Case Number:	Civil Appeal 292 of 2014
Date Delivered:	21 Dec 2017
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Martha Karambu Koome, Hannah Magondi Okwengu, Sankale ole Kantai
Citation:	Aggrey Chiteri v Republic of Kenya [2017] eKLR
Advocates:	Mr Kepha Onyiso for the Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Petition No. 380 of 2013)
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAI, JJ.A.)

CIVIL APPEAL NO. 292 OF 2014

BETWEEN

AGGREY CHITERI…….....APPELLANT

AND

REPUBLIC OF KENYA…….....……..…RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Majanja J.), dated 30th May, 2014

in

High Court Petition No. 380 of 2013)

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JUDGMENT OF THE COURT

[1] The appellant, **Aggrey Chiteri**, was convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code in Criminal Case No. 1453 of 2003 at the Chief Magistrate's Court at Nairobi. The High Court in H.C. Criminal Appeal No. 316 of 2004, and the Court of Appeal in Criminal Appeal No. 363 of 2006, each dismissed the appellant's appeal, upheld the appellant's conviction, and confirmed the death sentence.

[2] After the dismissal of the appellant's appeal in the Court of Appeal, the appellant filed High Court Petition No. 380 of 2013 in the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi against the Republic of Kenya through the Attorney General (the respondent). In the petition the appellant sought a declaration that the hearing and determination of Criminal Appeal No. 363 of 2006 was discriminatory, unconstitutional, and a breach of his fundamental rights; that the High Court sitting as a constitutional court should award him appropriate relief; and that in the interest of justice an order for retrial or acquittal of the appellant ought to be made.

[3] The appellant maintained that his right to a fair hearing was violated during the hearing of Criminal Appeal No. 363 of 2006 as the record of proceedings from the superior court and the trial court were tampered with, and parts of the record were missing. The appellant sought to have an order for retrial, asserting that it was in the interests of justice to order a retrial where the record of proceedings has been

tampered with in an appeal, and fair hearing cannot be achieved. In urging for a remedy for the violations of his fundamental rights, the appellant relied on **Article 21** of the Constitution that imposes a duty on the State and every State organ to ensure that fundamental rights are not breached.

[4] In support of his contention that he was not afforded a fair hearing as required under Section 77 (1) of the former Constitution, the appellant relied on correspondences between the Principal Deputy Registrar High Court, the Deputy Registrar of the Court of Appeal, and the Attorney General, which confirmed that the original charge sheet was missing, and that the judgment of the trial court had been tampered with.

[5] Ms Nyamwea who appeared for the Director of Public Prosecutions opposed the petition on two grounds. Firstly, that the issues being raised by the appellant were neither new nor compelling evidence as the issues had been raised and addressed by the Court of Appeal during the hearing of Criminal Appeal No. 363 of 2006. Secondly, that the High Court had no jurisdiction to review a decision of the Court of Appeal.

[6] In his judgment the learned Judge of the High Court **(Majanja J)**, noted that the judgment in Criminal Appeal No. 363 of 2006 was delivered before the promulgation of the 2010 Constitution and therefore the petition had to be determined in accordance with section 77 of the former Constitution. The learned Judge found:

that the appellant's petition was misguided as the Court of Appeal gave him a fair hearing; that the issues regarding the charge sheet and the tampered records were matters before the Court of Appeal and cannot be reopened by the High Court; and that an error in the decision of the Court of Appeal cannot be said to be a violation of the right to a fair hearing. Further, that there was nothing in the former Constitution that permits the High Court to intervene in a matter decided by the Court of Appeal; that Article 50(6) of the current Constitution only allows the setting aside of a conviction affirmed by the Court of Appeal where new and compelling evidence has become available; and that in all other circumstances Article 165(6) makes it clear that the High Court has no supervisory jurisdiction over a superior court. The learned Judge therefore dismissed the petition.

[**7**] Aggrieved by the judgment of the High Court, the appellant lodged an appeal that is now before us in which he has challenged the judgment on 8 grounds that we reduce to 5 grounds and paraphrase as follows:

(i) That the learned Judge erred in holding that the High Court has no jurisdiction to set aside a decision of the Court of Appeal where the Court of Appeal's decision has violated a citizen's fundamental rights and freedoms;

(ii) That the Learned Judge erred in finding that the appellant was granted a fair hearing by the Court of Appeal whereas the record of appeal was tampered with thereby making it impossible for the appellant to competently argue his appeal;

(iii) That the learned Judge erred in finding that the Court of appeal having handled the issue of the tampered record of appeal, the High Court could not reopen the issue;

(iv) That the learned Judge erred in failing to order for a retrial or acquittal;

(v) That the Learned Judge erred in failing to appreciate that Article 262 of the Constitution of Kenya as read with schedule Six of the Constitution, preserved the appellant's right for redress of the violation of his fundamental rights which were committed before the promulgation of the Constitution of Kenya, 2010

[8] Hearing of the appeal proceeded through written submissions that were duly filed and exchanged between the parties. Mr Wagara learned counsel for the appellant also orally highlighted the appellant's written submissions.

