



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Odunga, J)

PETITION NO. EO6 OF 2021

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLE 22 (1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 25(C) 27 (1), 50 (1) (B) (C),
& 165 (3) (A), (B) & (D) (I) & (II) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

IN THE MATTER OF ARTICLE 50 (6) (A) & (B) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF COURT OF APPEAL CRIMINAL APPEAL NO. 84 OF 2016 AT NAIROBI

AND

IN THE MATTER OF HIGH COURT CRIMINAL CASE NO. 72 OF 2008 AT MACHAKOS

BETWEEN

PHILIP MUEKE MAINGI.....1ST PETITIONER

NICHOLAS MUEKE MWANIA.....2ND PETITIONER

JONES MUTANGILI MWANIA..... 3RD PETITIONER

AND

REPUBLIC.....RESPONDENT

The Petition

1. According to the Petition filed herein on 19th January, 2021, the 1st Petitioner herein, **Philip Mueke Maingi**, is a prisoner currently serving life sentence at Kamiti Maximum Security Prison and is appearing in this petition as an intermediary on behalf of the 2nd and 3rd Petitioners.

2. The 2nd and 3rd Petitioners, **Nicholas Mueke Mwanja** and **Jones Mutangili Mwanja**, (hereinafter referred to as “the said Petitioners”) were originally charged with the offence of murder contrary to Section 203 as read with Section 204 of the **Penal Code** the brief particulars being that on the 21st day of June 2007 at Kithumani village, Kakutha Location in Makeni District, jointly with another not before court

murdered **Richard Ndula Mwanja** “the deceased”. According to them, after being kept for forty (40) days under pre-trial custody without any cogent explanation by the respondent, the trial commenced for which a total of seven (7) witnesses were called. The court having satisfied itself on the totality of the evidence tendered before it, convicted and sentenced the said petitioners to suffer death as provided by law then, on the 20th of May, 2014.

3. Dissatisfied with both the conviction and sentence, the said petitioners exercised their right of appeal at the Court of Appeal at Nairobi which on the 22nd of May, 2020 dismissed the appeal against conviction but allowed it on sentence for which they substituted the death sentence to thirty (30) years imprisonment.

4. According to the Petitioners, upon keenly perusing the trial proceedings, they realised that a big chunk of the record of what transpired during the trial process was missing and though they tried to raise the same before the superior judges of the Court of Appeal which gave an order for the missing records of the proceedings to be availed but this was not to be. However, based on persuasion from their then counsel that they had a good appeal, they proceeded with the appeal without this crucial evidence thereby prejudicing themselves greatly.

5. The said Petitioners contended that it is against this part of the evidence which clearly showed that the charges levelled against the petitioners were not premised on a perceived land dispute as spuriously fronted by the respondent that forms the bulk of the petition before this court. According to them, had this piece of evidence being properly received and evaluated by the Trial Court, perhaps the Court could have arrived at a different conclusion.

6. The said Petitioners therefore sought a determination of the following focal constitutional points-

a. Whether the Court has the requisite jurisdiction to hear and determine this petition.

b. Whether the said petitioners have posited a good case for a consideration of “new” and “compelling evidence” as par Article 50 (6) of the Constitution.

c. Whether the petitioners are entitled to a new trial based on satisfying the threshold set under Article 50 (6) of the Constitution.

7. Regarding the first issue it was sought to rely on **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited [1989] KLR** and **Tom Martins Kibisu vs. Republic, Supreme Court Petition No. 3 of 2014 (eKLR)**, whose reasoning, it was submitted, has since been imported by this court in several of its decisions and reference was made to the case of **James Mwaniki Kamau vs. Republic Makeni High Court Msc. Application No. 179 of 2014** and in the case of **JWM & Another vs. Attorney General & Another [2020] eKLR**.

8. On the basis of the above decisions, it was contended that the petitioners’ respective appeals to the highest court has already been exhausted and no leave has been granted on them to adduce fresh of additional evidence to another court. Hence they have satisfied the first limb of the requirement and this Court has the requisite jurisdiction to interrogate the rest of the facts to ascertain whether the circumstances therein satisfy the second limb as expounded under Article 50 (6) of the Constitution.

