Kibisu v Republic (Petition 3 of 2014) [2014] KESC 55 (KLR) (25 November 2014) (Judgment)

Tom Martins Kibisu v Republic [2014] eKLR

Neutral citation: [2014] KESC 55 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 3 OF 2014

PK TUNOI, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

NOVEMBER 25, 2014

BETWEEN

LT. COL. TOM MARTINS KIBISU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgement and Order of the Court of Appeal of Kenya at Nairobi (Nambuye, Musinga, M'Inoti JJA) delivered on the 7th day of February, 2014)

Circumstances in which a person may apply for re-trial at the High Court

The applicant sought the Supreme Court's intervention to authorize a new trial based on what was argued to be "new and compelling evidence" under article 50(6) of the Constitution. The appeal also questioned the constitutionality of section 115(3) of the repealed Armed Forces Act, which deemed High Court rulings on court martial appeals final. The Supreme Court held that no new and compelling evidence existed to justify a retrial. Additionally, it upheld the constitutionality of the Armed Forces Act under the transitional provisions of the 2010 Constitution, affirming that High Court decisions on court martial appeals remained final until the Act's repeal.

Reported by Teddy Musiga

Constitutional Law *– fundamental rights and freedom – right to fair trial – right to a re-trial at the High court – scope of High court's jurisdiction in conducting re-trials – whether lack of service of certain orders constituted "new and compelling evidence" sufficient to justify a new trial - whether the conditions for a new trial based on "new and compelling evidence" were satisfied under the right to a fair hearing - Constitution of Kenya, article 50(6).*

Military Law *- court martial - jurisdiction of the High Court in Court Marial appeals - finality of decisions in Court Martial appeals - whether the finality of High Court decisions in Court Martial appeals, as provided by statute, aligned with constitutional standards for appellate rights and judicial review.*

Statutes *- constitutionality of statutes - Armed Forces Act section 115(3) - right to fair trial vis-a-vis finality of Court Martial appeals - whether the Armed Forces Act was constitutionally consistent with the requirement*

under article 50(2)(q) that a convicted person had a right to appeal or review by a higher court as prescribed by law, given that appeals from court martial terminated at the High Court under section 115(3).

Brief facts

The appellant faced disciplinary charges at the Armed Forces for which he was found guilty of all the charges and awarded cumulative punishment accordingly. Aggrieved by the conviction, he appealed to the Defence Council as was provided in the repealed Armed Forces Act. However, that appeal did not proceed to the stage of formal hearing. After his conviction, he published a document "Order serial no. 14 of 2004" whose effect was to enable him to avoid the penalties that had been awarded against him in the disciplinary case. His "Orders" were eventually cancelled by another Order No. 15 of 2004, by the Corps Commander thus enabling the implementation of the penalties. The commander of the Kenya Army then 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. However, before the proceedings at the Court Martial commenced he filed judicial review application for orders to stay the intended Court Martial proceedings. He was granted leave for 21 days stay on condition that he filed and served the respondents with the orders, failing which the orders would have lapsed. He did not serve the court martial and they proceeded with the trial which eventually convicted him to a one year term of imprisonment and dismissing him from the armed forces.

That decision prompted him to appeal to the High Court challenging the Court Martial's decision. Justices Lesiit and Makhandia upheld the Court Martial's decision by finding the appellant guilty of gross misconduct and insubordination. The appellant then moved to the High Court again to seek revision of the judgment of Justices Lesiit and Makhandia which was dismissed by Justice Ojwang (as he then was). He then moved to the Constitutional & Human Rights Division allegedly to seek to enforce his fundamental rights which was dismissed by Justice Wendo. He appealed to the Court of Appeal and it was disallowed. He then went back to the High Court invoking the Constitution of Kenya, 2010 seeking orders for a new trial by a Court Martial on the premise of new and compelling evidence had since become available. He also sought a declaration that section 115(3) repealed Armed Forces Act was discriminatory, unfair and unconstitutional. Justice Mumbi Ngugi dismissed the petition. He then appealed to the Court of Appeal where justices Nambuye, Musinga & M'inoti upheld the High court's decision and dismissed the appeal hence the current appeal at the Supreme Court.

Issues

i. Whether the lack of service of certain orders constitutes "new and compelling evidence" sufficient to justify a new trial under article 50(6) of the Constitution.

ii. Whether the conditions for a new trial based on "new and compelling evidence" were satisfied under the right to a fair hearing.

iii. Whether the finality of High Court decisions in Court Martial appeals aligned with constitutional standards for appellate rights and judicial review.

iv. Whether section 115(3) of the Armed Forces Act was constitutionally consistent with article 50(2)(q), which guaranteed a convicted person the right to appeal or review by a higher court.

