



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 441 OF 2013

BETWEEN

JOSEPH MURIUKI NJOGUPETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

Introduction

1. Joseph Muriuki Njogu, the petitioner, is serving a life sentence at Kamiti Maximum Prison. His case is straightforward and is founded on the provisions of **Article 50(6)** of the Constitution which provide as follows;

50(6) 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.

2. The petitioner commenced these proceedings by a Notice of Motion filed on 17th October 2013. The petitioner, who was acting in person, sought and was granted leave by the Deputy Registrar, to commence the proceedings without payment of court filing fees under **rule 34** of the **Constitution of Kenya (Protections of Fundamental Rights and Freedom) Practice and Procedure Rules, 2013** ("the **Rules**"). The petitioner did not thereafter file a petition after the grant of leave but relied on the Notice of Motion and his supporting affidavit to make his case. The respondent did not object to the fact that no petition was filed and responded to it by way of written submissions. I am satisfied that neither party was prejudiced by adopting this course as the petition does not raise any factual issues. Further, the Court has a duty to facilitate access to justice under **Article 48** of the Constitution.
3. During the course of the proceedings, I appointed Mr Achach of *Achach and Company Advocates* to represent the petitioner.

Petitioner's Case

4. The petitioner case is summarised in the supporting affidavit as follows, “[6] *Due to conflicting judgments and lack for a precedence pertaining Article 50 sub-article 6 and 6(b) and the quest amongst prisoners and Kenyans, I felt the need for legal interpretation pertaining the same as some of them have found compelling new evidence after exhausting their appeals and that I together with others need court’s guidance pertaining the same.*”
5. The petitioner is apprehensive that if the provisions of **Article 50(6)** are not interpreted there are prisoners who may lose their right to file their cases in light of the decision of Makhandia J., (as he then was) in ***Duncan Kyalo Muange and Others v Republic Machakos* Petition No. 280 of 2010 (Unreported)**. In that case the learned judge dismissed a petition for retrial as the petitioners had not established the conditions set out in **Article 50(6)**.
6. The petitioner applies to the Court to interpret and give guidance to the type of new evidence that may warrant a new trial. In the absence of such an interpretation, the petitioner is fearful that justice may be defeated and the Constitution violated if prisoners with tangible, new and compelling evidence do not get a chance for a retrial.
7. Mr Anyoka, counsel prosecuting the petitioner’s case, disavows the fact that the petitioner is seeking a retrial under **Article 50(6)** but rather that he wants an interpretation of the provision. He submits that the outcome of this decision would impact on the petitioner’s right to seek a retrial. Counsel submits that the Constitution should be interpreted having regard to the principles set out in **Article 259(1)** which require that the Court gives **Article 50(6)** a broad and purposeful interpretation that would enable the petitioner and other applicants have the full measure of benefit of the right protected by **Article 50(6)**.

Respondent’s Case

8. The respondent on its part opposes the application. The thrust of Mr Ngetich’s submissions on the respondent’s behalf is that the petitioner has not met the terms of the **Article 50(6)** to entitle him to a new trial. Counsel submits that the petitioner’s appeal has not been heard and dismissed by the highest appellate court and that the petitioner had not furnished new and compelling evidence in the matter to warrant a retrial.

Determination

9. The petition in this case seeks interpretation of **Article 50(6)** of the Constitution. While the High Court has jurisdiction under **Article 165(3)** of the Constitution to interpret the Constitution such jurisdiction is not exercised in a vacuum. It is exercised in an actual case of dispute (see ***John Harun Mwau and Others v The Attorney General Nairobi* 65 of 2011 [2012]eKLR**, ***Jesse Kamau and 25 Others v The Attorney General, Nairobi* Misc. App. No. 890 of 2004 [201]eKLR**, ***National Conservative Forum v Attorney General Nairobi* Petition No. 438 of 2013 [2013]eKLR**). Furthermore, even when the court exercises jurisdiction to enforce fundamental rights and freedoms, a petitioner is obliged to establish that, “*his or her right or fundamental freedom has been denied, violated, infringed or threatened.*” In this instance, the interpretation of **Article 50(6)** can only be done in the context of a petition for retrial to enable the court determine whether the facts alleged by the petitioner fall within the provisions of the Constitution.
10. The court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical. In the absence of a real dispute between parties before it, the Court would be engaging in an academic exercise, or, at best, giving an advisory opinion, a role that is vested in the Supreme Court by the Constitution under **Article 163(6)**.
11. The petitioner fears that the interpretation by judges who have dealt with cases brought under **Article 50(6)** has been restrictive and is likely to result to an injustice. In each of the cases cited by the petitioner concerning **Article 50(6)**, the Court has had an opportunity to expound on the

meaning of the right in light of the facts of each case. These cases include *Muhoro Thuita v Republic Nakuru Misc. Appl. No. 58 of 2011 [2011]eKLR*, *Ramadhan Juma Abdalla & Others v Republic, Nairobi Petition No. 468 of 2012 [2013]eKLR* and *Wilson Thirimba Mwangi v DPP Nairobi Petition 271 of 2011 [2012]eKLR*.

12. The petitioner has the right to file the petition under **Article 50(6)** to seek a new trial. This right has not been abridged and all the petitioner has to demonstrate is that his case falls within the parameters set by the Constitution. The High Court is obliged to adjudicate the case and if the same is dismissed the petitioner has a right of appeal to the Court of Appeal and then to Supreme Court.

Disposition

13. In the absence of any concrete claim under **Article 50(6)** of the Constitution, the petitioner's Notice of Motion filed herein is struck out with no order as to costs.

DATED and DELIVERED at NAIROBI this 6th March 2014

D.S. MAJANJA

JUDGE

Mr Anyoka instructed by Achach and Company Advocates for the petitioner.

Mr Ngetich, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.