



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT Garissa
CRIMINAL APPEAL NO. 108 OF 2013

ARTE ABDI WITO APPLICANT

V E R S U S

REPUBLIC RESPONDENT

RULING

Before me is a petition dated 5th September 2013, which was brought by the petitioner in photocopy because the original could not be traced. The petition was brought under Article 21(1)(4), 50(2), 22(1) (3c) (4), 48(2) (1) (3) (4) and, 23(1) (2), 165 (3) (a) and (b), 159(2) (A) (B) and (E) and 49(1 (f), (E) and (G) of the Constitution.

In the petition, the petitioner has sought the following orders:-

- (i) That the court be pleased to grant a declaration (that) the Constitutional Rights and Fundamental freedoms of the petitioner have been breached by the respondent trying to convicting and sentencing the petitioner in the absence of the charges and or reliance of a non-existent charge sheet.
- (ii) That the court be pleased to grant a declaration that the Constitutional Rights and Fundamental Freedoms of the petitioner have been breached by the respondent by convicting him on unlawful and unconstitutional charges.
- (iii) That the respondent be ordered to release the petitioner who has served almost 13 years in prison.
- (iv) The record/court file is incomplete because it did not have the OB No. which is incoherent whether the matter was reported and the assessors opinion and therefore ignoring his prayers shall be against the letter and spirit of the Constitution of Kenya enshrined in Article 50(2) and 25(c) and the benefits of missing parts from the file should be given to the petitioner.
- (v) That the costs of the application be provided for.

The respondent was named as the Attorney General. However on the directions of the court, the office of the Director of Public Prosecuting agreed to participate in these proceedings, as this is primarily a criminal matter.

On the 3rd March 2015, however, the petitioner filed “Supplementary Grounds” stating that the absence of the OB report in court rendered the trial uncertain and requested that the conviction be quashed and

sentence set aside.

At the hearing of the petition, the petitioner relied on documents filed.

Learned Prosecuting Counsel Mr. Orwa submitted that the petitioner had appealed to the High Court in Nairobi and his appeal had been dismissed, and had secretly filed an appeal in Garissa, before filing the present petition. Counsel submitted that a close look at the petitioner's application dated September 2013 was confusing. Firstly, it was headed Court of Appeal and as such it should not have been filed in the High Court. Secondly, the prayers are not clear.

In response to the submissions of the Prosecuting Counsel, the petitioner stated that his appeal to the High court was dismissed in 2004 and his appeal to Court of Appeal was dismissed in July 2010. He stated that in July 2013, he made the present application while at Naivasha Prison and sent it to Garissa High Court.

The petitioner stated further that he made an application regarding the OB at the trial court and it was not provided to him and his co-convict. He stated that they did not call for the OB in the High Court during appeal, but they called for the same in the Court of Appeal. The Court of Appeal stated however that only the High Court could order production of the OB, and that was the reason why he had come to the High Court under Article 50 of the Constitution. In his view, the OB was new evidence which could affect the case.

In response Mr. Wanyonyi for the learned counsel for DPP submitted that the petitioner had exhausted the legal avenues available to him. Counsel submitted that the lower court records did not show that he asked for the OB.

Besides, counsel argued the petitioner had not demonstrated the discovery of new and compelling evidence which would bring him within the provisions of Article 50 of the Constitution. He had the chance to reinstate issue on appeal in the High Court under S. 362 and 358 of the Criminal Procedure Code (Cap.75), but he did not and had thus lost the opportunity available to him.

Counsel also submitted that the trial was conducted before the coming into effect of the new Constitution. It was also not clear whether the court records were presently available as they might have been destroyed after the lapse of two years. Counsel relied on **Meru High Court Petition No. 23 of 2015 Kevin Murerwa –Vs- Republic (2015) e KLR** on the parameters to be considered by the court before ordering a new trial under Article 50 (6) of the Constitution.

In response, the petitioner urged that his requests be allowed.

I have considered the two applications and the arguments on both sides. I must say that the contents of the petitions are confusing. However, that in my view, is attributed to the fact that the petitioner is a lay person not well informed in legal matters, and might also be a poor person struggling to make a breakthrough in the problems he is facing due to the conviction.

Both the applications cannot succeed. The first reason is with regard to the prayers. In my understanding the jurisdiction of the High Court under Article 50 (6) of the Constitution is very limited. It is to order a new trial if it is persuaded that new and compelling evidence has come to the knowledge of the petitioner which might persuade a reasonable court to come to a different finding from the decision reached by the trial and appellate courts.

The petitioner has not requested for an order for a new trial on discovery of new and compelling evidence. He has instead asked for declarations on the constitutionality of the proceedings at the trial and by implication the appeal in the High Court and Court of Appeal, and also asked for release from custody. This court does not have such powers. As such this court has no jurisdiction to grant the prayers sought. On this reason the two applications have to fail.

The second reason is that the trial and both appeals were conducted and concluded before the coming into

effect of the present Constitution in August 2010. As admitted by the petitioner himself, in court, his appeal to the court of Appeal was dismissed in July 2010 – about a month before the promulgation of the Constitution in August 2010. The Article 50 of the Constitution which the petitioners relied on to come to this court after dismissal of his appeals, was not made to operate retrospectively. Consequently, the case and appeals of the petitioner are not covered by the provisions of Article 50 (6) of the Constitution. Article 50 (6) of the Constitution can not help his case.

On the above two reasons, I find that the requests of the petitioner have no merits. There is thus no justification in considering the parameters set in *Meru High Court Petition No. 23 of 2015 – Kevin Murerwa Vs. Republic (2015) eKLR*. I dismiss both applications, with no order as to costs.

Dated and delivered at Garissa this 5th day of October, 2015.

GEORGE DULU

JUDGE