



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA ATNAKURU

PETITION NO.11 OF 2011

MICHAEL ACHIENG ODONGO.....PETITIONER

VERSUS

STATE.....RESPONDENT

RULING

By an amended petition dated 19th September 2012, this court is urged to order for a new trial on grounds that the petitioner has learnt of or accessed new evidence after conviction, and it is important that he be granted leave to adduce that evidence at the trial court.

The background to this matter is that the petitioner was convicted in **Kericho Criminal Case No.2018 of 2001** for the offence of robbery with violence contrary to **section 296(2) Penal Code** and sentenced to death. He filed an appeal being **Kericho High Court Criminal Appeal No.2 of 2002**, which was dismissed. He subsequently appealed to the Court of Appeal at Nakuru in Criminal Appeal No.176 of 2006 which appeal was dismissed on 10th June 2011.

The dismissal means he has no other appellate court to seek redress from. He relies on **Article 51(6) (a) and (b)** of the **Constitution of Kenya** and **section 358** of the **Criminal Procedure Code**.

The evidence the petitioner wishes to adduce includes, but is not limited to issues of malicious detention and prosecution by one DENNIS OTIENO TOGO who testified as a prosecution witness, ostensibly because he "seemed" to have given evidence which exonerated the petitioner from criminal liability on the charges he faced. The said DENNIS was charged for the offence of robbery with violence in **VIHIGA CMCRC.No.1228 of 2001 (R VDENNIS OTIENO TOGO)**, which charges the petitioner said were aimed to punishing him for the kind of evidence he gave, which the prosecution presumed was to help the petitioner out or lock him out of the court's jurisdiction.

The petitioner points out that charges against DENNIS involves the same complainants i.e., **HAMADI RASHIDGOSSARI** and **LAZARO ODONGO**, the same properties alleged to have been stolen on the same date and place as those alleged against the petitioner.

Although the prosecution was aware of the petitioner's case in Kericho, and could easily have charged Dennis as the petitioner's co-accused, they elected to charge him separately and at a different court.

The prosecution of DENNIS is described as suppressed of evidence and/ or fabrications of evidence. Incidentally Dennis was acquitted for want of prosecution, after attempts to have the charge withdrawn under section 87(a) were rejected. Thereafter, the Investigating Officer (FREDRICK ODHIAMBO MBOYA) and one JOHN SHIMAKA criminally charged in Kisumu CM Criminal Case No.196 of 2002 in matters relating to the circumstances under which the investigations of the case was carried

out. Although the said FREDRICK and JOHN were acquitted, the former was dismissed from employment on grounds that he had solicited bribes from many suspects whom he had arrested but not charged in the case where the petitioner was charged, and in which the petitioners made claims of bribery. This is the evidence the petitioner says he could not have obtained during the trial or before the sub-sequential appellate courts. Although the issue was addressed before the Court of Appeal, the said court could not deal with it as it only deals with matters of law on such appeal.

The application is supported by the affidavit sworn by the petitioner, and another one sworn by Dennis Otieno Togo in which he claims to have been forced to write a statement by police, incriminating persons he initially did not know, and subsequently to testify as a prosecution witness against the petitioner.

However upon realising that his false evidence could lead to the persons being sentenced to death, he declined to make the false allegations and so was declared a hostile witness by prosecution who did not want him to speak the truth. It was after such declaration that he ended up being charged in the Vihiga court for said offence as the petitioner. After being acquitted, Dennis pressed charges against the investigating officer (Fredrick) on charges of extortion, and although the said Fredrick was acquitted, he was dismissed from employment on grounds of having interfered with the conduct of the investigations in the case against the petitioner.

It is the petitioner's case that there was no case proved against him at the trial. The petitioner annexed a statement by Dennis in which the latter stated that the Viking charges were brought against him because:-

"I did not give evidence that incriminated the suspects he (i.e. the investigating officer) had levelled the (sic) the charges against and particularly that I had made revelations he had been soliciting money from every person he had apprehended in the name of making a kill."

In arguing the petition, Mr.Maragia submits that the applicant has met the conditions envisaged by Article

50(6) of the Constitution of Kenya namely that:-

(a) The appeal has been dismissed by the highest court in the land (the Court of Appeal at the time was the highest court). In any event, although a Supreme Court new exists, he argues that no act of Parliament has been established to operationalize the proceedings; secondly, that even after the passing of an Act of Parliament, the qualification for the appeal to be entertained is too high for any convicted person to pass without undue difficulty. He points out that there is no room for an appeal out of time - taking into consideration the time lapse since the pursuit of Judgment, and the establishment of the Supreme Court Act and Rules. Further, that a person intending to appeal, may be forced to lodge an application seeking leave from the Court of Appeal (which is bereft of provisions for grant of such an application).

