IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MUSINGA & M'IN OTI, JJ.A.

CIVIL APPEAL NO. 259 OF 2012

BETWEEN

LT. COL. ROBERT TOM MARTINS KIBISU……..……. APPELLANT

AND

REPUBLIC …….....…….…… RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (M. Ngugi, J) dated 16th March, 2012

in

PETITION NO. 197 OF 2011)

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JUDGMENT OF THE COURT

The appellant was dismissed from the then Armed Forces of Kenya on 15th April, 2005 after conviction by a court martial. Thereafter he launched a plethora of legal challenges of the dismissal, culminating in this appeal. About five months before the hearing of this appeal, this Court had on 21st June, 2013 dismissed another appeal by the appellant arising from a petition in the High Court alleging that his said dismissal was a violation of his constitutional rights under the former constitution. In his litigation the appellant evokes the image of a modern day *Alfred Dreyfus*, an officer unfairly deprived of his commission and honour on the basis of trumped-up charges.

Before we address the issues raised by the appellant in this appeal, it is important to set out the brief background to the appeal and the various suits and applications that he has launched, if for no other reason, to avoid the risk, ever lurking in this appeal, of appearing to determine afresh issues already determined by courts of competent jurisdiction.

At the time of his dismissal from the armed forces, the appellant held the rank of Lieutenant Colonel in the Kenya Army. He was also the Commanding Officer and Commandant, School of Signals. He had joined the army in 1983 and was awarded a Presidential Commission on 11th May, 1984. In July and August 2004, the appellant appeared before the Garrison Commander, Kahawa, facing 8 disciplinary charges arising from his refusal to have his car boot searched or inspected. He was found guilty of all the charges and was awarded cumulative punishment of one year loss of seniority, fine of 28 days pay, severe reprimand and reprimand. Aggrieved by the conviction and punishment, he appealed on

13th September, 2004 through redress to the Defence Council as provided by the repealed Armed Forces Act, Cap 199 Laws of Kenya. It appears that appeal was never head or determined, presumably because of the turn of events immediately after it was lodged.

After the conviction of the appellant, on 14th September, 2004 Colonel Phillip Mbindyo Mumo, the Corps Commander, Corps of Signals, authorized the publication of Part II Orders Serial No. 10 of 2004 entering into the appellant's records the charges that he had faced as well as the punishment awarded for each charge. On 11th November, 2004 and before his appeal was determined, the appellant prepared and published or caused to be prepared and published another Part II Orders Serial No. 14 of 2004 by which he purported to cancel Col. Mumo?s Orders Serial No 10 of 2004.

The effect of the appellant?s Orders Serial No. 14 of 2004 was to enable him avoid the penalties that had been awarded against him in the disciplinary case. His Orders Serial No 14 of 2004 was eventually cancelled by another Orders Serial No. 15 of 2004 by Col. Mumo, which enabled implementation of the penalties. The appellant contended that as the Commanding Officer, School of Signals, he was entitled to reverse Col Mumo?s Orders whilst the Military took the position that the appellant had acted mischievously and illegally and that even as a Commanding Officer he could not make a publication in respect of himself without permission from a higher authority.

Arising from publication of the Orders Serial No. 14 of 2004 by the appellant, the Commander of the Kenya Army by an order dated 2nd March, 2005 convened a court martial to try him for the offence of *"conduct prejudicial to the good order and discipline of the Armed Forces contrary to section 68 of the Armed Forces Act."* The court martial was scheduled to convene at Langata Barracks, Nairobi on 16th March, 2005.

The appellant responded to the convening of the court martial by filing in the High Court *Miscellaneous Application No. 365 of 2005* on 15th March,2005. This was a judicial review application for, among others, leave to apply for orders of *certiorari* to quash the order convening the court martial and *prohibition* to stop the convening of the court martial. The appellant also prayed for an order that leave do operate as stay of the court martial. The High Court granted the leave on the same date and ordered stay of the court martial for 21 days. However, the High Court added the following rider:

> *"The applicant shall within the next 21 days from the date herein file and serve the motion to the respondents and any other interested party. Thereafter the motion should be set down for hearing in the normal manner. However, should the applicant fail to comply with the requirement as to the filing and service of the main motion, the said leave and stay herein stated shall automatically lapse."*

We shall return to this order of stay of proceedings later in this judgment because it forms a major plank of the appellant?s case in this appeal.

