



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 460 of 2012

ROBERT MAKUMI WAWERU.....1ST PETITIONER

EVANS MAKUMI WAWERU.....2ND PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

1. I have considered the petition dated 24th September 2012 together with the supporting documents. The petitioners were convicted of the offence of robbery with violence under **section 296(2)** of the **Penal Code, (Chapter 63 of the Laws of Kenya)** in **Githunguri SRMCC No. 1916 of 2006** now seek the following orders:

- (a) A declaration that the petitioners' right to a fair trial has been violated.
- (b) That the respondent supplies the OB from Ngewa Police Post for 25.10.2005
- (c) An order that the petitioners be acquitted of the criminal charges in respect of which they were charged at the SRM Court Githunguri.
- (d) In the alternative, the petitioners be retried.

2. The petitioners did lodge an appeal from the conviction and sentence to wit; **HC Criminal Appeal No. 404 of 2006** and **No. 405 of 2006** which were consolidated. The consolidated appeal was heard by Justice Ojwang' and in a judgment dated 8th June 2008, he declared a mistrial as the appeal ought to have been heard by two judges.

3. According to the proceedings, the appeals were heard on 16th June 2010 by Justices Khaminwa and Warsame and judgment scheduled for 27th September 2010. On that date the judgment was not ready and was rescheduled to 18th October 2010. The records available do not show that judgment was delivered. I am aware, though, that one of the learned Judges on the panel was taken ill and therefore the matter could still be pending.

4. As the issues raised in the petition are really issues to be canvassed in the appeals, this petition cannot proceed on that basis as the appeal is still alive. In the circumstances, I am constrained to strike out the petition. (See **Julius Kamau Mbugua v Republic Nairobi Criminal Appeal No. 50 of 2008 [2010] eKLR** and **Methodist Church in Kenya Registered Trustees & Another v Rev. Jeremiah Muku and Another CA, Civil Appeal No. 233 of 2008 (Unreported)**).

5. Mr. Gitonga, counsel for the petitioners, has raised the issue of inordinate delay and the fact that the petitioners may be transferred to another prison. I agree that this is an unfortunate and regrettable state of affairs, but any application or issue concerning the trial and subsequent conviction must be raised in the attendant appeal.

6. Counsel for the petitioners is advised to follow up the matter with the Deputy Registrar of the Criminal Division as the files are available and take whatever action that is necessary.

7. Orders accordingly.

DATED and DELIVERED at NAIROBI this 4th day of April 2013.

D.S. MAJANJA

JUDGE

Mr Gitonga, instructed by Azania Legal Consultants for the petitioners.

Ms Kahoro, Prosecution Counsel, instructed by the Directorate of Public Prosecutions.