REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CRIMINAL APPLICATION NO.103 OF 2011

JACOB KOSGEI KAYAP ……...……PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. Though registered as a Miscellaneous Criminal Application, this matter is actually a petition seeking the enforcement of constitutional rights.

A background of the petition is relevant. The Petitioner *Jacob Kosgei Kayap* was convicted of the offence of Murder Contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code*** by the High Court in Kitale in High Court Case No. 22 of 2004. He was sentenced to suffer death as prescribed by the law.

2. Being dissatisfied with the conviction and sentence, he lodged an appeal to the Court of Appeal at Eldoret vide Criminal Appeal No. 189 of 2009. The Court of Appeal (R.S.C Omolo; P.N Waki and Alnasir Visram JJA) in a judgment dated 25th March 2011 partially allowed the appeal. The court set aside the conviction for the offence of Murder and substituted it with a conviction for the lesser charge of manslaughter contrary to ***Section 202*** as read with ***Section 205*** of the ***Penal Code.***

3. By the time the appeal was heard, the appellant's (Petitioner's) death sentence had been commuted to life imprisonment by the President. The court held that as the commutation had been based on the belief that the conviction for the offence of murder was right and it had been found to be invalid, the court had discretion to impose an appropriate sentence under ***Section 205*** of the ***Penal Code***. The court then proceeded to sentence the petitioner to 15 years imprisonment effective from 23rd July, 2009 the date on which he was sentenced to death by the High Court.

4. The Petitioner was apparently aggrieved by the sentence imposed by the Court of Appeal. He filed several constitutional petitions in the High Court starting with the one dated 7th October, 2011 which he amended on 28th November, 2013 and further amended on 6th February, 2015 by filing what he described as "further amended grounds of petition."

5. In the first two petitions dated 7th October, 2011 and 28th November, 2013, the petitioner urged the court to order for a retrial under ***Article 50 (6)*** of the ***Constitution of Kenya 2010*** or any other remedy provided under ***Article 23(3)*** of the Constitution. In his written submissions in support of the further amended petition, the petitioner conceded that he did not have new and compelling evidence to warrant an order for retrial hence the abandonment of the earlier petitions and filing of the further amended petition dated 8th January, 2015 and filed on 6th February, 2015. This is the petition that forms the subject of this judgment.

6. In the said petition, the petitioner claimed that his constitutional rights to equality and equal protection of the law under ***Article (27) (1) (2)*** of the Constitution had been infringed by the High Court when the court prematurely discharged assessors in the middle of the trial without any reason; that his fundamental rights and freedoms were violated when he was convicted on the basis of hearsay evidence and evidence of prosecution witnesses who had recanted their evidence contrary to ***Section 161*** and ***163*** of the ***Evidence Act*** and ***Article 50(4)*** of the Constitution; that his rights were violated when the five years he had spent in remand from 2004-2009 were not taken into account by the Court of Appeal when sentencing him to 15 years imprisonment.

7. In view of the foregoing, the petitioner sought the following orders which I will reproduce verbatim;

> (i) That may the Honourable court be pleased to order that my fundamental rights and freedoms enshrined in the Bill of rights were violated, infringed and denied by the respondent.
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> (ii) That may the Honorable court declare that I was denied the right to enjoy the five (5) years I had spent in remand and be deducted from the 15 years I am serving.
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> (iii) That may this court order for an acquittal by considering the period I had served from 2004 to now.
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> (iv) That may the court order for a re-trial because witness come from the same area and they have not relocated to another location or
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> (v) May the Honourable court order for any other remedy as provided for in Article 23(3) of the current constitution or such other order as the court shall deem just.

8. The Respondent opposed the Petition through grounds of opposition filed on 22nd January, 2015. The main grounds relevant to this petition taken by the respondent are that the petition was frivolous, vexatious, misleading and an abuse of the Court process; that the issue of premature discharge of assessors was expressly and conclusively considered and determined by the trial court and the learned Judges of Appeal; that the entire body of the evidence at the trial including witness testimonies' was carefully considered, evaluated, reviewed and confirmed by both the trial court and the Appellate court leading to the conviction and sentencing of the petitioner and finally, that the petitioner was fairly tried in accordance with ***Article 50*** of the Constitution.

9. The petitioner prosecuted his petition in person. He relied on his written submissions filed in court on 3rd March, 2015 and his oral submissions made in court on 30th April, 2015.

The petitioner's written submissions were long and repetitive but they basically re-iterated the pleadings in the petition regarding the alleged violation of his constitutional rights.

On the claim that the trial court violated his right to equal protection and benefit of the law as envisaged under ***Article 27(1) (2)*** of the Constitution, the petitioner submitted that his trial commenced with the aid of assessors and that nine out of ten witnesses had testified before the assessors were discharged contrary to the provisions of the law.