The court martial eventually proceeded and on 15th April, 2005, the appellant was convicted as charged. He was sentenced to one year imprisonment and dismissed from the armed forces. Aggrieved by the decision of the court martial, the appellant filed *Court Martial Appeal No. 1 of 2005* in the High Court. In the appeal he raised various issues including whether the court martial was validly convened, whether it could validly proceed in the face of the order of stay by the High Court, whether the charges were valid and the propriety of the sentence meted out against him. By a judgment dated 7th December, 2006 *Lesiit, J.* and *Makhandia, J. (as he then was)* specifically found that the order by the High Court that leave do operate as stay of the court martial proceedings was neither extracted nor served upon the Commander of the Kenya Army and the officer presiding over the Court martial; that the court martial was lawfully convened and that the charges against the appellant were proper and valid. The court, therefore, upheld the appellant?s conviction by the court martial and his dismissal from the armed forces but reduced his sentence of imprisonment from 12 months to the period already served.

Notwithstanding the findings by the High Court in Court Martial Appeal No. 1 of 2005 that the appellant had not served the order for stay of the proceedings of the court martial, the appellant filed in 2007 an

application to commit the Commander of the Kenya Army as well as the court martial?s presiding officer for contempt of court. The fate of that application is not apparent from the record of appeal.

In a move that completely blurs the line between tenacity and obstinacy, the appellant, on 9th December, 2008 filed *High Court Criminal Revision Application No. 116 of 2008* seeking revision of the judgment by Lesiit and Makhandia, JJ dated 7th December, 2006. By that application, a single judge of the High Court was being asked to invoke the court?s revision jurisdiction in respect of a merit-judgement of two judges of equal jurisdiction. The grounds upon which the revision application was founded were the very grounds canvassed before Lessit and Makhandia, JJ; only that the single judge was now being invited to make different findings on revision.

In a ruling prepared by Ojwang, J *(as he then was)* and delivered by Warsame, J *(as he then was)* the court dismissed the application after making the following pertinent observation:

> *"The merits of the instant application are to be assessed in the light of the jurisdiction of the High Court to revise certain orders, rulings and judgements. Inherently, the High Court is not required to expect to impeach its own decision; it renders its determination with finality, and that is the only way the rights of parties can be protected; but those aggrieved by such decisions may proceed to the Court of Appeal, subject to the statutes and rules governing appeals. All substantial questions of merits in claims coming up before the High court are matters for an appeal where there is a remaining grievance-but they are not matters for the High court's revision jurisdiction."*

The appellant?s next stop was the Constitutional and Judicial Review Division of the High Court where he filed High Court Petition No. 509 of 2006 alleging that his trial by the court martial was a violation of his rights and freedoms under the former constitution, in particular protection from slavery and forced labour *(section 73)* and protection from inhuman treatment *(section 74)*. The petition was heard by Wendoh, J who on 29th March, 2007 dismissed the same. Undaunted, the appellant filed in this Court Civil Appeal No. 137 of 2007, which as we have already stated, was heard and dismissed on 21st June, 2013.

While that appeal was pending before this Court, the appellant on 13th October, 2011 filed yet another petition in the High Court, namely Petition No 197 of 2011 seeking two primary prayers, namely:

> *(i) An order for a new trial in the court martial; and*
>
> *(ii) A declaration that section 115 (3) of the repealed Armed Forces Act, Cap 199 Laws of Kenya was discriminatory, unfair and unconstitutional.*

Petition No. 197 of 2011 was taken out under the Constitution of Kenya, 2010 and as far as the first prayer was concerned, the appellant invoked *Article 50 (6)* to request for a new trial by the court martial on the ground that new and compelling evidence had become available. As regards the repealed Armed Forces Act, the appellant contended that because it allowed only one appeal to the High Court from a decision of the court martial, it was to that extent unconstitutional.

In his affidavit in support of the petition, the appellant revisited the issues he had raised before the High Court in Court Martial Appeal No. 1 of 2005, including the contention that the court martial was held in violation of the order of the High Court that leave to apply for judicial review should operate as stay of the court martial, that the court martial was invalidly convened and that the charges preferred against him before the court martial were void.

