



**Ndayara v Republic (Criminal Appeal 11 of 2016)
[2018] KESC 79 (KLR) (21 December 2018) (Ruling)**

Neutral citation: [2018] KESC 79 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CRIMINAL APPEAL 11 OF 2016
DK MARAGA, CJ & P, PM MWILU, DCJ & VP,
MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ
DECEMBER 21, 2018**

BETWEEN

ELVIS OPEE NDAYARA APPELLANT

AND

REPUBLIC RESPONDENT

Mere allegations in pleadings is not sufficient to invoke the Supreme Court’s appellate jurisdiction as of right in matters involving the interpretation or application of the Constitution

The appellant had been convicted of robbery with violence and sentenced to death. He appealed on grounds of constitutional violations and defective charges. The Supreme Court found that merely invoking constitutional provisions did not automatically invoke its jurisdiction under article 163(4)(a), holding the appeal was a further appeal on matters of fact. The court struck out the appeal for want of jurisdiction, reiterating that not all intended appeals lie to the Supreme Court unless they involved interpretation or application of the Constitution.

Reported by Kakai Toili

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals as of right in matters involving interpretation or application of the Constitution – factors to consider - whether mere invocation of constitutional provisions in pleadings was sufficient to invoke the Supreme Court’s appellate jurisdiction as of right in matters involving the interpretation or application of the Constitution – Constitution of Kenya, article 163(4) (a).

Brief facts

The appellant was convicted and sentenced to death in the trial court and his appeals to both the High Court and Court of Appeal were unsuccessful. He was before the Supreme Court challenging the decision of the Court of Appeal dismissing his appeal against both conviction and sentence. The appeal (the petition) was anchored on article 163(4)(a) of the Constitution as well as section 15(2) of the Supreme Court Act as one involving matters of constitutional application or interpretation.



Issues

Whether mere invocation of constitutional provisions in pleadings was sufficient to invoke the Supreme Court's appellate jurisdiction as of right in matters involving the interpretation or application of the Constitution.

Held

1. Whereas the appellant had clothed his petition with the constitutional garb and invoked articles 25, 27 and 47 of the Constitution, the appeal was no more than a further appeal from the Court of Appeal on matters of fact. Indeed, the appellant, while re-litigating matters already dismissed by the two appellate courts, had also introduced new matters such as the alleged infringement of his article 25 of the Constitution rights by the Court of Appeal.
2. Article 163(4)(a) of the Constitution which granted any party access to the court as a matter of right had been interpreted to mean that mere pleading of that right could not clothe the court with jurisdiction to deal with every matter placed before it under that provision.
3. Article 163(4)(a) of the Constitution must be seen to be laying down the principle that not all intended appeals lay from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court. It was not the mere allegation in pleadings by a party that clothed an appeal with the attributes of constitutional interpretation or application.
4. The petition did not raise any question requiring the court to interpret or apply the Constitution in any way to address the appellant's concerns that his conviction and sentence ought to be entertained by the court.

Appeal struck out.

Orders

Each party to bear its own cost.

Citations

Cases

Kenya

1. *Ahmed Salah & 2 others v Republic* Criminal Appeal No 180 of 2008 - (Mentioned)
2. *Erupe, Francis v Republic* Criminal Appeal 105 of 2005; [2007] KEHC 2820 (KLR) - (Mentioned)
3. *Lobokuon, Stephen Lokoton v Republic* Criminal Appeal 345 of 2002; [2007] KEHC 1487 (KLR) - (Mentioned)
4. *Maweu, Nelson Kitesse & 2 others v Republic* Criminal Appeal 162 of 2007; [2008] KECA 159 (KLR) - (Mentioned)
5. *Miero, Norman Ambich & another v Republic* Criminal Appeal 279 of 2005; [2012] KECA 100 (KLR) - (Mentioned)
6. *Ndayara, Elvis Opee & another v Republic* Criminal Appeal 125 of 2013; [2015] KECA 988 (KLR) - (Mentioned)
7. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Explained)
8. *Njenga, Joseph Nganga & 5 others v Republic* Criminal Appeals 130, 147, 151, 152, 153, 154 & 215 of 2005; [2008] KEHC 3363 (KLR) - (Mentioned)
9. *Njeri, Tabitha & another v Republic* Criminal Appeals 118 & 120 of 2005; [2008] KEHC 3039 (KLR) - (Mentioned)
10. *Republic v Ahmed Salah & 2 others* Criminal Case No 1429 of 2002 - (Mentioned)

United States



Manson v Braithwaite 432 US 98 (1977) - (Mentioned)

Statutes

Kenya

1. Appellate Jurisdiction Act (cap 9) section 3A(1) - (Interpreted)
2. Constitution article 25(c); 27(1); 47; 50(1); 50(2)(b); 50(4); 163(4)(a) - (Interpreted)
3. Criminal Procedure Code (cap 75) section 137(c)(i); 137(c)(iv); 151; 214(1); 361 - (Interpreted)
4. Evidence Act (cap 80) section 111; 119 - (Interpreted)
5. Oaths And Statutory Declarations Act (cap 15) section 17; 18 - (Interpreted)
6. Penal Code (cap 63) section 296(2) - (Interpreted)
7. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)

