REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 3 OF 2014

MOHAMED ADAN HUSSEIN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

Before me is a Notice of Motion dated 10th November 2014 filed by the appellant **MOHAMED ADEN HUSSEIN** through counsel Mbuthia Kinyanjui & Company.

The application was brought under Article 159 (1) and (2) and 165 of the Constitution of Kenya 2010 and section 3 the Judicature Act, as well as section 358 and 362 of the Criminal Procedure Code. The prayers are as follows:-

1. That leave be granted to the applicant in the first instance to proceed on a priority basis dispensing service of sermons (sic) under the proceeding certificate of urgency for a grant of interim orders herein sort (sic).
2. That the honourable court be pleased to compel Safaricom Limited to avail certified copy of records of all IMEI numbers and models of handsets used by cell phone number 0721526665.
3. That leave be granted to adduce evidence not withstanding the fact that judgment was delivered.
4. That the court be pleased to review the judgment and order of Lady Justice S. N. Mutuku and Lady Justice F. Muchemi made on 8th September 2014.
5. That the Honourable court be pleased to grant such further orders and directions it may deem fit in the circumstances of the case and the interest of justice.

When the application came up in court on 3rd March 2015, Mr. Kinyanjui for the applicant and Mr. Orwa for the respondent by consent agreed to the grant of prayer (2) for Safaricom Limited to provide the information on the mobile phone. The court thus granted prayer (2) of the application, subject to the applicant meeting any costs of provision of the same. After a number of adjournments, the court directed that the rest of the prayers of application be argued in total for the court to make a decision on the same.

The application was thus argued on 15th July 2015.

Mr. Kinyanjui learned counsel for the appellant made oral submissions in support of the application. Counsel made an oral application to amend prayer 5 of the application to seek that :- “the court be pleased to order a retrial and or grant further orders and directions it may deem fit in the circumstances of the case and in the interests of justice”. Counsel argued that in essence this was an application under Article 50 (6) of the Constitution which provides that a person convicted for a criminal offence may petition the High Court for a new trial.

Counsel argued that the matter was heard as a robbery case in Mandera and the subject was theft of a Nokia Phone make 1280 worth Kshs. 2,000/=. After conviction the appeal to the High Court was dismissed and the applicant filed a notice of appeal to the Court of Appeal.

Counsel argued that records from Safaricom Limited had provided details on the subject mobile phone from 21/08/2004 to 10/10/2004. The records showed that the complainant never owned the phone in 2004.

Thus the evidence showed that the alleged phone was never owned by the complainant before the alleged theft or robbery. Counsel relied on two cases that is ***KEVIN MURERWA VS. REPUBLIC [2015] eKLR AND MICHAEL MWANGI KAMAU & 2 OTHERS VS REPUBIC [2015] eKLR***.

Counsel submitted that the new evidence was obtained on 30/10/2014 and was not available during trial. In counsel's view the new evidence was also compelling as a reasonable court on the basis of such evidence could come to a different conclusion from that reached at the trial and on appeal.

Mr. Okemwa for the state submitted that Article 50 (6) of the Constitution gives the parameters for such an application. Counsel also submitted that court decisions including the case of ***MICHAEL MWANGI KAMAU VS. REPUBLIC*** cited by counsel for the applicant have gone into depth in analyzing the applicability of the Article.

Counsel argued that there was also an avenue for calling additional evidence on first appeal from the trial court under Section 158 of the Criminal Procedure Code. Was the applicant denied that opportunity? Counsel argued that this was necessary in determining the prayer for this court to admit new evidence.

Counsel submitted that the court had given orders in March 2015 for Safaricom to avail the applicant information on the use of the subject mobile phone. Counsel lastly submitted that this court should administer substantive justice as envisaged under Article 159 (2) (d) of the Constitution. Counsel left the matter to the court to decide.