Held

1. The appellant properly invoked the jurisdiction of the Supreme Court because of the following reasons. Firstly, his case satisfied the requirements of article 50(6) of the Constitution of Kenya, 2010 for a new trial before the High court on the grounds of new and compelling evidence. Secondly, the appeal sought a determination whether section 115(3) of the repealed Armed Forces Act stood in conflict with the Constitution after its promulgation in 2010. Those two issues were proper questions for the Supreme Court under article 163(4) (a) of the Constitution being questions involving the interpretation or application of the Constitution.
2. Article 50 of the Constitution of Kenya, 2010 was an extensive provision that guaranteed the right to fair hearing, and as part of that right, it offered to persons convicted of certain criminal offences another

opportunity to petition the High Court for a fresh trial. Such a trial entailed a reconstitution of the High Court forum, to admit charges and conduct a re-hearing, based on new evidence. The window of opportunity for such a new trial was subject to two conditions. First, a person had to have exhausted the course of appeal, to the highest court with jurisdiction to try the matter. Secondly, there had to be "new and compelling" evidence.

3. Under article 50(6) of the Constitution of Kenya, 2010, "new evidence" which was not available at the time of the trial and which despite exercise of due diligence, could not have been availed at the trial; and "compelling evidence" implied evidence that would have been admissible at the trial, of high probative value and capable of belief and which if was adduced at the trial, would have probably led to a different verdict. Therefore, a court considering whether evidence was new and compelling had to ascertain that it was *prima facie*, material to or capable of affecting or varying the subject of the charges, the criminal trial process, the conviction entered or the sentence passed against the accused person.
4. In the instant case, there was no new and compelling evidence to warrant a new trial under article 50(6) of the Constitution of Kenya, 2010. That was because, lack of service of stay orders against the convening, sitting or conducting of the Court Martial had nothing to do with the framed charges, proof of which could alter an appeal before the High court, the verdict of the conviction or the subsequent sentence imposed by the Court Martial.
5. The issue of service of the order of the court was by no means any evidentiary information to be viewed as unavailable to the Court Martial, at the time of conducting the trial and reaching a verdict of conviction. Although that would have been relevant at the time of the trial, it would not have been of probative value and would not support a different verdict. Consequently, the appellant failed to satisfy the court that his case merited the invocation of article 50(6) of the Constitution, 2010 for a new trial by the High court.
6. The Armed Forces Act was still in force after the Constitution of Kenya, 2010 was promulgated by virtue of section 7 of the sixth schedule to that Constitution. However, that Act stood repealed by the Kenya Defence Forces Act, 2012. Section 60(1) of the repealed Constitution conferred upon the High Court the final jurisdiction in criminal matters that arose from the Court Martial.
7. It was clear under the repealed Constitution that the Court of Appeal could only exercise powers in accordance with the terms of legislation. By dint of constitutional provisions, parliament could determine matters amenable to appeal before the Court of appeal. A deliberate exclusion of a second appeal to Court of Appeal, under section 115(3) of the Armed Forces Act, was therefore parliament's clear intention, in the context of section 60(1) of the repealed Constitution which stipulated that the High Court's determination of criminal appeals from the Court Martial was final.
8. Section 115(3) of the Armed Forces Act, was therefore in conformity with the repealed Constitution of Kenya. The Armed Forces Act, by virtue of its continuous operative effect given by section 7 of the sixth schedule to the Constitution of Kenya, 2010 was until its repeal by the Kenya Defence Forces Act, a constitutionally valid statute law. Since the trial of the appellant was conducted under the Armed Forces Act, which was valid at the time, therefore the Constitution of Kenya, 2010 could not render unconstitutional a law which was at all times valid under the old Constitution.
9. Furthermore, article 50(2) (q) of the Constitution prescribed that a person under conviction could appeal, or apply for a review before a higher court as prescribed by law. The "prescribed law" after the promulgation of the Constitution of Kenya, 2010, for the period it was in effect before repeal was section 115(3) of the Armed Forces Act; and it provided that appeals in criminal cases from the Court Martial terminated at the High Court.

Appeal dismissed.

