



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL MISC. 7 OF 2014
CHARLES ENOS MAKOKHA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Petitioner has by a Notice of Motion dated 5th February, 2014 moved this court for an order of acquittal as a remedy under **Article 23(3)** of the Constitution or in the alternative an order for judicial Review.
2. The application which is expressed to be made under Articles **22,20(2), 21(i) 23(3), 25(a) (c), 27(i), (2)35(2), 28, 48, 50(2) (b) c, (j), q (4)** as read with Articles **159(2), 259 (4) (b) and 165(3) a,b** of the constitution is mainly premised on the ground that during the trial the Applicant`s rights under Article 25(a) and (c) of the constitution were violated.
3. The other grounds are set out in the affidavit sworn in support of the application and which reads as follows:
 - (2) **THAT am currently serving a 15 years imprisonment on the charge of defilement contrary to section 8(i) as read with 8(4) of S.O.A No. 3 of 2006.**
 - (3) **THAT I had appealed against conviction and sentence but my appeal was dismissed using lower court proceedings of a different case file number.**
 - (4) **THAT my rights under article 25(a) and(c) of the constitution were violated during the trial.**
 - (5) **THAT my conviction was achieved suing documentary evidence that was not authentic and properly drawn.**
 - (6) **THAT the age of the complainant was not properly proved and the first appellate judge dismissed my appeal using wrong principles of the law.**
 - (7) **THAT article 50(2) (j) of the constitution was breached (231 Criminal Procedure Act)**
 - (8) **THAT Article 50(2) (c) was also breached during my trial.**

(9) THAT the admissibility exhibit marked MFI-3 in my trial was a breach of article 50 of the Constitution.

(10) THAT the prosecution`s evidence was contradictory and inconsistent which rendered them unreliable witnesses.

(11) THAT the charge sheet presented in court was not authentic.

(12) THAT my rights under article 27(i) and (2) were infringed

(13 THAT I was charged and convicted on a defective charge sheet

(14) THAT the first appellate judge knowingly and intentionally failed to consider my written submission which was cogent enough to award me acquittal.

(15) THAT the first appellate judge used wrong principles and failed to observe the rule of law hence dismissing my appeal.

(16) THAT let there be a stay of orders made on Criminal case no 1917/2010 and criminal Appeal No. 84/2012.

(17) THAT by powers and mandate conferred to this court under Article 165(3)(a) and (b) of the constitution be pleased to declare that my rights under article 25(a)(c), 20(2),27(1) (2) 28 and 48 of the Constitution were violated.

(18) THAT powers and mandate vested to this court under Article 23(3) of the Constitution order for my acquittal and release as an appropriate remedy since this court is not only limited to remedies under article 23(3) of the constitution.

(19) THAT failure for this court to order for my acquittal and release, I will still suffer prejudice and a continual violation of my rights under article 20(2), 2(1), 25 (a) (c) 27 (1) (2), 28 and 48 of the constitution.

4. In his further affidavit sworn on **19th May, 2014** the Petitioner as that who he properly is deposes that this petition is properly before this court and that as the Respondent did not file its affidavit within the time prescribed, it has lost its right to reply.

5. Needless to say the application/Petition was opposed and the state has filed a replying affidavit sworn by George A. Mongare Senior Prosecuting counsel on 5/5/2014. He disputes that any of the Petitioner`s rights were violated and deposes that the charge was properly drawn, the entire proceedings were in order and that the Petitioner was accorded and an expeditious and fair trial. He deposes further that the grounds raised ought to have formed the basis of an appeal and have been raised in the wrong forum. He urges this court to find the petition untenable and lacking in merit and to dismiss it.