I have considered the application and the documents filed and the authorities cited to me. I must state from the outset that I am in full agreement with the reasoning in the two cases cited by the counsel for the applicant.

This application was brought by way of Notice of Motion. It cited a number of Articles of the Constitution and the sections of the law. It did not cite Article 50 (6) of the Constitution. Counsel for the applicant has however asked orally to amend the application with regard to prayer 5 and rely on Article 50 (6) of the Constitution. In my view, that was the saving grace for the application. Otherwise in my view the application in addition to the heading being a Notice of Motion instead of a Petition as required under Article 50 (6) of the Constitution, would be fatally defective in substance as none of the prayers would fall within the parameters covered under Article 50 (6) of the Constitution.

In my view, prayer 3 and 4 of the application for leave to adduce further evidence notwithstanding the judgment, and for review of the judgment of the High Court on appeal respectively, cannot be granted by this court in such an application. This court has no jurisdiction to entertain or grant the said prayers. This court granted prayer 2 only because the parties counsel consented to that prayer. This court has no mandate to review an order or judgment of the High Court. The order of the court was that the certified copy of the IMEI numbers used by cell phone number 0721526665 be supplied by Safaricom Limited to the applicant at own cost. It was not meant to be evidence to be tendered in court. Such evidence could only be tendered in a trial court in accordance with the Constitution, the law and laid down procedure. In such an application as the present one the court has no powers to record evidence from witnesses.

Prayer 5 as amended now relies on the provisions of Article 50 (6) of the Constitution which provides as follows:-

> 50 (6) A person who is convicted of a criminal of a criminal offence may petition the trial

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.

Counsel for the applicant has submitted that there is now available new and compelling evidence and as such the application should be allowed. The Learned Prosecuting Counsel has raised the issue that additional evidence could be tendered to the High Court on appeal, but has left the matter to the decision of this court.

In my view, under Article 50 (6) of the Constitution, the High Court has no powers to admit new evidence. It has only powers to order a new trial.

For the amended prayer 5 herein to succeed, the new evidence has to be unavailable to the applicant or petitioner at the trial or appeal. It has thus to be new. It has also to be compelling, that is it has to be such evidence that an independent court could be persuaded to come to a different conclusion from that reached at the trial and on appeal.

The issue of ownership or use of the alleged stolen mobile phone was a live issue both at the trial and on appeal. It is not new issue or item that has suddenly become relevant. It was relevant at the trial. It was relevant on appeal.

There is no evidence that the applicant sought for that information at the trial or on appeal and was denied the same or was not able to get the same. In my view therefore what is said to be new information or evidence from Safaricom Limited is not new or fresh evidence that could not reasonably be available to the applicant at the trial or on appeal. He had a right to take the line of defence most appropriate to him and he did so. He has however not demonstrated that the evidence he now wishes to rely on was not available or could not be availed to him. It is thus not new, and on that account the application will fail.

The issue of the evidence being compelling can only arise when it is new evidence. Having found that the alleged information from Safaricom Limited is not new, I also find that it is not compelling.

The application herein will not succeed for another reason. Under ground (ii) on the face of the application, it has been clearly stated as follows:-

(ii) that the applicant has filed a notice of appeal before the Court of

appeal against the judgment of the High Court.

In submissions also, counsel for the applicant has stated that a notice of appeal was filed in the Court of Appeal.

In my view, the provisions of Article 50 (6) of the Constitution require that no appeal be alive or in progress at the time of making the application for a new trial. In my view, once a notice of appeal has been filed to the Court of Appeal, an appeal is deemed by the rules of that court to have been filed, unless the notice is withdrawn. The applicant's counsel has not said that the notice of appeal to the Court of Appeal has been withdrawn, and as such this application cannot be sustained.

Consequently, and for the above reasons I find that this application has no merits. I dismiss the application, with no orders as to costs.

Dated and delivered at Garissa this 8th day of October, 2015

GEORGE DULU

JUDGE