Citations

Statutes

Kenya

1. Constitution of Kenya articles 50(6); 50(2)(q); 163(4)(a); Sixth Schedules section 7
2. Constitution of Kenya (repealed) section 60(1)
3. Armed Forces Act (repealed) section 115(3)
4. Kenya Defence Forces Act (cap 199)

Cases

Kenya

1. *Sum Model Industries Ltd v Industrial and Commercial Development Corporation* Supreme Court Civil Application No. 1 of 2011 – (Followed)
2. *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* Supreme Court Petition No. 3 of 2012 - (Followed)
3. *S.K. Macharia & others v Kenya Commercial Bank & 2 others* – (Followed)
4. *In the Matter of the Interim Independent Electoral Commission* Constitutional Application No. 2 of 2011 – (Followed)
5. *Samuel Kamau Macharia v Kenya Commercial Bank Limited* Civil Application No. 2 of 2011 – (Followed)
6. *The Commission on Administrative Justice v The Attorney-General* Petition No. 284 of 2012 – (Followed)

Advocates

Mr Kamula for the Director of Public Prosecutions

JUDGMENT

A. Introduction

1. This is an appeal by Lieutenant-Colonel Robert Tom Martins Kibisu, against the Judgment of the Court of Appeal at Nairobi delivered on 7th February, 2014 upholding the Judgment and Decree of the High Court (Mumbi Ngugi, J) dated 16th March, 2012.

2. Although the appeal to this Court does not state upon which provision of the law or the Constitution it is premised, a glance at the issues raised suggests constitutional questions which the appellant, without the assistance of counsel, has identified. These entail the interpretation and application to this case of Articles 24(1), (2), (3), (5); 25(b) & (c) and 50(6) of the Constitution. The appellant also asks this Court to address the question as to the constitutionality of Section 115(3) of the repealed Armed Forces Act (Cap 199, of Laws of Kenya).

B. Background

3. The record of appeal discloses that the appellant was dismissed from the then Armed Forces of Kenya on 15th April, 2005 following a conviction by court martial. At the time of his dismissal, the appellant held the rank of Lieutenant- Colonel. 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 both July and August, 2004 the appellant appeared before the Garrison Commander, Kahawa Barracks, facing eight disciplinary charges arising from his refusal to have his car-boot inspected. He was found guilty of all the charges, and was awarded the cumulative punishment of one-year loss of seniority, a forfeiture of 28- days pay, and severe reprimand. Aggrieved by the conviction and punishment, he sought redress by appealing to the Defence Council, as was provided in the Armed Forces Act (now repealed). It appears that that appeal did not come to the stage of a formal hearing.

4. After the conviction of the appellant, on 14th September, 2004 Colonel Phillip Mbindyo Mumo, the Corps Commander of the 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 imposed 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 the corps Commander's Orders Serial No. 10 of 2004.

5. The effect of the appellant's Orders serial No. 14 of 2004 was to enable him to avoid the penalties that had been awarded against him in the disciplinary case. His Orders Serial No. 14 of 2004 were eventually cancelled by another Order Serial No. 15 of 2004, by the Corps Commander–enabling the implementation of the penalties. The appellant contended that as the Commanding Officer, School of Signals, he was entitled to reverse the Corps Commander's Orders; whilst the Military took the position that the appellant had acted improperly, and that even as a Commanding Officer he lacked the competence to issue a publication in respect of himself, without permission from higher authority.

6. 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.

7. However, before] HH H]] Before the proceedings of the Court Martial commenced on 16th March, 2005 at Langata Barracks, the appellant on 15th March, 2005 moved the High Court seeking judicial review, in Miscellaneous Application No. 365 of 2005; he sought leave to file proceedings for orders of certiorari, mandamus and prohibition against the court martial proceedings, and for an order that the leave sought do operate as stay of the intended court martial. On that very day, Makhandia, J (as he then was) granted leave and stayed the court martial proceedings for 21 days, on condition that the petitioner filed and served, the respondents, and any interested party with a motion for judicial review, failing which the order for leave and stay would lapse.

8. The court martial proceeded with its hearing of the matter as from 7th April, 2005, having found that it had not been served with a valid order of the High Court staying the conduct of its proceedings. It eventually convicted the appellant, on 15th April, 2005, sentencing him to a one-year term of imprisonment, and dismissing him from the Armed Forces.

9. This prompted the appellant to lodge a series of suits in the High Court, challenging the court martial decision. First, was an appeal to the High Court, in Court Martial Appeal No. 1 of 2005. On 7th December, 2007 Lesiit and Makhandia, JJ. upheld the court martial's decision, finding the appellant guilty of gross misconduct, and insubordination. The learned Judges, however, reduced the appellant's sentence to the period already served. They also established that the High Court's order of leave to file judicial review proceedings, and granting stay of 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."

10. The appellant then, on 9th December, 2008 filed before the High Court Criminal Revision Application No. 116 of 2008, seeking a revision of the Judgment of Lesiit and Makhandia JJ – an application which was dismissed by Ojwang, J (as he then was), on the basis that the substantive issues raised were not

matters for the High Court's revisionary jurisdiction, but were fit and proper for an appeal in the Court of Appeal.