The new and compelling evidence being Togo's status on the proceedings is described as relevant as it would help to reveal that there was a frame-up and fixing of persons by the investigating officer. Togo testified in the matter as PW6.

Mr. Maragia argues that the court can easily call **Vihiga Criminal Case No.1228 of 2001 R V DENNIS OTIENOTOGO, and Kisumu CMCRC.No.196 of 2002 R V FREDRICK ODHIAMBO MBOYA**, to confirm the issues raised by the petitioner, and that even if the files are not available, the respective court's registries will reveal the existence of these cases and the results.

So why didn't counsel just have copies of the proceedings in the two files annexed to the petitioner's affidavit? Mr.Maragia explains that:-

"Our attempts to get the files for purposes of annexing the same as our evidence has been hitting a snag to the extent that we sought administrative assistance of this honourable court to have the files forwarded, but that notwithstanding, it has taken quite a long time, and the last position being that wrong files were sent instead. It will be at the expense of the petitioner to continue waiting for the files."

Counsel also points out that the dismissal of the Investigating Officer for alleged misconduct is a private and confidential matter which unfortunately can only be obtained through orders of this court.

Mr. Maragia argues that the reason why the prosecution did not amend the charge sheet so as to include Dennis Togo (PW6) as the petitioner' co-accused/ accomplice after he was declared hostile was because the prosecution's sole intention was to block PW6 from telling the truth, as it can counter the prosecution's interest. He explains that the petitioner could not have known what had befallen PW6 as they were not related nor were they meeting. He opines that perhaps when PW6 was declared hostile, he was actually speaking the truth, and if the information about PW6's woes had been disclosed during trial, perhaps the trial court would have taken that into consideration when making its decision.

Further, the fact of the investigating officer being charged and later relieved of his duties is also described as significant evidence which had been within the petitioner's knowledge and offered to the trial court, would perhaps have resulted in a different outcome.

Counsel also wishes to exhibit the OB from various stations to demonstrate that despite allegation that various items were stolen, the OB from Vihiga and Kisumu police station bear no such records.

In opposing the petition, Mr. Omari argues on behalf of the DPP that the petitioner had his day in court, from the lowest to the highest court, and the respective courts considered the conviction and sentence and upheld it. While conceding that some aspects of what the petitioner raises, may not have been within the court's knowledge, the DPP argues that the details would not alter the findings of the trial court. He insists that, the prosecution case at the trial, left as it is, even with the new information, would still lead to a conviction and urges the court to dismiss the petition.

In response Mr. Maragia submits that the Constitution of Kenya does not provide that the new-found evidence must lead to an acquittal - what is required is that the evidence should be compelling. Further that, at this stage, it is not for this court to go through the mind of the trial court to determine what the outcome would be in the light of the new evidence.

The relief being sought here is a constitutional one under Article 50(6) of the Constitution of Kenya, which provides that:-

"(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.

(b) And new and compelling evidence has become available."

I need not repeat what Mr. Maragia has submitted on regarding the petitioner's demonstration that the avenues of appeal have been exhausted. Should the petitioner have pursued his appeal right up to the Supreme Court?

Article 163(4) of the Constitution of Kenya provides that:

"(4) Appeal shall be from the Court of Appeal to the Supreme Court:-

(a) As a right in any case involving the interpretation or application of this Constitution.

(b) In any other case in which the Supreme Court as the Court of Appeal clarifies that a matter of general public importance is involved. . ."

My view is that the petitioner's criminal appeal does not fall within two specifications, so that he had effectively exhausted his crucial appeal at the highest court which could deal with such an appeal, namely the Court of Appeal of Kenya. Secondly, even if he was to try his chance and have the Court of Appeal certify the matter as meriting a hearing before the Supreme Court, I think an assortment of inhibition, ranging from the lapse of time, the Court of Appeal Rules vis a vis Supreme Court Rules, application for enlargement of time, would militate against the applicant. I find that the applicant has satisfied the constitutional threshold as regards **Article 50(6)** of the **Constitution**.

The second aspect is whether there is new and compelling evidence which has become available.