He asserted that the trial court was wrong in discharging the assessors midstream on grounds that ***Sections 297, 298, 299*** and ***300*** of the ***Criminal Procedure Code*** had been repealed without replacement; that the trial ought to have continued with the assessors in view of the provisions of ***Section 23 (3) (a)*** of the ***Interpretation and General Provisions Act*** Chapter 2 Laws of Kenya which provides as follows:-

> ***"Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not-***
>
> ***(a) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal***

proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealed written law had not been made"

10. For the above proposition, he relied on three court of appeal authorities namely, ***Paul Kithinji V Republic Criminal Appeal No. 310 of 2008 (2009) eKLR; Peter Ngatia Ruga V Republic Criminal Appeal No. 42 of 2008 (2010) eKLR and David Benson Kipkerich Kemei Chumo V Republic Criminal Appeal No. 115 of 2009 (2011) eKLR*** where the Court of Appeal nullified the trials of the appellants and ordered a retrial on grounds that the trial court had erred in discharging assessors in the course of the trial following the repeal of the law requiring the presence of assessors in murder trials.

It is important to note at this stage that the petitioner did not however demonstrate how the error of the trial court in prematurely discharging assessors contrary to the law violated his right to equal protection and benefit of the law.

11. In support of the other claims in the petition, the petitioner submitted that he had been wrongly convicted by the trial court as his conviction had been based on either hearsay evidence or evidence which had been recanted by witnesses and that this violated ***Article 50(4)*** of the Constitution. He also assailed the sentence imposed on him by the Court of Appeal saying that the court erred in failing to take into account the five year period he had been held in custody when passing sentence as required by ***Section 333(2)*** of the ***Criminal Procedure Code.***

12. In his oral submissions, the petitioner clarified that his petition was not seeking a retrial under ***Article 50(6***) on grounds of availability of new and compelling evidence but that it was based on violations of his rights during the trial in the High Court and in the outcome of his appeal to the Court of Appeal. He submitted that the High Court violated his rights by proceeding with his trial without assessors and that this amounted to a mistrial; that the Court of Appeal erred in its finding that there was nothing wrong with the trial continuing without assessors and in convicting him on the lesser charge of manslaughter instead of ordering a retrial.

13. The state through the Assistant Director of Public Prosecutions learned Counsel *Mr. Omwenga* opposed the petition in oral submissions made in court on the hearing date. He re-iterated the grounds of opposition filed on behalf of the respondent emphasizing that the petition amounted to an abuse of the court process. He added that the matters raised in the petition were canvassed before the Court of Appeal which held that assessors were not necessary in a trial for the offence of manslaughter and declined to order a retrial; that the respondent is the Republic but no evidence had been placed before the court proving that the respondent violated the petitioners constitutional rights; that what has been placed on record are perceived errors by the High Court and Court of Appeal and that this court cannot order a retrial on the basis of such errors; that the court has no jurisdiction to re-evaluate evidence of the other superior court and the Court of Appeal or to review a sentence passed by the Court of Appeal.

14. Having considered the petition, the written and oral submissions made by the petitioner and the state, I find that by the petitioners own admission, this petition is based on what he believed were errors made by the High Court and the Court of Appeal as enumerated above. It is the petitioner's case that these errors violated his constitutional rights to equal protection and benefit of the law under ***Article 27(1) (2)*** and ***Article 50(4).***

Let me state at the outset that I am clear in my mind that any person whose constitutional rights are violated is entitled to any or a combination of the remedies set out under ***Article 23*** of the Constitution or any other appropriate remedy crafted by the court depending on the nature of the violation(s) in question; the damage or loss suffered by the claimant and the general circumstances of the case.

15. I entirely agree with the petitioner in his submissions that this court has jurisdiction under ***Article 22*** and ***Article 165*** of the Constitution to *interalia* adjudicate on allegations of denial or infringement of constitutional rights and to grant appropriate remedies if satisfied that the alleged violations had been proved. Put another way, for a petitioner to succeed in a petition, he must prove by credible evidence that his constitutional rights or fundamental freedoms in the Bill of rights had been as a matter of fact denied,

infringed, violated or threatened with violation. This is so because the law at ***Section 107*** of the ***Evidence Act*** places a burden on any person who alleges the existence of certain facts to prove that those facts actually existed. A petitioner must therefore prove that the person named as the respondent had violated or denied the constitutional rights sought to be enforced.

16. Unfortunately in this case, the petitioner has miserably failed to adduce any evidence to substantiate his claims against the respondent. He claims that errors made in the course of his trial in the High Court and in his appeal to the Court of appeal resulted in the violation of his constitutional rights. But he did not go further to demonstrate how the alleged errors automatically violated his rights. It is worth noting that the perceived errors were allegedly made by the two superior courts and not by the State (Republic) which is the respondent in this case. As correctly submitted by *Mr. Omwenga*, the petitioner did not adduce any evidence to show that the State either violated or contributed to the alleged violation of his constitutional rights.

17. This court cannot interrogate the proceedings or the judgment of the two superior courts to determine whether or not they contain any errors for reasons that will become clear shortly. But even if I were to assume that such errors existed, it is my view that errors made by a competent court in the conduct of its proceedings can only be corrected using the procedures prescribed by the law which is either through an appeal or review. I take the view that errors made in the course of court proceedings cannot by themselves form the basis of a constitutional petition.