6. The Petitioner filed written submissions in which he states that his application arises from **HCCR/A 84 of 2012 and CMCR/917 of 2010** where he was charged with defilement under the sexual offences Act and after the trial was convicted and imprisoned. Being aggrieved he appealed to the High Court but that court dismissed his appeal. He states that his rights were violated because firstly the trial court as well as the appellate court relied on exhibits which were not properly filled and which were not authentic; that even the witnesses who produced them did not prove that he was a qualified clinical officer. That the age of the injury was not proved and the P3 form did not bear the official rubber stamp of the station that issued it. He contends that the P3 bears an Occurance Book number that is different from that under which he was charged. He also takes issue with the treatment notes and states that the rubber stamp thereon cannot prove their authenticity as anybody including in the “jua kali” could have rubber stamped them. He contends that the same ought to have been on the letter head of the facility that made them, the serial number of the complainant admission. He submits that under **Article 50(4)** any evidence obtained

in a manner that violates any right or fundamental freedom shall be excluded and that the admission of the exhibits violated his right to a fair trial and this court should invoke Article 50(4) and acquit him. Further he takes issue with the charge sheet saying it was not authentic in that it neither bore the name nor the signature of the person who drew it and it is also had no official rubber stamp of the police station. He wondered how it was admitted in a court of law. He compares this with a person charged with forgery under section **349-353 of the Penal Code**. He contends that by the Trial Magistrate convicting him and the appellate Court confirming that conviction they did not treat him as a Kenyan citizen with inherent dignity for which he has a right to be protected and respected. He submitted that he has instead been treated as an inferior being and instilled with psychological torture. It is his further submission that the prosecution did not furnish him with 3 sets of committal documents as provided under **section 231(2) of the Criminal Procedure Code and Article 50(2) (j)** of the Constitution. He relies on the case of **Thomas Patrick Gilbert Cholondeley Versus Republic** where relying on **R. V Ward (1993) 2 ALL ER 557** the Appellant was acquitted on a similar ground. He urged that Kenya and England are all members of the Commonwealth and that by virtue of **Article 2(5)** of the Constitution Rules of International Law form part of the law of Kenya under which he has equal protection and benefit.

7. The trial in the Magistrate's Court he contends that the charge was not read to him again once the court found that he had a case to answer and so he could not tell what offences he was being asked to defend. He contends that the trial magistrate was biased and that his right under **Article 50 (2) (c)** was violated. He concludes by saying that the judgments were unsound and that they were obtained by fraud or collusion and cites the elements of fraud as the Appellate Court's failure to re-evaluate and consider the evidence in the trial court. The decision of the trial magistrate to amend the alternative charge during the judgment yet the prosecution did not make an application. He states that the evidence of the prosecution witnesses was contradictory as regards the date of the offence and the age of the complainant and cites cases where other Appellants were acquitted on those grounds and wonders why his appeal resulted in a different finding. He urges this court to find that his rights under **Article 25(a) (c)** were violated and order his acquittal and release from prison.

8. Mr. Ruto for the state relied on the replying affidavit sworn on by Mr. Mongere on 5th May, 2014. He submitted that the Petitioner seeks a retrial and that none of the Petitioner's rights were breached; that he was accorded a fair and expeditious trial. He contended that the charge was properly drawn and that the complainant had properly identified the Petitioner. He further submitted that the issues raised are matters for appeal and that the same have been raised in the wrong forum.

9. In reply, the Petitioner clarified that he was not seeking a retrial but an acquittal on the ground that his rights were breached. He stated that this is because the documents relied on to prove his case were against the spirit of the constitution. He submitted that he raised this issue in the High Court but it was not addressed. He contended that the P3 form should be excluded based on Article 50 (4) of the constitution as it was not authentic it was obtained and also in the manner it was admitted against him.

10. Human dignity equality, human rights and non discrimination are among the national values under Article 10(i) of the constitution and Article 20 (3) obligates Article 19(3) of this court to promote those values. The constitution provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. Article 20(2) further provides that every person should enjoy the rights and freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The Petitioner is therefore correct in his submission that he, like every other Kenyan is entitled to the rights and freedoms in the Bill of Rights.

