



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION NO.38 OF 2012

MOSES ODONGO ODINGAAPPLICANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The petitioner was charged with, and convicted of, robbery with violence c/s 296(2) of the Penal Code before the Principal Magistrate's Court at Siaya. The particulars of the charge were that on the night of 28th to 29th day of November, 2006 at Bar-Sauri sub-location, Yala Township location in Siaya District within Nyanza Province, jointly with others not before the court robbed Grace Anyango Dawa of one mattress, three bedsheets, one curtain, one mobile phone make Samsung and cash Kshs.240/= all valued at Kshs.37,740/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Grace Anyango Dawa. He was sentenced to death.

He appealed to the High Court in Criminal Appeal No.272 of 2007 at Kisumu. Two Judges heard the appeal which they dismissed. He appealed to the Court of Appeal in Criminal Appeal No.156 of 2010 at Kisumu. The three Judges who heard the appeal found that it lacked any merits and dismissed it in a judgment handed down on 4/11/11. That is when the petitioner filed the present petition under Articles 21, 22, 23, 26 and 50 of the Constitution. The petition was opposed by Mr. Mongare for the state.

In the petition, the petitioner stated that he is **“not challenging the conviction, but only challenging the violation of his Constitutional rights....”**

He went on that, during the trial the prosecution did not provide him with copies of documents they sought to rely on; and that he did not follow the evidence of police officer Wilson Kinyondi (PW3) of Yala Police Station because, although the record shows the translation was from English to Dholuo, there was no translator to translate his evidence to either Kiswahili or Kinyore/Luhya.

In the affidavit in support of the petition, he raised other grounds on which he was relying. He basically attacked the evidence on which he was convicted. He stated that he was wrongly convicted on the suspect evidence of a single identifying witness; that the trial court erred in disregarding the evidence of initial report to police by the complainant; and that, generally, there was failure to properly evaluate and analyse the evidence tendered by the prosecution to support the charge.

The petitioner sought for a new trial under Article 50(6)(a) and (b) of the Constitution and also for a declaration that his Constitutional rights during the trial were violated.

It is not true that the petitioner is not challenging the conviction. He is challenging the conviction by the trial court and the decisions thereon by the High Court and Court of Appeal. He is challenging the basis and substance of these determinations. Looking at the Court of Appeal decision, for instance, the issues around identification by single witness and the initial report to the police were dealt with and findings made thereon. All the evidence by the prosecution and the defence was re-considered by the two superior courts and a conclusion reached that the petitioner had been convicted on safe grounds. This court has no jurisdiction to re-open or re-hear the matter.

It should also be pointed out that the petitioner has not alleged, and proved, that there is any **“new and compelling evidence”**

that has become available since he was tried and the appeals heard and determined. Such evidence would be the only basis under Article 50(6)(b) of the Constitution for a petition for a retrial.

Lastly, the petitioner was before the High Court and the Court of Appeal during the respective appeal. These courts had jurisdiction to deal with any Constitutional issue that arose during the criminal trial whose appeal they were handling. The petitioner was at liberty to complain to them that he was not provided with an interpreter or that he was handicapped in the preparation of his defence because the prosecution did not give him the evidence it was relying on in the case. If he did not complain when he had the opportunity to do so, he cannot today be allowed to plead that his rights to a fair trial were violated.

In short, the petition lacks any merits and is dismissed.

Dated, signed and delivered this 8th day of November, 2013.

A. O. MUCHELULE

J U D G E