[9] For the appellant, it was submitted that the High Court had jurisdiction to entertain and set aside the decision of the Court of Appeal if it violated the appellant's fundamental rights; that Sections 60(1) and 84(1) of the former Constitution gave the High Court sitting as a constitutional Court jurisdiction to hear and determine whether a right or fundamental freedom guaranteed in the bill of rights had been violated or infringed; that if the Court of Appeal judgment violated the appellant's fundamental rights, the High Court would have jurisdiction to entertain and set aside the decision; and that issues concerning a record of appeal that is incomplete or tampered with could be revisited by the High Court sitting as a constitutional court if those issues violated the appellant's guaranteed fundamental freedom.

[10] Further, it was argued that the appellant's petition was not premised upon the ground that the Court of Appeal arrived at a wrong judgment liable to be set aside, but that the appellant's fundamental right to a fair hearing was violated as the Court of Appeal did not have the benefit of the whole record and could not therefore effectively interrogate the proceedings of the lower courts. It was asserted that by finding that the High Court lacked jurisdiction to handle the matter, the learned judge of the High Court abdicated his jurisdiction as given by Section 84(1) of the former Constitution.

[11] In support of his submissions, the appellant relied on several authorities including the case of **Protus Buliba Shikuku v The Attorney General, Constitutional Reference No. 3 of 2011** where the High Court considered the jurisdiction donated to it by section 84(1) of the old Constitution and arrived at the conclusion that the High Court while sitting as a constitutional Court has original jurisdiction to hear and determine an application made by a person who alleged that his fundamental rights and freedoms have been violated.

[12] Of note also is the case of **Peter M. Kariuki -v- Attorney General Civil Appeal Number 79 of 2012** in which the Court having considered **Maharaj -vs- Attorney General of Trinidad Tobago (No.2) (1979) AC 385** with regard to the principle that a wrong and erroneous judgment by a court arrived at within the confines of the prescribed procedure and guaranteed rights does not constitute violation of guaranteed rights, concluded that:

"That principle, with respect cannot be readily extended to shield trials that are replete with violations of constitutional guarantees to a fair trial. The effect of such violations is to vitiate the trial to such extent that it amounts to no trial"

[13] The appellant asserted that he was not accorded a fair hearing, nor was the hearing by the Court of Appeal conducted in accordance with procedure and due process as the record of appeal was adulterated and confused with multiple records of appeal being in existence. He faulted the High Court for misapprehending the petition, and failing to appreciate that it was sitting as a Constitutional Court and thus had jurisdiction to entertain the petition. He concluded by urging the Court to allow the appeal.

[14] Mr Kepha Onyiso a Senior Principal State Counsel in the Attorney General's office filed written submissions on behalf of the respondent. In the submissions two main issues were identified for determination. These were whether the High Court had jurisdiction to hear the petition that raised issues regarding the judgment of the Court of Appeal; and whether the appellant's right to fair hearing was violated.

[15] The main issue in this appeal is whether the High Court had jurisdiction to entertain the appellant's petition that questioned the propriety of the process in the proceedings of the Court of Appeal in Criminal Appeal No. 363 of 2006, and if so whether the learned Judge correctly found that the Court of Appeal granted the appellant a fair hearing during the proceedings.

[16] On the first issue, regarding jurisdiction, the respondent relied on the Court of Appeal decision in **Owners of the Motor Vessel "Lillian S' -vs- Caltex Oil (Kenya) Ltd [1989] KLR,** wherein it was held that jurisdiction is everything and that where a court lacks jurisdiction it must down its tool. The respondent urged that the High Court had no jurisdiction to intervene in a matter that had already been decided by the Court of Appeal; that as stated by the Supreme Court in **Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank and 2 Others (2012) eKLR** jurisdiction can only be conferred by the Constitution or statute; and that neither the Constitution nor any other law granted the High Court jurisdiction to intervene in the manner sought by the appellant.

[17] The events that are the basis of the appellant's alleged violation of fundamental rights are based on the proceedings in Cr. Appeal No. 363 of 2006 that culminated in a judgment delivered on 23rd April 2010 in which the appellant's appeal against conviction and death sentence for the offence of Robbery with violence was dismissed. The appellant's alleged violations arose from rights conferred by the former Constitution of Kenya, **Section 77** of which provided a right to a fair hearing. He moved the Court under **Section 84** of the former Constitution that provided for the enforcement of the provisions dealing with fundamental rights and freedoms

[18] That section provided as follows:

"84(1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 - 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine an application made by a person in pursuance of subsection (1)

(b) to determine any question arising in the case of a person which is referred to in pursuance of (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 - 83 (inclusive).

