



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CRIMINAL APPL. NO. 19 OF 2014

ANTONY ODHIAMBO OLANDO1ST APPLICANT

YONA OTIENO WAUNA2ND APPLICANT

GEORGE OCHIENG MESO3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 17th March 2014 the applicant filed a pleading styled as follows:-

“REF: ARTICLES 22(1) AND 23(1) OF THE CONSTITUTION ARTICLE 22(1)

Every person has the right to institute a Court Proceedings claiming their rights or fundamental freedom in the Bill of Rights which has been denied to us, violated and infringed and threatened us.

ARTICLE 23(1)

The High Court has Jurisdiction in accordance with Article 165, to hear and determine this applications for redress for a denial, violation, infringement, threat to a right and/or fundamental freedom in the Bill of Rights.

In view of the above cited laws we humbly request the Honourable Court to consider and determine the appropriate relief over the violation of our rights under Articles 27(1) (2) (1), 25(c), 19(2) and 50(2) (CP) of the Constitution”

On the same date they filed a Notice of Motion seeking to have their petition set down for hearing and indeed it was on several occasions. It was however adjourned severally at their own instance and it was not until 12th May 2016 that it was finally heard. The 1st applicant had by then informed the Court that he wished to withdraw from the application and he was allowed to do so.

The 2nd and 3rd applicants appeared in person and whereas their application was for redress of rights which they allege were violated at the hearing their application took a different turn. They both stated that they were here to apply for a fresh trial. The 2nd applicant stated that he was never given an opportunity to defend himself at the trial. He submitted that the witnesses were rushed more so the arresting officer thereby denying him the opportunity to cross-examine him. He contended that he was also not allowed to cross-examine the investigating officer and craved the leave of this Court to do so. He

also filed written submissions in which the main complaint was that he was not allowed to mitigate and also raised the issue of the constitutionality of the death sentence.

On his part the 3rd applicant stated that he wanted his case to start afresh because at his first arrest the administration police Corporal did not attend to say if he was found with exhibits. He contended that all he wanted was for that officer to testify.

The application was opposed with Prosecution Counsel submitting that the applicants had an opportunity to raise these issues in the lower court and the appellate court and that moreover no proceedings were placed before this court to demonstrate that the applicants' rights were violated and the application is therefore made in a vacuum. She further submitted that as the applicants' case was heard before the new constitution and the law does not apply retrospectively the applicants cannot enjoy the rights now being sought. She submitted that the appellants cannot use this court as a third appellate court and prayed that their application be dismissed.

The right to a new trial is provided for under Article 50(6) of the Constitution which provides:-

“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”

In my view this article is clear in its operation in that it makes reference to a person who is already convicted of a criminal offence and does not restrict its application to the time of conviction. To qualify for a new trial all one has to prove is that his appeal has been dismissed by the highest court or that he did not appeal within the time allowed for appeal and that new and compelling evidence has become available. It is therefore erroneous to state as did the Prosecution Counsel that the applicants herein are not entitled to bring this application. Having so stated the next issue I must determine is whether they meet the threshold for a new trial.

Having carefully considered the material placed before me my finding is that they have not. They have not demonstrated that any new and compelling evidence has become available. What they raise are issues that were always available to them both at the trial and at the appeals. The issue of the constitutionality of the death sentence now lies with the Supreme Court the Court of Appeal having determined in **Joseph Njuguna Mwaura & 2 Others V. Republic [2013]eKLR** that where the death sentence is mandatory in our jurisdiction it must be imposed. The applicants were charged with Robbery with Violence Contrary to Section 296(2) of the Penal Code which offence attracts a mandatory death sentence and the applicants having been found guilty were convicted and sentenced to death. Both the High Court and the Court of Appeal upheld their conviction and the sentence. Mitigation does not constitute new and compelling evidence and as submitted by Prosecution Counsel the 1st applicant has not demonstrated that he was not afforded an opportunity to mitigate. The applicants have not shown that new and compelling evidence has become available since their trial and appeals and their application for a new hearing is found to be devoid of merit and is dismissed.

Signed, dated and delivered at Kisumu this 12th day of May 2016

E. N. MAINA

JUDGE

In the presence of:-

N/A for the state

2nd & 3rd Applicants in person

CC: Felix Magutu