On 16th March, 2012, Mumbi Ngugi, J dismissed the petition on two principle grounds, namely; that the appellant had not presented any *"new and compelling evidence"* within the meaning of *Article 50(6) of the Constitution* and in any event, a court of competent jurisdiction (Lesiit and Makhandia, JJ) had conclusively determined the issues raised by the appellant and had, in particular, found as a fact that no court order had been extracted and served upon the respondents. The learned judge concluded that she did not have jurisdiction to re-open matters that had been handled and determined by the High

Court.

It was that decision by Ngugi, J. that provoked the present appeal. The memorandum of appeal lists 10 grounds of appeal, but in our view, the real issues raised and upon which the appeal turns are the following 4:

> *(i) Whether the appellant had satisfied the requirements of Article 50(6) of the Constitution to be entitled to a retrial by the court martial;*
>
> *(ii) Whether the issues raised by the appellant were res judicata;*
>
> *(iii) Whether the respondents had disobeyed the order of the High Court dated 15th March, 2005 in High Court Miscellaneous Application No. 365 of 2005; and*
>
> *(iv) Whether section 115(3) of the Armed Forces Act, Cap 199 was unconstitutional.*

The appellant agitated his appeal before us in person while Mr Monda, learned Senior Principal Prosecution Counsel, appeared for the respondent. The appellant submitted that he had satisfied the requirements of Article 50(6) of the Constitution to entitle him to an order for a new court martial trial. *Article 50(6)*, he argued, is meant to ensure that the ends of justice are met and so long as there is new evidence available, a party can petition the High Court for a new trial, which is exactly what he had done. To be entitled to a new trail, the appellant submitted, all he was required to do was show why the new evidence was not adduced. In his submission, evidence is new if it was not produced at the trial. In his case, he continued, the new evidence was in existence at the time of the trial, but he was not aware of its existence.

The appellant relied on an extract from *CROSS AND TAPPER ON EVIDENCE*, 11th Ed, page 20 on adducing fresh evidence in criminal cases at the appellate level where the learned authors state as follows:

> *"The overriding consideration is one of justice. In this context, it seems to connote that the evidence should have been admissible at the trial; that there should be a good reason why it was not adduced; and that it should be of such significance as to have been capable of affecting the decision at trial."*

To the same effect, the appellant cited *R VS HANRATTY, (2002) 3 All ER 534* which involved an application by the prosecution to introduce new DNA evidence in the Court of Appeal. It was held that under the English Criminal Appeal Act, 1968 the overriding consideration for the court in deciding whether fresh evidence should be admitted on the hearing of an appeal was whether fresh evidence would assist it to achieve justice and that fresh evidence that was of sufficient quality and was relevant to the question of guilt would be legally admissible if in its discretion, the court decided to admit it.

Lastly, the appellant cited *R VS PENDLETON, (2002) 1 All ER, 524* discussing the correct test to be applied in deciding whether or not to allow an appeal against conviction where fresh evidence had been received on appeal under the Criminal Appeal Act. In that case the House of Lords held that where fresh evidence had been received on an appeal against conviction, the correct test to be applied by the Court of Appeal in determining whether to allow the appeal was the effect of the fresh evidence on the minds of the members of the court and that it was advisable for the court to ask whether the evidence, if given at the trial, might reasonably have affected the decision of the jury to convict.

It is opportune at this juncture to observe that the authorities relied upon by the appellant relate to the interpretation of the English Criminal Appeal Act, 1968 and concern adducing of fresh evidence before the Court of Appeal when the Court is hearing an appeal. The authorities therefore relate more to the situation provided for under *Rule 29 of the Rules of this Court*, which empowers the Court, in its discretion and for sufficient reason to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.

The appellant further argued that the new evidence in this case was an affidavit sworn by Brigadier Maurice Oyugi on 4th July, 2007 in which he had deponed that the court martial had convened on 7th April, 2005. He contended that he was not aware of that fact until the affidavit was filed and served upon him. In his view, that was the new evidence that indicated that the court martial had convened in violation of the order of stay granted by the High Court on 15th March, 2005. Accordingly, the appellant submitted, the court martial did not have jurisdiction to try him on account of the order of stay by the High Court.

The appellant also relied on an affidavit sworn by a process server, Alexander Ochwo Alela on 25th April, 2005, in which he deponed that on 15th April, 2005, he attempted to serve the court order upon the officer presiding over the court martial at Langata Barracks, but instead he was arrested and locked up at Langata Police Station. To the appellant that affidavit was evidence of knowledge and further defiance of the order of 15th March, 2005, by the respondents.

The appellant next faulted the learned judge for holding that the issues raised by the appellant in his petition were *res judicata* because in his view, a matter cannot be *res judicata* where it has been determined on points of law.

Lastly, on the constitutionality of *section 115 (3) of the repealed Armed Forces Act*, the appellant submitted that the provision was unconstitutional because it limited the number of appeals an aggrieved party could lodge against the decision of a court martial. In his view, providing for a right of appeal only to the High Court was constraining and limiting, which was contrary to the Constitution of Kenya, 2010. The appellant cited *Article 24 of the Constitution* and argued that it did not allow limitations to fundamental rights unless those limitations complied with the provisions of the Article, which *section 115(3) of the Armed Forces Act* had not done.

Mr Monda for the respondent opposed the appeal, submitting that the same lacked merit; that the appellant had appealed to the High Court against the decision of the court martial; that the High Court had heard and dismissed the appeal on merit; and that the matter was *res judicata*, a view which was affirmed by Ngugi, J.

Regarding the new and compelling evidence alleged by the appellant, Mr Monda submitted that all that evidence went to address the question whether the High Court order of 15th March, 2005, was ever served upon the court martial; and that Lesiit and Makhandia, JJ as well as Ngugi, J had all held as a fact that the order was never extracted and served upon the respondent. Ngugi, J, counsel continued, had properly held that she had no jurisdiction to disturb the concurrent findings of two other judges of the High Court. In his view, the appellant was doggedly raising the same issues that had been determined even when there was no possibility of this court arriving at any different conclusion.

Counsel further submitted that *Article 50 of the Constitution* had no retrospective application, being a provision of the Constitution of Kenya, 2010 that was not in existence at the time of the appellant?s conviction by the court martial.

Lastly, Mr Monda submitted that the High Court had properly reached the conclusion that *section 115(3) of the Armed Forces Act* was not unconstitutional. In his view, the Constitution itself contemplates legitimate limits to the right of appeal and that the right of appeal cannot be open-ended.

The first issue for our consideration is whether, given the facts of this appeal, the appellant can invoke *Article 50(6) of the Constitution*. That Article provides as follows:

> *"(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; and*

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

Article 50 (6) has no equivalent provision in the former constitution. It is a new invention of the Constitution of Kenya, 2010. *Article 263* makes provision for the effective date of the Constitution. The Constitution defines *"effective date"* to mean the date the Constitution came into force. For all intends and purposes, the effective date of the Constitution of Kenya is 27th August, 2010, the date it was promulgated. The question that arises therefore is whether *Article 50 (6)* can be applied retroactively to cater for cases concluded before the provision came into being.

The Supreme Court discussed retroactive application of legislation and the Constitution in *SAMUEL KAMAU MACHARIA & ANOTHER VS KENYA COMMERCIAL BANK LTD & 2 OTHERS, (Supreme Court Application No 2 of 2011)* in which the applicant had sought to appeal to the Supreme Court against a judgment of the Court of Appeal delivered on 31st July, 2008. As of the date of the judgment, the Court of Appeal was the final court in Kenya. The Constitution of Kenya, 2010, created the Supreme Court as the new apex court. The applicant contended that the judgement involved *"a matter of general public importance"* so as to entitle him, under *Article 163(4) of the Constitution of Kenya, 2010,* to appeal to the Supreme Court. The respondent countered that the Supreme Court had no jurisdiction to entertain appeals in respect of final judgments of the Court of Appeal rendered before the Supreme Court came into being.

The Supreme Court framed the issue for determination to be whether *Article 164(b) of the Constitution* was intended to confer appellate jurisdiction upon the Supreme Court, the exercise of which would have retrospective effect upon vested rights of individuals. Quoting from *BLACK'S LAW DICTIONARY (6th Edition),* the Court noted that a retrospective or retroactive law is one *"which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force"* and that most common law jurisdictions frown upon retrospective or retroactive criminal legislation.

Regarding non criminal legislation, the Supreme Court observed that save in declaratory legislation or one merely on procedure or evidence, *prima facie* retrospective or retroactive legislation is not allowed unless by express words or necessary implication.