11. The rights of an accused person to a fair trial is provided for under Article 50 (2) of the Constitution. That right is absolute as it is one of the rights which cannot be limited-

(see Article 25(c)). Article 50 (2) provides as follows:-

“(2) Every accused person has the right to a fair trial, which includes the right_”:-

(a) to be presumed innocent until the contrary is proved:

- (b) to be informed of the charge, with sufficient detail to answer it;**
- (c) to have adequate time and facilitates to prepare a defence;**
- (d) to a public trial before a court established under this Constitution;**
- (e) to have the trial begin and conclude without unreasonable delay;**
- (f) to be present when being tried unless the conduct of the accused person makes it impossible for the trial to proceed;**
- (g) to choose, and be represented by an advocate, and to be informed of this right promptly;**
- (h) to have an advocate assigned to the accused person by the State and State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;**
- (i) to remain silent, and not to testify during the proceedings;**
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable evidence;**
- (k) to adduce and challenge evidence;**
- (l) to refuse to give self-incriminating evidence;**
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;**
- (n) (not to be convicted for an act or omission that at the time it was committed or omitted was not**
 - (I) an offence in Kenya; or**
 - (ii) a crime under international law;**
- (o) Not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;**
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and**
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by Law.**

12. This list clearly is not exhaustive given that, the phrase” which includes” is used. The Petitioner has submitted at length on why he believes that he did not get a fair trial. I have considered his submissions and those of prosecuting Counsel. I have also perused the proceedings and Judgments of the Lower Court and have The Judgment of the first come appellate Court to the conclusion that his Petition has no merit. Save for the submission that he was not accorded an expeditious trial and that he was not supplied with statements all the other issues that he raises touch on the merit of the evidence at the trial. He complains that the P3 form and the treatment notes were not authentic as the Clinical Officer who tendered the same in evidence did not have proof that he was a Clinical Officer; that the P3 Form did not have an official rubber stamp and that the treatment notes though stamped were not on the hospital`s letter heads. He also complains about the charge sheet and submits that the evidence tendered was contradictory and unreliable. These are all issues that touch on the merit of the case before the Trial Magistrate and the Judge and as submitted by the Prosecuting Counsel ought to be urged in an appeal.

This Court cannot sit on appeal over the judgment of another Judge.

13. Article 50 (40) is very clear on the nature of evidence that must be excluded. From the record there is nothing to suggest that the P3 form and treatment notes were obtained in a manner that violated any right or fundamental freedom. The kind of evidence that comes to my mind here could be a confession obtained from an accused through torture for instance. Whether the trial magistrate and the Judge erred in placing reliance on the evidence is an issue for appeal. The same applies to the testimony of the witnesses for to hold that they did would be tantamount to me sitting on appeal which I ought not to do.

14. As for the submission that he was not given the witnesses' statements this would indeed be a breach of his right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence- **Article 50 (2) (I)**. The courts have held that it is indeed the right of an accused person to be supplied with witness statements-

see **Thomas Patrick Gilbert Cholmondeley V.R C/APP NO. 116 OF 2007**

I note from the proceedings however, that the Petitioner did not ask to be supplied with the statements and that he fully cross – examined the prosecution witnesses. Indeed he does not allege that he was prejudiced by the omission.

The record shows that the trial was adjourned on several occasions partly upon application by the prosecution and partly by the petitioner. **Article 50(2) (d)** provides that the trial must begin and conclude without unreasonable delay. The law does not state the time within which a Criminal trial must conclude and given the circumstances in our courts, I must say that the time this trial took to conclude was not unreasonable.

When the matter went before the Judge he employed his mind to all the issues now raised by the Petitioner including that concerning the charge sheet and as I have stated this being court of equal jurisdiction cannot sit on appeal over his findings

15. While I must commend the Petitioner for the meticulous manner he prepared his submissions I must come to the conclusion that his Petition has no merit. It is accordingly dismissed.

Dated, signed and delivered at Kisumu this 5th day of February, 2015.

E.N. MAINA

JUDGE

In the presence of:

..... for State Counsel

.....for Appellant

Moses Okumu Court Interpreter