I appreciate this issue with a host of caution, bearing in mind that what was observed in the case of **WILSONTHIRIMBA MWANGI V DPP** (Nrb JR Misc. Appl. No.271 of 2011 to the effect that:-

"A person who is convicted has gone through the legally established process with the necessary protection contemplated under Article 50....A petitioner seeking a new trial moves the court without the presumption of innocence and the burden to upset a lawful decision of the trial and appellate court is equally on the petitioner's shoulders."

Yet there must have been very good reason why Kenyans elected to retain Article 50(6) in the Constitution when they overwhelmingly voted for the same. I can do no better than borrow again from the words of the Judge in **Wilson ThirimbaMwangi's case** that:-

"Article 50(6) seeks to balance the public interest in having finality in criminal cases on one hand, and ensuring that where there is new and compelling evidence, an innocent person should not suffer the penalty of a conviction."

The Constitution is clear, that there are instances where having a second bite at the cherry of justice should not be frowned up. The question courts have to grapple with is what constitutes new and compelling evidence?

In the case of **Rodgers Ondiek Nyakundi and 2 others V State** (Kisii High Court Criminal Appeal No.135 of 2006), Sitati J examined the legal definition, drawing from the Court of Appeal's expression in a civil matter **D.J. Lowe & Co. Ltd. V Bangué Indosuez** - (although a civil matter, at least gave some hint of what amounts to new evidence as follows:-

"Where such a review application is based on fact of the discovery of fresh evidence, the court must exercise greatest care as it is easy for a party who has lost, to see the weak part of his case, and the temptation to lay and produce evidence which will strengthen that weak party and put a different complexion in such comprehension in such event to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

The underlying factor is that apart from being new and compelling, the evidence must not have been within the knowledge of the petitioner and he/she could not have obtained review with the exercise of due diligence. From that new evidence to be considered as compelling, then the petitioner must demonstrate that it would probably

"Have an important influence on the result of the case, though it need not be decisive, and must be such as is presumably to be believed....."

[See Chesoni Ag. JA in **MZEE WANJIE and 93 Others Vs A.K. SAKWA & 3 Others [1982-88] 1 KAR 465**)]

In the circumstances of the case what the applicant alluded to was not available to him during the trial; and was a development which occurred while he was in custody. This means the petitioner could not have obtained the evidence, even if he had exercised due diligence, and used it during his trial or at the hearing of the subsequent appeals. The evidence is significant and material, especially taking into account the manner in which the prosecutor treated PW6, and his subsequent arraignment in court and acquittal.

Also significant is the role of the investigating officer and the subsequent events thereon. Would this require a complete new trial? I don't think this needs re-opening of the prosecution case, what it means is that the petitioner merits being given a chance to adduce further evidence regarding what he has so far referred to in respect of the two individuals. The prosecution evidence would remain as having been presented and no prejudice would be occasioned as under section 34 of the Evidence Act the previous evidence can be adopted. Should the prosecution then seek to counter that evidence by production of new evidence? I am certain that opportunity would be available in the course of cross examination and upon appropriate application.

In my View, the scenario here is not so much that the judgment was right or wrong, in fact it is not a claim of error on the part of the court, but a plea to be given a chance to demonstrate why there may be a chance that he is innocent. He is not accusing the courts of violating his rights, or attacking the decision of the courts that there was an error of fact or substantive law- nay, what he contends is that if the evidence he now has, had been made available at trial and on appeal, just perhaps, the outcome could be different.

I perused the two files i.e. **VIHIGA CMCR.C.N0.1228 of 2001 R V DENNIS OTIENO TOGO and KSM CMCR.C.N0.196 of 2002, R V FREDRICK ODHIAMBO MBOYA.**

The petitioner was convicted and sentenced on 31/12/2001 and by 11/01/2002 he had filed his appeal, which was eventually heard on 15/12/2005.

PW6 was charged in court on 26/9/2001 with the same offence that the petitioner was charged with and eventually acquitted on 29/10/2010 - it follows thus that even at the hearing of the appeal at the High Court, the petitioner did not" have the information he alluded to.

I am persuaded that to this extent the petitioner's prayer is merited but will be limited to adducing evidence only for the defence, and only with regard to the role of Dennis Togo and Fredrick Odhiambo.

The issue regarding the entries in the various OB's (bearing in mind that the petitioner was moved around various police stations) is a fact which with just a little diligence, his counsel would have been able to access and present at the trial and he should not introduce that portion of the evidence at the re-opened trial which shall take place in Kericho.

Delivered and dated this 7th day of October, 2014 at Nakuru.

H.A. OMONDI

JUDGE