



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISC. APPL. NO. 158 OF 2011

JOSEPH CHEMASWET LOMULEI APPELLANT

=VERSUS=

REPUBLIC RESPONDENT

RULING

The application before me was brought pursuant to the provisions of **Article 50 (6) of the Constitution** of the Republic of Kenya.

The Applicant, **JOSEPH CHEMASWET LOMULEI**, was convicted for the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. He was then sentenced to suffer death in the manner prescribed by the law.

Following his conviction and sentencing, the Applicant lodged an appeal to the Court of Appeal. After the appeal had given due consideration, it was dismissed on 25th March, 2011.

The Applicant has now moved this court, seeking a retrial. The grounds upon which the application is founded are set out in the body of the said application, as follows;

“ 1. THAT your Honour, the Judge erred in law and fact by reading out the plea in a language I was not understanding, as provided under Article 274 of the CPC.

- 2. THAT your Honour, the trial Judge erred in law and fact by not considering that P.W. 5 and P.W. 8 were not on the list of prosecution witnesses.***
- 3. THAT your Honour, the trial Judge erred by not calling the arresting officers and the Chief, since I left my document (buying agreement) in his office.***
- 4. THAT your Honour, the trial Judge erred by not considering the period I was detained in police station as prohibited by the laws of Kenya.***
- 5. THAT your Honour, the trial Judge erred in law and fact when state counsel Mutuku requested for a case to start afresh after a new Judge F.A. Ochieng replaced W. K. Karanja. Mr. Mutuku on his request quoted that he was praying that a case can start afresh because only P.W.1 had testified, of which it was false.***
- 6. THAT your Honour, on lodging my first appeal, I prayed that I be furnished with a copy of trial proceedings in which I was given one day before the hearing date, your Honour, I did not***

get sufficient time to raise more grounds.”

When canvassing the application, the Applicant stated that he was not given an opportunity to bring the letter which was written by the Chief. The Applicant told this court that he had wanted to produce that letter as an exhibit.

The Applicant also pointed out that the plea was read in a language he did not understand. I believe that he meant to talk about the charge that was read, at the time he was taking his plea.

The other issue that was raised by the applicant was that P.W.6 was not a witness of truth.

Finally, because the trial did not start *de novo* after the prosecuting state counsel had requested for that, the Applicant feels that that was reason enough to warrant a re-trial.

Mr. Mulati, learned state counsel, opposed the application, because there was no basis for a retrial.

The Respondent submitted that the Applicant had failed to show any new and compelling evidence which had become available after the trial.

I was therefore invited to dismiss the application.

I have perused the record of the proceedings, and noted that the plea was taken on 28th July, 2004. The record clearly shows that the charge was read and explained to the accused in the Kiswahili language.

Later, when putting forward his defence, the accused did so in the Kiswahili language. That must have surely meant that the accused was competent to communicate in that language.

In any event, whether or not the accused understood Kiswahili was an issue which he knew about at the very outset of his trial. It is not a fact which he only became aware of subsequent to the trial.

As regards the contentions that the learned trial Judge erred, those are issues which should have been placed before the appellate court.

Mistakes, if any, would have been made during the trial. Therefore, such mistakes did not arise after the trial.

There is nothing that has been demonstrated to this court to show that the Applicant could not have raised those issues either at the trial or on appeal.

The absence of P.W.5 and P.W.8 from the list of the prosecution witnesses; the alleged failure to call the arresting officer and the chief as witnesses; the alleged failure by the court to consider the period when the Applicant had been detained at the police station; the alleged falsity of the reasons for requesting that the trial should start *de novo*; and the insufficiency of time for the accused to prepare for his defence, are all matters which could have been addressed either during the trial or at the stage of appeal. None of those concerns was a new issue, which only came to the knowledge of the Applicant after his trial and appeal were concluded.

Pursuant to Article 50 (6) of the Constitution;

“ 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.*”

Therefore, a person who seeks a retrial must prove that there was new and compelling evidence which had become available.

The Applicant has failed to discharge that onus .

Meanwhile, it is noted that on 1st March, 2007, the court was informed, by the learned state counsel, **Mr. Mutuku**, that the case was part-heard before **Karanja J.** He requested that the case should start *de novo*, because only one witness had already testified.

Mr Chebii advocate held brief for **Mr. Tigogo**, the learned advocate for the accused person. **Mr. Chebii** had no objection to the trial starting *de novo*.

As there was consensus between the prosecution and the accused, the court directed that the trial should start *de novo*.

However, shortly after that order was made, **Mr. Mutuku** realized that he had confused two cases. He informed the court that in this particular case, four (4) witnesses had already testified before **Karanja J.** He therefore asked that the case be mentioned before the learned judge, for Directions about the further hearing.

In the light of that development, the court ordered as follows:-

**“ *The case is Stood Over to 12/3/2007 for mention before
Karanja J., for directions. This order supersedes that made
earlier herein. Accused remanded in custody.***

(Signed)

F. A. OCHIENG

JUDGE.”

Whereas the prosecution and the accused had agreed to have the trial start *de novo*, that order was effectively countermanded on the very same day.

Therefore, the Applicant is not right to blame the court for refusing to start the trial *de novo*.

Accordingly, there is no merit in the application for a retrial. The application is therefore dismissed.

DATED, SIGNED, AND DELIVERED AT ELDORET

THIS 4TH DAY OF FEBRUARY. 2014.

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FRED A. OCHIENG

JUDGE.