(3) If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), a person presiding in that court may, and shall if any party to the proceedings so requests, referred a question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious

(4) …"

[19] As evident from the above, section 84 of the former Constitution gave the High Court original jurisdiction for enforcement of rights conferred under sections 70 to 83 of the former Constitution. The question is whether the appellant could invoke the jurisdiction of the High Court under section 84(1) of the former Constitution to seek redress for violation that allegedly occurred in appellate proceedings before this Court.

[20] In the case of **Kamau John Kinyanjui v Attorney General [2005] eKLR,** Nyamu & Emukule, JJ, considered the jurisdiction of the High Court under the provisions of **Section 84(1)** of the repealed Constitution and had this to say:

"An application under Section 84(1) and (2) is not an appeal. An Appeal against an enquiry under the two sub-sections is provided for under Section 84(7)… The jurisdiction conferred upon the High Court in respect of contravention of Section 70 – 83 of the Constitution is thus an original jurisdiction to conduct an enquiry. The original jurisdiction is confined to an enquiry on process followed and whether there was a violation of fundamental rights and procedures. The power to challenge such a contravention of fundamental rights or freedoms is clearly reserved under Section 84(1), and the High Court has the original jurisdiction to enquire into such contravention and make necessary finding orders etc. under Section 84(2) of the Constitution."

[21] In **Peter Nganga Muiruri v Credit Bank Ltd & Others [2008] eKLR** the Court of Appeal

considered an appeal in which Nyamu J (as he then was) sitting in the Constitutional Division of the High Court stated thus:

"Section 84 states that the original jurisdiction to hear any allegations of the contraventions or threatened contravention is vested in the High Court … When a challenge is directed at a Judge's order or ruling pursuant to section 84 of the Constitution a Judge of the High Court has jurisdiction by virtue to (sic) section 84 (1) and (2) of the Constitution to hear the challenge. The Jurisdiction I am now exercising in this matter or any other High Court Judge placed in similar situation, does not certainly extend to considering or reviewing the merits of the ruling of another Judge. In my view where there is a final order or ruling the jurisdiction extends to whether the process, or procedure adopted in obtaining the ruling there were any procedural improprieties which could have led to any violation or contravention of the fundamental rights and freedoms of the applicant e.g. was there a fair hearing as per the Constitutional requirements or a breach of procedural and statutory requirements which are aimed at safeguarding a fair hearing……

[22] The Court rejected the above view holding that procedural aspects in the administration of justice are an integral part of those decisions and are not severable; and that the High Court had no powers of review over decisions of judges of concurrent or superior jurisdiction. The Court demonstrated the absurdity of the position taken by the learned judge by stating as follows:

"Appeals from the High Court lie to this Court. If this Court's decisions will be subject to review by the so called "Constitutional Court," an appeal from that court will lie to this Court for a second time, and if any of the parties feels any of his fundamental rights has been violated by this Court he will have recourse to the "Constitutional Court" whose decision will be appealable to this Court. There will be no end to litigation."

[23] Section 84 of the former Constitution was in force when this Court was the apex Court, and the former Constitution did not provide for a Constitutional Court. It could not therefore have been intended that section 84 of the former Constitution confer review powers on the High Court over the apex court, even where there were allegations of violations of fundamental rights. Such an issue would be a grave issue to be addressed in the apex Court, and not by an inferior court. Moreover the alleged violations relate to the propriety of the appeal itself. The record shows that the complaint relating to the record of appeal was in fact raised and addressed during the proceedings. For the appellant to purport to resurrect the issue three years after the determination of his appeal is a clear indication that the petition is frivolous and an abuse of the Court process. The appellant is simply trying to have another bite of the cherry by rearguing his appeal while disguising it as a constitutional petition. As was held in *LT. COL. ROBERT TOM MARTINS KIBISU V REPUBLIC, CA NO. 259 OF 2012, (unreported)*, this is an illegitimate use of a constitutional petition, to re-open issues that have been conclusively heard and determined by a court of competent jurisdiction, and we cannot countenance such abuse.

[24] On the appellant's right to a fair hearing, the respondent submitted that this right was not violated

as the issue regarding tampered and or missing proceedings was raised and addressed by the Court of Appeal during the hearing of the criminal appeal; that the same issues could not be reopened before the High Court. In support of these submissions the respondent cited **Maharaj v Attorney General of Trinidad and Tobago** (supra), and urged the Court to dismiss the appeal.