11. Undeterred, the appellant once again knocked at the doors of the Constitutional and Judicial Review Division of the High Court–this time allegedly to enforce his fundamental rights. 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... and protection from inhuman treatment...." This cause was dismissed by Wendoh, J. on 29th March the 2007. The appellant appealed to Court of Appeal, but his appeal was subsequently disallowed, on 21st June, 2013.

12. It was not the end; for the appellant, on 13th October, 2011 he went back to the High Court, by Petition No. 197 of 2011, invoking the Constitution of 2010 and seeking orders for a new trial by court martial, on the premise that 'new and compelling evidence' had since become available (Article 50(6)(b)). He also sought a declaration that Section 115(3) of the repealed Armed Forces Act (Cap. 199, Laws of Kenya) was "discriminatory, unfair and unconstitutional". Section 115(3) of the Armed Forces Act had provided that the High Court was the final appellate Court in relation to a decision from court martial. The appellant contended that this provision as it was, contravenes the Constitution of Kenya, 2010. Noting that she had no jurisdiction to re-open matters concluded by the High Court, Mumbi Ngugi, J on 16th March, 2012 dismissed the petition. Reasons for the dismissal of the appellant's claims, as given by the Constitutional Division of the High Court, were that: no new and compelling evidence had been brought by the appellant under Article 50(6) of the Constitution; a final determination of the matters raised by the appellant had been previously made by the High Court (Lesiit and Makhandia, JJ) which found that stay orders had not been extracted and served upon the respondents, to bar the conduct of court martial proceedings.

C.the Cause In The Court Of Appeal

13. Aggrieved by the decision of Ngugi, J the appellant moved to the Court of Appeal, which summarized the main issues as follows:

    (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 Miscellaneous Application No. 365 of 2005; and

    (iv) whether Section 115(3) of the Armed Forces Act (Cap. 199) was unconstitutional.

14. The Court of Appeal (Nambuye, Musinga and M'Inoti JJA) interpreted the meaning of "new and compelling evidence" and considered the implication of Article 50(6) for criminal matters already concluded, prior to the promulgation of the 2010 Constitution. In the view of the Appellate Court:

> " the opportunity offered by Article 50(6) of the Constitution 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."

15. The Court observed that under Article 50(6) of the Constitution, the finality of a conviction depends on whether new and compelling evidence had surfaced, and that where such evidence is available, a

person has a right to petition the High Court on that account, any time after 27th August, 2010 when the new Constitution took effect. The Appellate Judges defined "new and compelling evidence" as:

> " 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."

16. The Court of Appeal considered what the appellant alleged constituted new and compelling evidence. It established that the appellant had cited the affidavits of Brigadier Maurice Oyugi sworn on 4th July, 2007 and Alexander Ochwo Alela sworn on 20th April, 2005. In the view of the learned Judges of Appeal, the said depositions could not constitute new evidence, as had been found by Ngugi J. The Court held that the issues raised in the petition before Ngugi, J were res judicata, and that no new evidence had been placed before the High Court to warrant a retrial under Article 50(6). The Court of Appeal also found that Section 115(3) of the Armed Forces Act was in conformity with the repealed Constitution (1969), since under Section 60(1) of that Constitution, the High Court could, by 'any other law,' be conferred with a specified jurisdiction; and the jurisdiction of that Court to entertain appeals from any other Court had been conferred by the Armed Forces Act, Section 115(3). The Court also found that this statutory provision did not contravene Article 50(q) of the 2010 Constitution, during the time the repealed Armed Forces Act was in operation after the effective date of the said Constitution. It thus dismissed the appeal.

D. Appeal Before The Supreme Court

17. Aggrieved by the Judgment of the Court of Appeal, the appellant has come before us, seeking the following reliefs:

    (a) a declaration that the court martial that tried and imprisoned him for one year (reduced to 102 days by the High Court), had no jurisdiction to try him, and so the penalty was illegal, null and void;

    (b) a declaration that his rights guaranteed under Article 25 (a) & (c) of the Constitution of Kenya, 2010 not to be subjected to torture or to inhuman or degrading treatment or punishment, or denied a fair trial, were breached, in the court-martial process;

    (c) a declaration that Section 115(3) of the repealed Armed Forces Act (Cap. 199, Laws of Kenya) denied, violated, or infringed a right or fundamental freedom in the Bill of Rights, and was in conflict with Article 24 when read together with Article 25 (a) and (c), and was discriminatory, unfair, and therefore unconstitutional;

    (d) a declaration that the appellant is entitled to restoration of military rank, benefits, honours and decorations, and to a new trial;

    (e) a declaration that the appellant is entitled to a pension on retirement;

    (f) a declaration that the appellant is entitled to damages, as redress in respect of each of the rights allegedly violated, to his detriment;

    (g) an order consequential on the declarations sought, quantifying the amount of damages appropriate in each instance;

    (h) an order of mandamus, to compel the Defence Council to conclude the appellant's pending redress appeal dated 13th September 2004;

(i) costs;

(j) interests on (f) and (g);

(k) further/ other orders as the Court shall deem just.

18. The respondent, through learned counsel Mr Kioko Kamula, for the Director of Public Prosecutions, filed grounds of opposition dated 12th May, 2014 as follows:

(i) the petition is incompetent, improperly before the Court, and an abuse of Court process;

(ii) there is no factual basis for the petitioner to invoke Article 50 (6) of the Constitution;

(iii) the petitioner is misguided in his interpretation of the provisions of Section 115(3) of the repealed Armed Forces Act, and Article 50(q) of the Constitution;

(iv) the matters raised by the petitioner, on the legality of the court martial proceedings, are res judicata.

E. Cases Of The Parties

(i) The Appellant

19. The appellant submitted that the appeal involves the interpretation and application of Article 50(6), and Section 7(1) of the Sixth Schedule to the Constitution. He urged that on the basis of Article 163(4)(a) of the Constitution, the appeal is rightly before the Supreme Court, for: (a) it involves the interpretation and application of the Constitution, and (b) it was filed in the High Court on 6th of October, 2011 following the promulgation of the Constitution.

20. The appellant urged that the appeal specifically relates to the re-opening of a criminal case in the High Court, on grounds of availability of 'new and compelling evidence' as contemplated in Article 50(6) of the Constitution. He relied on the authorities of R. V. Pendeleton (2001) UKHL 66, R. v. (2002) EWCA Crim, 1141 and Cross and Tapper on Evidence 11th edition (pages 17-22), regarding the meaning, implication, and judicial test to be applied, where fresh evidence has been received on appeal.

21. The appellant urged that the Appellate Court had disregarded the evidence in the proceedings in Miscellaneous Civil Case No.365 of 2005, in which the certified proceedings constituted "new and compelling evidence". It was his submission that the Court of Appeal had erred in its finding on the issue of extraction and service of stay orders. In his perception, he had complied with Order 5 and Rule 19 of the Civil Procedure Rules, by effecting service through the Department of Defence Headquarters.

22. The appellant submitted that the learned Judges introduced a wrong procedure involving a 'runner' in the inspection of archives, for a scrutiny of certified proceedings in Misc. Civil Case No.365 of 2005 that there was nothing to show any inspection of Court records by the runner–and hence there was no evidence of inspection, to show that service had been effected.

23. The appellant contended that the Appellate Court should not have found his case to be res judicata. He submitted that in the civil proceedings he lodged at the High Court, regarding breach of fundamental rights under Section 84(1) of the repealed Constitution, the parties were different from those in the current appeal. He urged that the Appellate Court's finding that the matter was res judicta, should be regarded as obiterdictum.

24. The appellant urged that he had been punished for what, in law, he indeed had an obligation to perform as a Commander, under Section 138(5) and (6) of the repealed Armed Forces Act, the Armed Forces Standing Orders, and the President and Commander-in-Chief's Regulations for the Kenya Armed Forces, 1997. He invoked Section 120 of the Evidence Act, urging that the rule of estoppel rules out penal action for acts authorised by law.

25. The appellant contested the constitutionality of Section 115(3) of the repealed Armed Forces Act, for denying members of the Armed Forces a second appeal from the High Court. He submitted that at the time of the application for a new trial before the High Court, on the 6th October 2011, the law governing the Armed Forces was the Armed Forces Act, which was later repealed in August, 2012 by the Kenya Defence Forces Act, 2012; and this Act still had effect and was the operational law, by virtue of Section 7(1) of the Sixth Schedule to the Constitution of 2010, which provides that:

> "All laws in force immediately before the effective date continue in force and shall be construed with the alterations and adaptations, qualifications and exceptions necessary to bring them into conformity with this Constitution."

26. The appellant submitted that Section 115(3) of the Armed Forces Act, at the time the 2010 Constitution came into force, and even before, was unconstitutional, for denying members of the Armed Forces a second appeal. The right to fair trial, he urged, is not in the gift of the State, or Parliament; rather, one is born with this right; it is a right that was recognized in Section 77 of the repealed Constitution, and is a right also in International Humanitarian Law. The appellant invoked Article 25(c), on the right to fair trial, a right that cannot be limited. It was his case that denial of a second appeal under Section 115(3) of the Act was a limitation of fundamental rights, in contravention of the terms of Article 24 of the Constitution.

ii. The Respondent

27. The respondent's case was based upon grounds of objection dated 12th May, 2014. Learned counsel submitted that the matter before the Court has no bearing upon any question concerning the interpretation of the Constitution, but was concerned rather, with an issue already deliberated upon, and conclusively dealt with in the court martial and in High Court Criminal Appeal No.1 of 2005. He submitted that the issue of stay of proceedings had been disposed of by Lesiit and Makhandia JJ and further by Mumbi Ngugi J. and that the said Judges had held that the stay order against court martial had neither been extracted, nor served upon to the Commander of the Kenya Army.

28. Learned counsel adopted the Court of Appeal's perception of "new and compelling evidence" under Article 50(6) of the Constitution, and urged that in this case, there was no factual basis upon which the appellant could justify a new trial. What the appellant perceived as new evidence, counsel urged, are merely affidavits sworn at the court martial, and all of which have been within the knowledge of the appellant at the lower Court and the Superior Courts. And counsel submitted that the issue of service of orders of stay had been finally determined by the court martial, and the High Court at various stages.

29. Counsel submitted that to succeed under Article 50(6), the appellant had to show that new evidence does indeed exist, which was not available to him at the court martial, and which was not known to him, was not available, and could not have been obtained through due diligence. And such new evidence, as counsel noted, should be of such weight as to be capable of changing the decision of the court martial.

30. Learned counsel urged that Section 115(3) of the Armed Forces Act is and was not a nullity under the repealed or current Constitution. Under Section 61 of the former Constitution, the High Court exercised unlimited original jurisdiction in civil and criminal matters, and in such other jurisdiction

and powers as may be conferred by the Constitution, or any other law. That jurisdiction, he submitted, could be limited by legislation, as exemplified by Section 115(3) of the Armed Forces Act.

31. Learned counsel urged that even under the 2010 Constitution, Section 115(3) of the Armed Forces Act still met the constitutionality test of Article 50(2)(q),given that one's right of appeal, or review in a higher Court, is to be exercised only in accordance with the manner prescribed by law.

32. On the issue of res judicta, counsel urged the Court to consider the reasoning in other cases: Jomunjo Education Foundation Limited v.Daniel Kipurket Lepalel & 3 Others2013 eKLR; and The Commissioner of Police and the Director of Criminal Investigation Department and Another v. Kenya Commercial Bank and 4 Others (2012)eKLR. He argued that in those earlier cases, Courts have taken the view that issues determined with finality cannot be re-opened. He also cited the Indian case, Bhagat Ram v.State of Rajasthan (1992) AIR 1502, in which it was held that the principle of res judicta is also applicable to criminal proceedings, or other subsequent proceedings to convict a person for an offence in respect of which an order for his or her acquittal has also been recorded.

33. Learned Counsel urged that the instant case is an attempt by the appellant to re-introduce through the backdoor an appeal over the decision of the court martial and the High Court, on issues conclusively determined. He urged the Court to dismiss the appeal.

F. Issues For Determination

34. It is apparent that the appellant drew his own petition and record of appeal, which he then proceeded to urge before this Court on his own, without any legal assistance–a feat he undertook ably and with confidence. From the totality of the appellant's petition, the responses and the submissions of both parties, we extracted the essential issues for determination as follows:

    (i) whether this Court has jurisdiction to consider the appeal;

    (ii) whether the appellant's case satisfies the requirements of Article 50(6) of the Constitution so as to warrant a new trial before the High Court;

    (iii) whether Section 115(3) of the repealed Armed Forces Act was unconstitutional, before its repeal and replacement.

(i) The Issue of Jurisdiction

35. The objection by learned counsel Mr. Kamula, for the respondent, is that the issues forming the substance of this appeal are res judicata, having been fully determined by the superior Courts. It was contended that the question of service of the High Court order in Judicial Review Application, Misc. Civil Application No. 365 of 2005 had conclusively been determined by all the lower Courts, and therefore, it was not open for the appellant to re-introduce the same at this forum. We hold a contrary view to that of counsel. Res judicata is a rule to restrain repetitive claims before Courts of concurrent jurisdiction. As a rule of finality to litigation, it bars a party from re-litigating concluded similar-issue claims, involving same parties and same subject matter, where a Court of competent jurisdiction has made a final determination. This rule is laid out in Section 7 of the Civil Procedure Act (Cap.21, Laws of Kenya), which thus provides:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court

competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

36. The rule applies to bar a party from re-instituting a claim that had previously been determined before a Court of concurrent jurisdiction. However, it does not stop such a party from lodging an appeal to a higher Court. Now, coming up before this Court is an appeal from the Court of Appeal. The petition of appeal was drafted by the appellant himself. As a lay person who urged his own case, he lacked the skill to craft the main issues of his case with precision and exactitude, so as to meet the jurisdictional requisites under Article 163(4)(a). Where an appellant identifies succinct constitutional questions for determination by this Court, he satisfies the criteria for appeal to this Court under Article 163(4)(a).

37. The appellant's appeal raises two main issues for determination: Firstly, that his case, contrary to the position taken in the High Court and the Court of Appeal, satisfies the requirements of Article 50(6) of the Constitution, for a new trial before the High Court, on grounds of new and compelling evidence; and secondly, the appeal seeks a determination whether Section 115(3) of the repealed Armed Forces Act stood in conflict with the new constitution after its promulgation on 27th August, 2010. It is clear to us that these two issues are proper questions for the Supreme Court, under Article 163(4)(a) of the Constitution, being questions involving the interpretation or application of the Constitution, and issues coming through from the High Court and the Court of Appeal(see Peter Ngoge v. Ole Kaparo, Sup. Ct. Petition No. 2 of 2012 [2012] eKLR).

38. Just as we found in Lawrence Ndutu & 6000 Others v. Kenya Breweries Limited & Another, Sup. Ct. Petition No. 3 of 2012[2012] eKLR, the material questions in the instant appeal were constitutional contests in the Court of Appeal. At paragraph 28 of that Ruling Tunoi & Wanjala SCJJ thus stated, in relation to Article 163(4)(a) of the Constitution:

> " The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)"

39. Accordingly, we hold that the appellant has properly invoked the jurisdiction of this Court. The petition is competent and properly lodged. It is on this basis, that we will proceed to consider the other issues.

(ii) Article 50(6): Is this a fit case for Retrial?

40. Article 50(6) of the Constitution provides as follows:

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

41. Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be 'new and compelling evidence'.

42. We are in agreement with the Court of Appeal that under Article 50(6), "new evidence" means "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"; and "compelling evidence" implies "evidence that would 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 a different verdict." A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person.

43. What material does the appellant perceive as new and compelling evidence in this matter? In his oral submission, the appellant stated that certified proceedings of the judicial review matter in High Court Miscellaneous Civil Application No. 365 of 2005, constituted "new evidence". At paragraph 6 of his written submissions, the appellant censures the Court of Appeal for failing to consider this claim in its final Judgment. Again at paragraph 7 of his written submissions, the appellant further states that the learned Judges of Appeal had not taken into account the fact that Makhandia and Lesiit, JJ in determining the criminal appeal from the court martial, did not have before them the judicial review proceedings in Miscellaneous Civil Case No. 365 of 2005.

44. Can the proceedings of the Court evidencing extraction and service of the stay order in Misc. Civil Appeal No. 365 of 2005, be said to be new and "compelling evidence", warranting a new trial under Article 50(6) of the Constitution? We think not. The element of extraction and service of the order of stay against proceedings of court martial, is to be found in the affidavit of Brigadier Maurice O. Oyugi, the presiding officer of the court martial, and that of Alexander Ochwo Alela, the process-server instructed by the appellant's advocates to serve the orders which came up in the multiple actions before the High Court and the Court of Appeal.

45. From the record of appeal (pages 40 and 41) supplied by the appellant, Makhandia J on 15th March 2005 (Misc. Civil Application No. 365 of 2005) granted to the appellant among other Orders, leave to file and serve the notice of motion application for judicial review Orders within 21 days. The learned Judge had imposed a caveat that the leave and stay Orders were to lapse if the appellant failed to serve the respondents and the interested party within 21 days. These facts are confirmed by a copy of the Order certified by the Registrar of High Court (page 228 of the record).

46. Since the terms of the said Order were not complied with by the appellant, on 11th April, 2005 when Ms. Violet Barasa, counsel for the appellant appeared before Makhandia J, there was no need to extend time to serve Brigadier Oyugi, since the case had not been set down for hearing. We note that the Order of stay had lapsed, but learned counsel for the appellant did not seek extension. In the absence of any Order of stay, the court martial proceeded with the trial of the appellant from the 7th of April, 2005.

47. Is it true that on appeal to the High Court, in Criminal Appeal No. 1 of 2005, the learned Judges were not aware of the fact of lack of service of the stay Orders of 15th March, 2005 (in Misc. High Court Civil Appeal No. 365)? A reading of the Judgment of the two learned Judges in the criminal appeal shows the contrary. At page 198 of the record, the first issue listed for determination was, whether service

of the High Court Order in the judicial review action, staying the proceedings of the court martial, was effected. The learned Judges found, as a fact, that the Order was not extracted, or served upon the court martial.

48. We find that even if service had been effected, that would not constitute "new and compelling evidence", within the terms of Article 50(6) of the Constitution. This is because: lack of service of stay Orders against the convening, sitting or conducting of court martial, had nothing to do with the framed charges, proof of which could alter on appeal before the High Court, the verdict of conviction, or the subsequent sentence imposed by court martial. The issue of service of the Order of the Court was by no means any evidentiary information to be viewed as unavailable to the court martial, at the time of conducting the trial and reaching a verdict of conviction. Although this would have been relevant at the time of trial, it would, in our perception, be of no probative value, and would not support a different verdict.