On retrospective or retroactive application of provisions of the Constitution, the Supreme Court expressed itself as follows:

> *"At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution."*

Agreeing with the reasoning of the South African Constitutional Court in *DU PLESSIS VS DE KLERK AND ANOTHER, (1997) 1 LRC 637*, the Supreme Court concluded that the judgement of the Court of Appeal, as the then final court in the land, had vested certain property rights in and imposed certain obligations upon the parties to the dispute and that *Article 163(4)(b)* was forward–looking and did not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the Commencement of the constitution.

Article 50(6) confers upon a person who has exhausted his right of appeal the right to petition the High Court for a new trial, where new and compelling evidence has become available. The plain language of

Article 50(6), without more, is not very helpful in determining whether the rights created therein is prospective only or whether it is also retrospective. All one can say is that there is nothing in the language that suggests that the right to petition the High Court for a new trial was not intended to be available to persons who were convicted before the Constitution of Kenya, 2010 came into force. We have therefore to bear in mind other considerations over and above the language of the provision.

The right conferred by *Article 50(6)* is not a right, the exercise of which would affect or impinge upon the crystallized rights and obligations of any other party as the Supreme Court found to be the case in respect of *Article*

163(4) (b) of the Constitution. On the contrary, it is a window of opportunity granted to a person wrongly convicted, to address the wrongful conviction if new and compelling evidence has come to light. The opportunity offered by *Article 50(6)* strongly suggests, in our view, that a conviction is final and conclusive where the convict has exhausted his right of appeal *so long as* no

new and compelling evidence has come to light. To that extent, conviction of a criminal offence is not necessarily final in the same way as a judgment of the Court of Appeal would have been before the creation of the Supreme Court. *Article 50(6) of the Constitution* has, inherent in it, the enduring possibility that a conviction will be reconsidered so long as new and compelling evidence has come to light. Under *Article 50(6) of the Constitution*, therefore, whether or not a conviction is ultimately final depends on whether new and compelling evidence had come to light.

Where new and compelling evidence has come to light, we do not see any reason why a person who alleges to have been wrongfully convicted before 27th August, 2010, cannot petition the High Court for a new trial on account of the new and compelling evidence that has since become available. *Article 50(6)* was created to cater for precisely those kinds of situations and we do not see any kind of limitation of time within which the new and compelling evidence must be found.

The argument that to allow persons convicted before the promulgation of the Constitution to petition for new trials would open a floodgate is, with due respect, a red-herring. It ignores or pays minimal attention to the safeguard provided in *Article 50(6) (b)* that a condition precedent for invoking the provision is the existence of new and compelling evidence, which, to our minds, means evidence that was not available at the time of the trial or could not have been availed upon exercise of due diligence and evidence sufficiently weighty that if it was available to the trial or the appellate courts, the conviction would probably not have been sustained. *Article 50(6)* does not embody open door policy for new trials; it has a fundamental control mechanism that would not readily admit to a floodgate of petitions for new trial.

We also bear in mind that *Article 50* is part of the Bill of Rights and that in the absence of clear words in the Constitution limiting application of *Article 50(6)* to post 27th August, 2010 convictions, the Constitution demands that in applying a provision of the Bill of Rights, we must develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or a fundamental freedom (See *Article 20(3) of the Constitution*). *Article 259* in addition requires us to interpret the Constitution in a manner that, among other things, promotes its purposes, values and principles and advances the rule of law, and the human rights and fundamental freedoms in the Bill of rights.

We therefore find that *Article 50(6)* is the kind of provision of the Constitution that the Supreme Court stated in *SAMUEL KAMAU MACHARIA & ANOTHER VS KENYA COMMERCIAL BANK LTD & 2 OTHERS*, (supra) looks both forwards and backwards and embodies retrospective ingredients. We shall address together the questions whether the issues raised by the appellant in his petition to the High Court were *res judicata* and whether he had placed before the High Court *"new and compelling evidence"* to entitle him to an order for a new trial because the issues are intrinsically intertwined. As stated above, the *"new and compelling evidence"* that the appellant relied upon was the affidavit of *Brigadier Maurice Oyugi* sworn on 4th July 2007 and that of *Alexander Ochwo Alela* sworn on 26th April, 2005.

In the pertinent parts of his affidavit, Brigadier Oyugi deponed that the appellant?s court martial was convened on 7th April, 2005 at 11:45 hours and sat on 7th and 8th April, 2005 before adjourning to 13th April, 2005 to enable the appellant prepare his defence. On both occasions, the appellant was present. The court martial reconvened on 13th April, 2005 at 09:00 hrs when the appellant tried to adjourn the proceedings on grounds of illness, though a doctor had certified him fit to stand trial. The appellant?s advocate then appeared with what purported to be an order issued by the High Court on 13th April, 2005 and addressed the court martial at length on the same.