[25] The evidence that was before the High Court in support of the appellant's allegation that he was denied a fair hearing by the Court of Appeal were three letters attached to his petition. The letters confirmed that the charge sheet that was in the record of appeal before the Court of Appeal in Cr Appeal No. 363 had been tampered with. The appellant had in his grounds of appeal taken issue with the charge sheet contending that the particulars of the charge were not proved.

[26] In the judgment in Cr Appeal No. 363 the Court addressed this issue as follows:

"***At the onset, Mr. Marube focused his submissions on grounds 2 and 3 above. Concerning the grounds alleging that the charge sheet was defective and that there was no complainant or compliance with the section 214 of the Criminal Procedure Code, following a timely intervention by the Court to have the original record perused by the Court,*** (***counsel did graciously abandon that ground because the charge sheet in the original proceedings did directly reflect all the necessary ingredients…***" (emphasis added)

[27] This extract shows that counsel for the appellant in the criminal appeal had based his grounds of appeal on a charge sheet that formed part of the record of appeal, but which was not the same as the charge sheet that was used to prosecute the appellant in the trial court. The Court confirmed this when it called for and perused the original record of appeal in High Court Criminal Appeal No. 316 of 2004 that included the original proceedings of the Chief Magistrate's Court. Once it became clear that the charge sheet in the record of appeal before the Court of Appeal was not the correct charge sheet, and that the proper charge sheet was as reflected in the High Court record and the original record in Chief Magistrates Criminal Case No. 1453 of 2003, the appellant's counsel abandoned the ground of appeal concerning the charge sheet.

[28] The learned judge who heard the appellant's petition also referred to the above extract from the judgment of the Court of Appeal in coming to the conclusion that the issues raised in the appellant's petition could not be revisited by the High Court, as they were not new issues, but were issues that had in fact been addressed by the Court of Appeal in the criminal appeal proceedings.

[29] Moreover, the appellant has not complained that he was denied a fair trial in the Chief Magistrate's Court or the High Court. Having been served with the record of appeal in regard to the appeal in the High Court, He must have been in possession of the proper charge sheet that was used during the appeal proceedings in the High Court.

[30] In our view, the mistake in the record of appeal prepared for the Court of Appeal hearing, whether inadvertent or contrived was not of much consequence. The appellant, through his counsel was aware

that there was a mistake in the record of appeal in so far as the charge sheet was concerned, and when alerted the Court moved to correct this error by reverting to the record of appeal that was in the High Court. Indeed, the letter from the Deputy Registrar, High Court to the Deputy Registrar, Court of Appeal acknowledged that the charge sheet in the record of appeal at the Court of Appeal was different and proceeded to issue the Court of Appeal with a record of appeal that had initially been served upon the Attorney General containing the correct charge sheet. It is this record of appeal that the Court of Appeal based its judgment on.

[31] The contention that the appellant was denied a fair hearing because of the confusion regarding the charge sheet is therefore untenable, as the Court of Appeal was alive to the anomalies in the record of appeal and the same was addressed to the satisfaction of the appellant. We reiterate the caution given in ***Zahira Habitullah Sheikh & Another v State Of Gujarat & Others Criminal Appeal 446-449 of 2004*** that this Court adopted in ***Peter M Kariuki v Attorney- General [2014] eKLR***:

"There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where miscarriage of justice has resulted"

[32] The appellant's right to a fair trial during the hearing of his appeal included the right to have the Court of Appeal review his conviction and sentence. Contrary to the submission that the Court of Appeal could not effectively interrogate the proceedings as it did not have the benefit of the whole record, a perusal of the judgment of the Court of Appeal that was one of the documents annexed to the appellant's petition reveal that submissions anchored on the record of appeal were made by the appellant's counsel, and that the Court considered the record of the lower court and re evaluated the evidence. It is not therefore true that the appellant was denied a fair hearing or that he suffered any prejudice or miscarriage of justice.

[33] We take cognizance of the fact that Article 50 (6) of the Constitution of Kenya 2010 provides a window under which a person convicted of a criminal offence may petition the High Court for a new trial, where the highest court has dismissed his appeal. Nevertheless, the conditions under which such a petition can be entertained are clear that there must be new and compelling evidence. As already demonstrated this is not the situation obtaining herein.

[34] We come to the conclusion that the appellant's right to a fair hearing was not contravened and that the learned judge had no jurisdiction to review the judgment of the Court of Appeal, or make orders for appellant's retrial or acquittal.

[35] Accordingly we find no merit in this appeal and do therefore dismiss it in its entirety. We make no orders as to costs

Dated and delivered at Nairobi this 8th day of December 2017.

M. K. KOOME

……..……

JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR