



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO. 1 OF 2010

STANLEY NJUGUNA NDUTA.....PETITIONER

- V E R S U S -

REPUBLIC.....RESPONDENT

R U L I N G

The petitioner herein filed his petition on 14/1/16 by an undated Notice of Motion. He seeks orders that

1. This hon. court hears and determine my humble petition and readdress my case
2. Under Article 165(3) of the Constitution my fate be determined by this court.

The motion is supported by his affidavit undated and filed on the same date.

In his affidavit he avers that he is serving death sentence over a robbery with violence charges in Nyeri Criminal Case number 169 of 2008.

That he has exhausted all his appeals under Nyeri HCCRA 79/010 which was determined on 6/11/13 and Court of Appeal Cr. Appeal No. 89/13 which upheld both court’ decisions on 17/3/15.

That he seeks that his fate be determined under Article 48 of the Constitution.

Article 165(3) of the Constitution provides for the jurisdiction of the High Court – both unlimited in Civil and Criminal cases, and in determining the constitutionality of certain actions and issues. I believe the relevant provisions would be;

3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c)
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this

Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii)

.....
.....

(iv)

.....
..... and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

Article 48 provides;

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

The applicant argued his application orally and relied on two authorities.

From what I gathered from his submissions the issues are:

(1) That his appeal in the High Court was heard by an improperly constituted bench – In that one of the Judges was from the Employment and Labour Relations Court and hence had no jurisdiction to hear his appeal. He submitted that there was an authority for retrial and relied on **George Muriithi Kari vs. R. Nyeri Criminal Appeal no. 47 of 2015** where the two judge bench was found not to be clothed with jurisdiction and an order for the appeal to heard afresh was made.

(2) That he was not given a fair trial and that his constitutional rights were violated because the court convicted him on an altered charge without calling upon him to plead afresh to that charge in violation of the mandatory provisions of section 214 of the Criminal Procedure Code. He relied on **Harrison Mwangi Njuguna Vs. R. HCCRA 185/2001** where Court of Appeal found that failure to comply with section 214 (1) (ii) of the Criminal Procedure Code rendered the trial in the magistrate’s court substantially defective and the court did not order a retrial but ordered the immediate release of the appellant from prison.

In response the state opposed the motion and noted that the applicant had raised three grounds

1. That he wanted the court to re address his case because he did not get a fair trial
2. He relied on Article 165 of the constitution
3. He relied on Article 48 of the constitution

The state argued that on the issue of the altered charge the record clearly showed that the application was made to alter the charge by deleting section 295 and replacing it with s.296 on the charge sheet but the description of the offence and the particulars remained the same. That the record showed that the applicant had no objection to the alteration.

She relied on the petitioner’s appeal in **the Court of Appeal 89/2014 in Samuel Mwangi Giyathi and Stanley Njuguna Nduta**. The petitioner raised the issue of section 214. The Court of Appeal did note that it was not prejudicial to the appellant. The Court was of the view that despite the amendments the appellants were at all material times aware of the charges against them. The issue was settled. On the

issue of Article 165 of the constitution, it was submitted for the state that under Article 165(6) the High Court has no powers over the court of appeal and cannot overturn the decision of the court of appeal and relied on see **David Mushiri Gakuya V. R. Petition no 8/2015** where Justice Ngaah dealt with the issue conclusively.

The appellant in response argued that when he filed his appeal in the Court of Appeal, there was no authority that 'land' judges had no jurisdiction to hear his case. That since then things and changed and hence he was entitled to a retrial now. He argued strongly that because of the jurisdictional issues of the High Court bench that heard his case, and the Court of Appeal's failure to note that the trial court had violated the mandatory provisions of section 214 of the Criminal Procedure Code – he is entitled to a retrial. He went further to urge this court to give him an interpretation of section 214 of the Criminal Procedure Code.

He argued further that under Article 50 he could make any application to allow him to adduce further evidence arguing that in another case the same court of appeal had allowed an application for retrial upon reviewing section 214 in light of Article 50 of the Constitution.

I have carefully considered the issues raised by the applicant and the submissions by himself and those of the state.

All the issues raised are collapsible into one big one; the issue of petitioner's entitlement to a retrial:

His plea is two pronged. First that his appeal in the High Court was heard by an improperly constituted bench. This is not in dispute. However, the Court of Appeal upheld the decision of the High Court finding that his appeal had no merit and dismissed it. Secondly that the Court of appeal failed to follow its own precedent regarding section 214 of the Criminal Procedure Code, hence violating his rights.

The other prong is grounded in Article 50(6) of the constitution which provides, a person who is charged with a criminal case and has inter alia exhausted all his appeals and there is new and compelling evidence may petition the High Court for a new trial.

Has the appellant exhausted all his appeals? – Yes.

Is there new and compelling evidence? His argument is that the jurisdictional issue of the High Court bench, and the alleged violation of the section 214 by the trial court and the upholding of the same by the court of appeal – are new and compelling evidence.

On the issue of new and compelling evidence, Justice Mativo in **Pet.6/2014 Mali Ole Moiyale V. R.** at page 4 cited Odunga J., in **Manson Okeyo V. R [2014] eKLR** regarding the application of Article 50(6) of the constitution – where Odunga J cited from **Maurice Odhiambo Werunga Vs. R. HC Pet.4/2013.**

Article 50(6) has been the subject of every decision of the High Court they demonstrate that the petitioner must adduce new evidence in the sense that it must not have been available to the petitioner during the trial... could not have been obtained with reasonable diligence for use at the trial... at the hearing of the 2 appeals... the evidence must be compelling...admissible, credible....it may possibly persuade a court of law to reach an entirely different decision than that already reached.(See also **Lieutenant Martin Kibisu Vs. R. Supreme Court Pet. 3/2014.**)

Issues similar to those raised by the petitioner herein were exhaustively dealt with by Justice Ngaah in **Nyeri H.C. Pet. 8/2015 – David Muchiri Gakuya Vs. R.**

I agree with Justice Ngaah's judgment in its entirety.

The Judge noted

“to the extent that the question of the 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 the issue. He regards this issue as new and compelling evidence”.

The Petitioner herein further wants this Court to declare the Court of Appeal’s decision as unconstitutional.

Justice Ngaah went on to determine the issue in the following words,

“the question as to 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...jurisdiction is a question of law and not a question of fact”.

The same situation applies to this petition.

The appellant never raised the jurisdictional issue in the Court of Appeal. He raised the s.214 issue and the court of appeal dealt with it – This court has no powers to sit in appeal or review of a court of appeal decision. The petitioner’s dissatisfaction with the Court of Appeal decision cannot be the subject of a petition before this this court. Article 163(4) of the Constitution ensures that the petitioner is not left without a remedy. It provides that,

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.

The powers of this court are also limited by Article 165(6) which states

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

According to the petitioner the decision by the Court of Appeal was in violation of his constitutional rights. That becomes an issue for the Supreme Court.

It cannot be dealt with under Article 165 of the Constitution. The unlimited jurisdiction of the High Court in both criminal and civil matters and the jurisdiction to determine issues related to fundamental rights and freedoms does not include the power to sit on appeal of Court of Appeal matters. This was the wrong forum.

In view of the foregoing, I find the petition has no merit.. It is hereby dismissed.

Dated, signed and delivered in open court at Nyeri this 8th June 2017

TERESIA MATHEKA

JUDGE

In the Presence of:

The Appellant

State Counsel – Ms. Jebet

Harriet – Court Asst.