A runner was dispatched to the High Court to confirm the purported order, where it was discovered that the appellant had unsuccessfully sought the extension of the order made on 15th March, 2005 which had already lapsed. Brigadier Oyugi further deponed that neither the application nor the order made on 15th March, 2005 had been served on him.

To the appellant, the above paragraphs of Brigadier Oyugi?s affidavit constituted new and compelling evidence that the Court Martial which had tried him had no jurisdiction because it had convened on 7th April, 2005, in violation of the order of the High Court issued on 15th March, 2005. The appellant?s position is that he was not aware of that fact until the affidavit of Brigadier Oyugi was served upon him.

Regarding the affidavit of Alexander Ochwo Alela, the *"new and compelling evidence"* was the deposition by Alela that he had on 15th April, 2005 tried to serve upon Brigadier Oyugi court orders issued by the High Court on 4th April, 2005 at Langata Barracks. For his labours, he was arrested and locked up at Langata Police Station. To the appellant this was further new and compelling evidence that the court martial that tried him had no jurisdiction to do so.

Was this new evidence within the meaning of *Article 50(6) (b) of the Constitution*? In our view, to constitute new evidence within the meaning of that Article, the evidence must be evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial. The word compelling? connotes something that is powerful, convincing, weighty, imperative, irresistible or irrefutable. To constitute compelling evidence therefore, the evidence in question must be evidence that could have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to different verdict.

The affidavit of Brigadier Oyugi, read together with the proceedings of the court martial which the appellant annexed to his petition, show that the appellant was before the court martial at Langata Barracks on 7th April, 2005 at 11:45 hours. He participated in those proceedings and objected to the proceedings on account of the order of stay of the court martial proceedings issued by the High Court on 15th March 2005. The court martial informed him that no order had been served upon it. The proceedings were adjourned to the next day when the appellant and his advocate were present. There was a further adjournment to 13th April, 2005 when the appellant was again present.

From this evidence which shows that the appellant was present and took part in the deliberations of the court martial on 7th, 8th and 13th April, 2005, it does not make sense for the appellant to allege that he learnt of those sittings from Brigadier Oyugi?s affidavit sworn more than two years later. The appellant knew, by his own presence, the dates when the court martial sat. We are in full agreement with Ngugi, J. that the appellant did not place before her any new evidence. As at the time of the hearing before the court martial and the hearing of Court Martial Appeal No. 1 of 2005, there is ample evidence that the appellant was well aware of the dates when the court martial sat.

What is even more astounding to us is the fact that the question of the jurisdiction of the court martial to try the appellant was canvassed in full before the court martial itself and later before Lesiit and Makhandia, JJ. who found that the order of 15th March, 2005 was neither extracted nor served upon the court martial and that upon the expiry of that order, the appellant?s advocate had sought unsuccessfully for its extension.

When the appellant appealed against his conviction to the High Court, the court framed some 8 issues for

determination. Three of those issues (Nos. 1 to 3) are pertinent for the purposes of this appeal and were in the following terms:

> *1. Did the High Court orders in the judicial review application staying the proceedings of the court martial take effect?*
>
> *2. Were the proceedings of the court martial properly convened?*
>
> *3. Were the charges against the appellant defective, null and void?*

On the first issue, the High Court expressed itself as follows:

> *"We find that the High Court order was never extracted and served upon the court martial or the respondents named in it. Instead, on 15th March 2005, the proceedings of the High Court were served indirectly on the 1st respondent. The appellant's counsel, who also defended the appellant before the court martial, presented an application before the High Court on 8th April, 2005in which she sought unsuccessfully, the extension of time to serve the order of stay of proceedings. That means that the order of 15th March 2005 staying the proceedings of the Court Martial was the only order of stay the appellant had which was effective for 21 days from [the] said date. By 7th April, 2005, the stay order had expired before being served upon the respondents and therefore it never took effect. We find and hold that no order stopping the proceedings of the court martial was served on the court martial at any one time and that therefore the proceedings were not defective or a nullity for non-compliance with the High Court Order."*

On the other two issues for determination, the Court found that the court martial was properly convened and that the charges against the appellant were valid.

