



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HIGH COURT MISC. CR. APPLICATION NO. 28 OF 2016

(CORAM: J. A. MAKAU – J.)

FRANCIS OCHOLA ODERO APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. **FRANCIS OCHOLA ODERO** through an application pursuant to **Section 362 of the Criminal procedure Act Cap 75** sought the following orders:-

- a. This revision be allowed and same be heard on priority basis.*
- b. The Honourable court be pleased to admit and/or accept the revision application.*
- c. Such other or further orders be made as this court shall deem just and expedient*

2. The application is supported by the affidavit dated 5.2.2016 in which the applicant has deponed, interalia, that he was convicted on a charge of Burglary contrary to **Section 304 (2) of the Penal Code** and sentenced to serve 4 years imprisonment, that what he seeks was court to allow his application for review and have a hearing for the application under **Article 50 (6) (b) of the Constitution of Kenya**.

3. The Applicant at the time of the hearing appeared in person whereas Mr. E. Ombati Learned State Counsel appeared for the State.

4. The Applicant urged his application relying on **Section 362 of C.P.C. and Article 50(6) (b) of the Constitution of Kenya**.

5. He also submitted that following his conviction in Criminal Case at Bondo Law Courts he filed an appeal to Kisumu High Court, which appeal against both the conviction and sentence was dismissed. That the Kisumu High Court Criminal Appeal, case was **number 82 of 2014** and was dismissed on **20.5.2015**. It is of significant to note the applicant did not attach any annextures to this application.

6. Mr. E. Ombati opposed the application as it was an application under **Section 362 of C.P.C.** seeking revision of orders urging that Section does not give this Court jurisdiction to entertain the application before the court as the applicant was seeking to have sentence passed by the lower court and upheld by the High Court on appeal reviewed. He urged the applicant's remedy was with Court of Appeal and not with this Court.

7. I have very carefully considered the application and rival arguments by the applicant and the State Counsel. The issues for consideration in this application are:-

(a) Whether the applicant is amenable to the prayers sought under Section 362 C.P.C. and 50 (6) (b) of the Constitution of Kenya?

(b) Whether the application is proper before this court?

8. Section 362 of Criminal Procedure Code Provides:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”

9. The Applicant after conviction filed an appeal to the High Court at Kisumu which dealt with the appeal and upheld the lower Court's orders on both conviction and sentence. The Applicant upon filing appeal ousted himself from the benefit of **Section 362 C.P.C.** The judgment that is now standing is a judgment of a Court of parallel jurisdiction to this court. That if this court calls for the file for the purpose of examining the record will be sitting on appeal of its own judgment. This court has no jurisdiction to call for the court's record from a court of parallel jurisdiction for the purposes sought by the applicant, thus Revision. I find the applicant's application to be misplaced and without basis. That if the applicant was not satisfied with Kisumu High Court decision on appeal in **Criminal Appeal No. 82 of 2014** as he has stated, he should have proceeded to file an Appeal at Court of Appeal at Kisumu but not to file the present application.

10. **Article 50 (6) (b) of the Constitution of Kenya** Provides:

“A person who is convicted of a criminal offence may petition the High Court for a new trial if:-

(b) new and compelling evidence has become available.”

11. The **Constitution under Article 50 (6) (b)** Provides for a convicted person of a criminal offence to petition High Court for a new trial if 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 on a new and compelling evidence which has subsequently become available.

12. In my view the above mentioned Section do not give a convicted person of criminal offence automatic right to petition for a new trial without complying with the requirements set out under the said article. In the instant case the applicant did not exhaust the mechanism provided for appeal as he did not file appeal to the Court to Appeal after dismissal of his appeal by the High Court, which Court cannot be said to be the highest court to which the applicant is entitled to appeal. He did not aver that no appeal had been filed in time contrary to the provisions of **Article 50 (6) (b)**. The Applicant has not disclosed to this Court any new and compelling evidence that has since become available. He attempted to point out without providing any court record that the prosecution had stated that he had previous record and by which reason he was sentenced to serve 5 years imprisonment. That if that is the reason and basis of this application, it should be noted the sentencing is always at the discretions of the trial judge or magistrate unless the sentencing section imposes a mandatory minimum sentence. He was charged under **Section 304(1) (a) of the Penal Code** which provides for maximum sentence of 10 years and he was sentenced to serve 5 years. This with all due respect, cannot be a basis for seeking a new trial as the conviction is not challenged and at any rate the Kisumu High Court upheld the trial Court's judgment on both the conviction and the sentence.

13. **Having come to the conclusion that I have, I find that the application do not meet the threshold for granting of the prayers sought under S. 362 of C.P.C. and Article 50 (6) (b) of the Constitution, the same is dismissed.**

DATED, SIGNED AND DELIVERED AT SIAYA THIS 7TH DAY OF APRIL, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 7TH DAY OF APRIL, 2016.

In the presence of:

Applicant present in person.

Mr. Ombati for Respondent

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akidah

J. A. MAKAU

JUDGE