Advocates

None mentioned

RULING

A. Introduction

1. The appellant was convicted and sentenced to death in the Chief Magistrate's Court at Nairobi *R v Ahmed Salah & 2 others*, Chief Magistrate's Court, Nairobi Criminal Case No 1429 of 2006. His appeals to both the High Court and Court of Appeal were unsuccessful. He is now before this court challenging the decision of the appellate court dismissing his appeal against both conviction and sentence. He has styled his petition "a criminal appeal".
2. On June 14, 2016, the appellant made an application for extension of time to file his appeal. Both parties consented to the application and on May 3, 2018, the consent was formally adopted as an order of the court by Ojwang, SCJ.

B. The Petition

3. The petition dated July 11, 2016 is anchored on article 163(4)(a) of the [Constitution](#) as well as section 15(2) of the [Supreme Court Act](#). The appellant has outlined eight grounds of appeal which are reproduced verbatim:
 1. That the learned judges of appeal erred in law by misapplying and misinterpreting article 25(c) as read with article 47 of the [Constitution](#) when they infringed upon my right to fair trial by failing to identify any error of law that justified appellate intervention as provided for under section 3A(1) of the [Appellate Jurisdiction Act](#) and section 361 of the [Criminal Procedure Code](#) (CPC).
 2. That the learned judges of appeal erred in law by misapplying and misinterpreting articles 25(c) and 50(2)(b) of the [Constitution](#) when they infringed upon my rights to fair trial by affirming a conviction based on an incurably defective charge contrary to sections 214 (1) and 137(c)(i) (iv) of the [CPC](#), respectively, occasioning a miscarriage of justice.
 3. That the learned judges of appeal erred in law by misapplying and misinterpreting articles 25(c) and 27(1) of the [Constitution](#) when they infringed upon my right to a fair trial and equal benefit of the law by affirming a conviction based on a misapprehension of evidence by the trial court occasioning a miscarriage of justice.



4. That, the learned judges of appeal erred in law by misapplying and misinterpreting article 25(c) as read along with section 151 of the CPC by affirming a conviction based on the unsworn evidence of two prosecution witnesses ie PW1 and PW2 rendering the conviction unconstitutional.
 5. That the judges of appeal erred in law by misapplying and misinterpreting article 25(c) of the Constitution when they infringed upon my rights to fair trial by affirming a conviction based on wrongly applied legal principles relating to circumstantial evidence.
 6. That the learned judges of appeal erred in law by misapplying and misinterpreting article 25(c) as read along with section 111 of the Evidence Act, cap 80, when they infringed upon my rights to fair trial by applying wrong principles of the burden of proof.
 7. That the learned judges of appeal erred in law by misapplying and misinterpreting article 25(c) as read along with article 50(4) of the Constitution when they infringed upon my right to fair trial by affirming the conviction based on evidence of identification which was procured via a procedure not provided for in law occasioning a miscarriage of justice.
 8. That the learned judges of appeal erred in law by misapplying and misinterpreting article 25(c) of the Constitution when they infringed upon my right to fair trial by affirming the conviction based on a documentary evidence (MF1-2) which was incompatible with the evidence of PW1, PW2 and the information on the charge sheet regarding the alleged stolen monies hence rendering the verdict unreasonable.
4. He then prays that:
- a. The appeal be allowed, the conviction be quashed, the sentence be set aside and that he be set at liberty in the interest of justice or;
 - b. In the alternative, the matter be remanded back to the trial court for the errors apparent on the face of the record to be corrected if in the opinion of the court the verdict is in the evidence.

C. Background

5. In *R v Ahmed Salah & 2 others*, Chief Magistrate's Court, Nairobi Criminal Case No 1429 of 2006, the appellant was charged together with two others with the offence of robbery with violence contrary to section 296(2) of the Penal Code. On May 19, 2008, the Senior Principal Magistrate (Mrs Murage) found all of them guilty as charged and sentenced them to death.
6. Aggrieved, they all appealed the Chief Magistrate's Court's decision in *Ahmed Salah & 2 others v R*, High Court Criminal Appeal No 180 of 2008 at the High Court in Nairobi. On February 28, 2012, Ochieng J and Achode J, found the appellant's appeal unmeritorious, upheld both the conviction and sentence and dismissed the appeal.
7. Still aggrieved, the appellant sought redress from the Court of Appeal in *Elvis Opee Ndayara & another v R*, Criminal Appeal No 125 of 2013. In its decision dated January 23, 2015, the Court of Appeal summarised the appellant's grievances as: the court failing to note that there was a variance between the charge and evidence adduced; the court relying on circumstantial evidence upon which to base his conviction; the court relying on unreliable and contradictory evidence; and the court failing to consider the accused person's respective defences.
8. The state counsel Mr Njagi Nderitu appearing for the Attorney General did not oppose the appeal. He noted in that regard that there were major discrepancies in the evidence adduced which rendered



the conviction unsafe. The state counsel also stated that the prosecution witnesses were neither sworn nor affirmed and so the evidence tendered could not be authenticated. The appellate court on its part found that it was not bound by the views of counsel in determining appeals citing the decision in *Norman Ambich Miero & another v Republic*, Criminal Appeal No. 279 of 2005 [2012] eKLR and thus proceeded to determine the appeal on its merits.