18. I wholly agree with *Manjanja* J in ***Wilson Thirimba Mwangi V Director for Public Prosecutions (2012) eKLR*** when in adjudicating on a petition for a retrial sought under ***Article 50(6)*** of the Constitution stated as follows:-

> "In ***essence, what the petitioner seeks to do is have this court evaluate the judgment of the appellate court. If the petitioner is aggrieved by a judgment of a court of competent jurisdiction, such judgment cannot form the basis of a collateral challenge based on some breach of constitutional provisions.*** In making this pronouncement, the Hon. judge relied on the case of ***Chokolingo V Attorney General of Trinidad*** and ***Tobago (1981) ALL ER 244*** in which the court cited with approval the decision in ***Maharaj V Attorney General of Trinidad*** and ***Tobago (No.2) (1979) AC 385 at 399*** where the Privy Council had stated as follows;
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> > ***"In the first place, no human right or fundamental freedom… is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say there was an error…."***

19. By asserting that he was wrongly convicted by the High court which relied on hearsay and recanted evidence and in challenging the court's decision to discharge assessors in the course of the trial, the petitioner was in effect inviting this court to re-evaluate the evidence tendered before the High Court, determine its admissibility and the validity of the court's decision to discharge assessors. This clearly shows that the petitioner in filing this petition was basically seeking to have another bite of the cherry by instituting a further appeal to this court disguised as a constitutional petition.

However, this court does not have jurisdiction to sit on appeal against the judgment of another High Court judge. That is purely the province of the Court of Appeal. I concur with learned counsel Mr. Omwenga that the appellant's action of attempting to file a third appeal to this court camouflaged as a constitutional petition amounts to an abuse of the court process.

20. If the petitioner was aggrieved by the High Court's conduct of the proceedings or its judgment, his only remedy was to exercise his right of appeal to the Court of Appeal. The right of appeal or review is protected by ***Article 50(2) (q)*** of the Constitution.

The petitioner duly exercised that right hence institution of Criminal Appeal No. 189 of 2009. One of his

grounds of appeal was that the trial judge erred in both law and fact by relying on prosecution witnesses who had changed the statements they had recorded with the investigating officer.

21. The Court of Appeal analysed and re-evaluated the evidence tendered before the High Court and made a finding that the evidence adduced before the Court was credible and that it established an offence of manslaughter. Though the petitioner in his grounds of appeal did not complain about the premature discharge of assessors, the Court of Appeal in its judgment nevertheless considered it and expressed itself in the following terms;

"It is, therefore, unnecessary for us to consider the issue of pre-mature discharge of the assessors by the learned Judge; one did not need assessors to try a charge of manslaughter. Even if we had agreed with Mr. Marube that the assessors were wrongly discharged, all that would have happened is that we would most likely have ordered a retrial. There is no reason for us to do so in view of the Republic's concession that the appellant ought to have been convicted of manslaughter and not murder".

22. From the foregoing, there is no doubt that the petitioner's complaints in this petition were matters which were canvassed before the Court of Appeal which rendered its findings on the same. This court cannot question, consider or purport to determine matters which formed the subject of deliberations and decision by the Court of Appeal for the simple reason that it lacks jurisdiction to do so. I say so because though both the High Court and the Court of Appeal are superior courts, the Court of Appeal is higher than the High Court in the hierarchy of superior courts as can be seen from ***Article 162(1)*** of the Constitution.

I am therefore unable to accept the petitioner's invitation to interfere with the findings or sentence passed by the Court of Appeal by ordering an acquittal.

23. Turning now to prayer 4, the petitioner urges the court to order a retrial on the basis of his alleged mistrial in the High Court and perceived errors by the Court of Appeal.

In my opinion, a retrial is a remedy which can only be ordered by a court in the exercise of its appellate jurisdiction if it is satisfied that a retrial is necessary to meet the ends of justice. As stated earlier, this court does not have jurisdiction to sit on appeal over any decision made by another superior court. It only has jurisdiction to entertain appeals from decisions made by the Magistrates' Courts.

24. Other than when determining a criminal appeal, the only other time that this court is mandated to order a retrial is under ***Article 50(6)*** of the Constitution if in a petition for a retrial, the petitioner establishes as a fact that he had been convicted of a criminal offence; that his appeal if any had been dismissed by the highest court in the land or that he did not file an appeal within the stipulated time and lastly that new and compelling evidence had become available. The instant petition, as admitted by the petitioner is not grounded under ***Article 50(6)*** of the Constitution and therefore, a retrial as a remedy is not available to the petitioner.

25. For all the foregoing reasons, I am satisfied that this petition is devoid of merit and must fail in its entirety. Consequently, the petition is hereby dismissed with no orders as to costs.

C.W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at **ELDORET this 14th** day of **October**, **2015**

In the presence of :-

The Petitioner/Applicant

Mr. Lesinge Court clerk