Regarding the *"new and compelling evidence"* in the affidavit of Alexander Ochwo Alela, we find the same to be totally irrelevant to the issues before Ngugi, J. on account of the express findings by Lesiit and Makhandia JJ. Firstly, the process server purports to have tried to serve the order at Langata Barracks on 15th April, 2005. By that date, there was no order in force that could have been served. Secondly, the order that the process server purported to serve was allegedly issued on 4th April, 2005. The High Court, however had found that only one order, namely that of 15th March 2005 had stayed the court martial proceedings and the same had expired before it was extracted and served. There was therefore no valid court order issued on 4th April that the process server could have served on 15th April, 2005.

We accordingly find that the learned judge of the High Court came to the right conclusion when she found that the issues raised in the appellant's petition relating to the validity of the proceedings before the court martial were *res judicata* and that the appellant had not placed before the High Court any new and compelling evidence within the meaning of *Article 50(6) (b) of the Constitution* to entitle the appellant to an order for a new court martial trial.

The last question relates to the constitutionality of *section 115 (3) of the Armed Forces Act, cap 199* (repealed). *Section 115* made provision for appeals from decisions of the court martial and *section 115(3)* specifically provided that the decision of the High Court on any appeal under *section 115* shall be final and not subject to any further appeal.

The Armed Forces Act, Cap 199 Laws of Kenya was repealed and superseded by the *Kenya Defence Forces Act, No. 25 of 2012*. The latter Act received the president?s assent on 27th August, 2012 and came into operation on 17th September, 2012. Effectively the appellant was tried and convicted under the former Act and as of the date of the hearing and determination of his petition before the High Court (16th March 2012) the Kenya Defence Forces Act had not yet come into force. We understood the appellant to challenge the validity of *section 115(3) of the Armed Forces Act*, not on the basis of the former constitution of Kenya, but on the basis of the Constitution of Kenya, 2010.

We have no doubt in our minds that as against the former constitution, *section 115(3)* was perfectly constitutional because under *section 60(1) of the former Constitution*, the High Court had unlimited *original* jurisdiction in civil and criminal matters *"and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."* The jurisdiction of the High Court to hear and determine appeals from courts martial was conferred by the Armed Forces Act, being "any other law" as contemplated by the Constitution. That jurisdiction could be validly determined and limited by the legislation conferring the right of appeal to the High Court in the manner provided in *section 115(3),* that is, a final appeal with no right of further appeal from the decision of the High Court. *Section 115(3)* could therefore not be unconstitutional under the former Constitution.

Regarding *section 115(3) vis-à-vis the Constitution of Kenya, 2010, Schedule 6 (7) (1) of the Constitution* provides as follows:

> *"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with this Constitution."*

The appellant's argument is that *section 115(3) of the Armed Forces Act* was unconstitutional because it was violative of *Article 50(q) of the Constitution* which guarantees a person who has been convicted of an offence the right to appeal or to apply for review of the decision by a higher court. In his view, *Article 50(q)* does not limit the right of appeal or review to only one appeal or review as *section 115(3)* purported to do. In addition, *Article 24 of the Constitution* does not allow limitation of fundamental rights unless the provisions of that Article have been complied with, which had not been done in respect of the limitations placed on the right of appeal by *section 115(3).*

We are not able to agree with the appellant?s argument. *Article 50(q)* provides as follows:

> *"Every accused person has the right to a fair trial, which includes the right- (a) …(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."*

This provision, in our view, does not guarantee a convicted person a limitless number of appeals or reviews as of right. The right of appeal under *Article 50(q)* is *"as prescribed by law." Article 50(q)* has inbuilt in it some form of limitation or qualification of the right of appeal, independent of *Article 24 of the Constitution*. To that extent, *section 115 (3) of the Armed Forces Act* was the kind of law contemplated by *Article 50(q),* its operation and continuation having been validated by *Schedule 6 of the Constitution*, subject to consistency with the Constitution. We find, as the High Court rightly did, that *section 115(3) of the repealed Armed Forces Act* was not inconsistent with *Article 50(q) of the Constitution of Kenya 2010.*

We find that there is no merit in this appeal and accordingly dismiss the same. Each party shall bear its own costs.

Dated and delivered at Nairobi this 7th day of February, 2014.

R. N. NAMBUYE

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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