9. The appellate court in that context determined that the High Court had properly dealt with the allegation that the charge was defective when it stated that there was no discrepancy since the value of the currency stolen (Kshs 58 million) was consistent. The court was also of the view that the discrepancies in the charge sheet were minor and did not cause any prejudice to the Appellant and his co-accused as the evidence against them remained cogent and clear.
10. The appellate judges were of the further view that the High Court came to the right conclusion in dismissing the Appeal before it and that the appellant was rightly convicted and sentenced. Consequently, they dismissed the appeal and confirmed the death sentence thus triggering the instant appeal.

D. Submissions

i. Appellant

11. The appellant filed his submissions on September 20, 2016. It is his case that the charge as framed was an illegal charge as it was not in compliance with the mandatory provisions of the *Criminal Procedure Code* (CPC) and this prejudiced his case necessitating this court's intervention. He buttresses this assertion by relying on the decision in *Nelson Kitesse Maweu & 2 others v R* [2008] eKLR.
12. The appellant also urges that he was not given a fair hearing in all the three courts below contrary to article 50(1)(2)(b) of the *Constitution* as the charge that he faced was defective and fatally so.
13. He has also contended that his conviction was based on unsworn evidence contrary to section 151 of the *CPC* as well as sections 17 and 18 of the *Oaths and Statutory Declarations Act*. He further contends that his conviction was therefore unconstitutional and, in this regard, relies on the decisions in *Francis Erupe v Republic* [2007] eKLR; *Tabitha Njeri & Another v R* [2008] eKLR; *Stephen Lokoton Lobokuon v Republic* [2007] eKLR and *Joseph Nganga Njenga & 6 others v R* [2008] eKLR.
14. The appellant furthermore submits that this court should exclude the entire identification evidence of PW1 as it is contrary to article 50(4) of the *Constitution*. He relies on the decision in *Manson v Braithwaite*, 432 US 98 (1977) to support this contention. It is thus urged that since the identification evidence was incapable of supporting a conviction, the same should be overturned.
15. The appellant finally submits that the learned appellate judges erred by misapplying and misinterpreting section 111 of the *Evidence Act* by not considering that the prosecution had not proved its case beyond reasonable doubt.

ii. Respondent

16. The respondent filed written submissions on October 19, 2016. It is his case that the appellant has not raised matters involving the application or interpretation of the *Constitution* and therefore there is no automatic right of appeal to this court.
17. He further submits that, in any event, the courts below properly directed their minds on: variations of evidence between the charge sheet and the evidence of both PW1 and PW2; identification; shifting of



burden of proof under section 111 of the Evidence Act as read with section 119 of the same Act and also considered the appellant's defense.

18. The respondent further contends that the appellant is raising the issue of unsworn evidence in this court for the first time and as such, it is urged that the appellant is guilty of laxity or inordinate delay. In any event, he contends that the trial court complied with the relevant provisions of the Constitution, the Evidence Act and the CPC in taking evidence and therefore the conviction and sentence were proper under the Law. That therefore the appeal is without merit and ought to be dismissed.

E. Determination

19. Having read the petition before us, the submissions by parties and having orally heard the appellant and Mr. Omirera for the respondent, we have no doubt in our minds that whereas the appellant has clothed his petition with the constitutional garb and invoked articles 25, 27 and 47 of the Constitution, the appeal is no more than a further appeal from the Court of Appeal on matters of fact. Indeed the appellant, while re-litigating matters already dismissed by the two appellate courts, has also introduced new matters before us such as the alleged infringement of his article 25 rights by the Court of Appeal.
20. In that regard, article 163(4)(a) which grants any party access to this court as a matter of right has been interpreted to mean that mere pleading of that right cannot clothe this court with jurisdiction to deal with every matter placed before it under that provision. That is why in Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & another SC Petition No 3 of 2012; (2012) eKLR, a two-Judge-Bench of this court (Tunoi and Wanjala SCJJ) observed that:

“Article 163(4)(a) of the Constitution must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court ...Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.”

21. We reiterate that holding and without saying much more, the petition before us does not raise any question requiring this court to interpret or apply the Constitution in any way to address the appellant's concerns that his conviction and sentence for the reasons reproduced above, ought to be entertained by this court. The appeal is therefore one for striking out for want of jurisdiction.

F. Disposition

22. For the reasons given above, our final orders are that:
- a. The Appeal herein is struck out.
 - b. Each party shall bear its own cost.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2018

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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M. MWILU



DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