49. The appellant has failed to satisfy us that his case merits the invocation of Article 50(6) of the Constitution for a new trial by the High Court.

(iii)The Armed Forces Act, Section 115(3): Inconsistency with the constitution?

50. Section 115 of the now-repealed Armed Forces Act (Cap. 199, Laws of Kenya) thus provided:

> "(1) Subject to this Part, where a person has been convicted by a court martial -
>
> (a) the person convicted may, with the leave of the High Court given pursuant to section 116, appeal to the High Court against the conviction, or against the sentence, or against both;
>
> (b) the Director of Public Prosecutions may, in any case, within ..... appeal to the High Court against the sentence.
>
> (2) Subject to this Part, where a person has been acquitted of a charge by a court martial, the Director of Public Prosecutions may, within forty days of the acquittal, appeal to the High Court against the acquittal.
>
> (3) The decision of the High Court on any appeal under this Act shall be final and shall not be subject to any further appeal."

51. The Armed Forces Act, as correctly urged by the appellant, was still in force after 27th August, 2010 when the new Constitution was promulgated by virtue of Section 7 of the Sixth Schedule to that Constitution. This was a statute enacted under the Constitution of Kenya (1969). By the Kenya Defence Forces Act, 2012 (Act No. 25 of 2012), that enactment now stands repealed.

52. By the repealed Constitution, the High Court's jurisdiction was provided for in the following terms (section 60):

> "(1) There shall be a High Court, which shall be a superior court of record, and which shall have 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."

53. The powers and functions of the High Court were, therefore, conferred by the Constitution,or any other law. Section 115(3) of the repealed Armed Forces Act should be perceived as "any other law"

under Section 60(1) of the repealed Constitution; and it conferred upon the High Court the final appellate jurisdiction in criminal matters arising from the court martials.

54. Considering that the Court of Appeal, at the material time, was the highest Court in the land, a question is raised: was the appellate bar of Section 115(3) of the Armed Forces Act, an undue limitation on the "right to a fair hearing", in contravention of Section 77 of the repealed Constitution? Under Section 64(1) of the repealed Constitution, the Court of Appeal had powers to hear appeals from the High Court as "conferred by law". Section 64(1) provided as follows:

> " 1) There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law."

55. It is clear that under the repealed Constitution, the Court of Appeal could only exercise powers in accordance with the terms of legislation. By dint of constitutional provision, Parliament could determine matters amenable to appeal before the Court of Appeal. A deliberate exclusion of a second appeal to the Court of Appeal, under Section 115(3) of the Armed Forces Act, was therefore Parliament's clear intention, in the context of Section 60(1) of the Constitution, which stipulated that the High Court's determination of criminal appeals from court martial was final.

56. Section 115(3) of the Armed Forces Act was, therefore, in conformity withthe repealed Constitution of Kenya. The Armed Forces Act, by virtue of its continuous operative effect given by Section 7 of the Sixth Schedule to the 2010 Constitution, was until its repeal by the Kenya Defence Forces Act, 2012 Act No. 25 of 2012 a constitutionally valid statute law. Since the trial of the appellant was conducted under the Armed Forces Act which, as we have found, was in conformity with the repealed Constitution, we do hold that the promulgation of the 2010 Constitution on 27th August, 2010 could not render unconstitutional a law which was at all times valid under the old Constitution.

57. Furthermore, Article 50(2)(q) of 2010 Constitution prescribes that a person under conviction may appeal, or apply for a review before a higher Court as prescribed by law. The "prescribed law" after 27th August, 2010, and for the period that it was in effect before repeal, was Section 115(3) of the Armed ForcesAct; and it provided that appeals in criminal cases from court martial terminate at the High Court.

G. Orders

58. This Court has closely adverted to relevant information and legal argument, and has taken into account pertinent authority and undertaken appropriate interpretations of the Constitution and the law. All this leads us to clear conclusions which we now reduce to specific Orders as follows:

(i) The appellant's appeal dated 28th March, 2014 is hereby dismissed.

(ii) Each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2014

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P. K. TUNOI

SUPREME COURT OF KENYA JUDGE

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M.K. IBRAHIM

SUPREME COURT OF KENYA JUDGE

.....

J.B. OJWANG

SUPREME COURT OF KENYA JUDGE

.....

S.C.WANJALA

SUPREME COURT OF KENYA JUDGE

.....

N.S. NDUNGU

SUPREME COURT OF KENYA JUDGE

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

REGISTRAR, SUPREME COURT