sought in the Petition does not fall under Article 50(6) of the Constitution. That in my view may be but a technical issue. The Petitioner has pleaded that he has new evidence to adduce. It is the Court hearing the Petition that will determine if the alleged evidence meets the constitutional criteria to order a retrial. What this Court has to consider is whether the Applicant is entitled to an Advocate at the expense of the state.

7. Article 50 (2) (h) of the Constitution provides that:

“(2) Every accused person has the right to a fair trial, which includes the right –

(a) – (g) ...

(h) to have an advocate assigned to the accused person by the State and at the State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

8. In my view, by permitting persons who have exhausted the appellate process to apply for a retrial of their cases, the Constitution must envisaged that such Applicants be accorded the same right to fair hearing as those freshly being charged. In this regard, the same principles applicable to an accused under Article 50 will apply to a convict making an application under sub-article (6) of that Article. Some of the considerations for one to benefit from state attorney may be; the nature and seriousness of the charge or offence facing the accused or applicant; the seriousness or severity of the sentence; the complexity of the case facing the accused or applicant; the ability or otherwise of the accused or applicant affording the services of an Advocate.

9. In the present case, the Applicant is already serving a life sentence (commuted from death), the application is under **Article** 50 of the Constitution which is a new area of jurisprudence thereby making the matter complex. The Applicant has sworn that he is unable to afford the services of an Advocate which fact has not been denied, challenged or controverted. In the premises, I am satisfied that the Applicant has satisfied the criteria for being accorded the services of an Advocate at the expense of the state.

10. Accordingly, the Applicants application is successful. I direct the Deputy Registrar of this Court to appoint an Advocate for the Applicant under Article 50(2) (h) of the Constitution.

DATED and DELIVERED at Meru this 12TH day of June, 2017.

A. MABEYA

JUDGE

12/06/2017

PRESENT

Bonface, Court Assistant

Applicant, Present

Mr. Mungai for State