9. As regards the issue whether the said petitioners have posited a good case for a consideration of “new” and “compelling evidence” as par Article 50 (6) of the Constitution, it was contended that the said petitioners were alive to the threshold set by law in determining what amounts to “new” and “compelling” evidence for purposes of compliance with Article 50 (6) of the Constitution as espoused by the Supreme Court in **Tom Martins Kibisu (Supra)**.

10. In the said Petitioners’ view, the subject matter of the arrest and subsequent arraignment to answer to the charges of murder was premised on a perceived land dispute between the said petitioners and the deceased. However, no inherent land dispute existed that could have warranted them manifesting malice aforethought which was relied on by the Trial court in finding them culpable for the commission of the offence in question.

11. The petitioners invited this court to scrutinise the evidence of PW1 in which she alleged that the deceased had been bequeathed the land in question and that there was a letter to that effect. However, that letter was not produced. It was the Petitioners’ case that the referred letter was crucial in proving the fact of there having been a dispute between the accused persons and the deceased over the alleged piece of land and without such an independent evidence what remained was unsubstantiated hypothesis which was not backed up by the rest of the key prosecution witnesses.

12. It was noted that PW3, the Chief of the locality in which the alleged offence took place, had never heard of any dispute in relation to a land belonging to the accused persons and the deceased despite having worked there for over thirteen (13) years and was well known to both the accused persons, PW1 and the deceased. Similarly, in PW4’s evidence, the only dispute that he knew of was in relation to a minor incident and which was amicably resolved by the said petitioners.

13. It was posited that-

a. Firstly, no land dispute ever existed between the petitioners herein and the deceased to warrant them developing any bad blood against him.

b. Secondly, in any case it could be suggested that such a dispute ever existed, then crucial documents in the name of a letter by a clan presiding over the alleged dispute ought to have been availed to cement and back this position.

c. Thirdly, a service register detailing a report of the alleged incident would have been crucial in proving or disproving the facts in question and ought to have been availed. Failure to avail the same would only lead to the conclusion that no such dispute ever

existed and if it did, then other persons apart from the petitioners herein could well have committed the fatal offence.

14. According to the said Petitioners, it is for the above reasons and concerns that the evidence of the investigating officer (PW6) was crucial in unravelling the steps he took in marshalling up evidence to bring up the charges against the accused persons. However, it was contended that a glean at the committal bundles shows that part of the records is missing and that the records submitted to the Court of Appeal do not show when the prosecution closed its case and crucial to the matter before this court, the said records do not show the cross examination evidence of PW6. It was noted that as per proceedings dated 15/5/2012, PW6 asserted in part that, “***no evidence of any provocation between any accused and the deceased up to now, I don’t know the person who inflicted the injuries and observed.***” PW6, on the other hand, concluded on the missing captioned proceedings thus, “***from my investigations, I could not find the exact person who killed or cut the deceased.***”

15. It was averred that at the hearing of the appeal, the said petitioners were denied the opportunity of benefiting from this crucial evidence of Pw6 which could have albeit reasonably created doubts on their commission of the offence and hence they were greatly prejudiced when it did not form part of the certified records of the proceedings that was submitted to the Court of Appeal. In their view, PW6’s evidence would have been properly appreciated had the above aforementioned documentary evidence formed part of the record of proceedings and the failure thereof to include them prejudiced the trial greatly as the investigating officer (**PW6**) exonerated them from any wrongful doing.

16. In support of their position, the Petitioners relied on the case of **James Macharia Anumbi vs. Republic [2017] eKLR**, where the Court gave a guide the determination of “new and compelling evidence” as the evidence newly discovered and the petitioner did not know about it prior to, or during the trial. In this case the Petitioners contended that they did not know of the existence and content of the clan letter and or service register prior to or during the trial process.

17. Regarding the materiality of the said evidence, it was contended that the evidence of the clan letter if produced would have crystallised PW1’S assertions of existence of any clan meeting which sat and adjudicated upon a perceived land dispute between the deceased and the said petitioners. As it is, the rest of the witnesses especially PW3 and PW4 disputed the prior existence of any such disputes that could have led to the commission of such an offence. Similarly, the service register which can be equated to a first report or initial report would have confirmed the none-existence of the above assertions and put Pw1’s evidence to be of considerable doubt. All this would have given credence to Pw6’s conclusions to wit that he could not get any iota of evidence of provocation between the said petitioners and the deceased and hence he could not tell who killed the deceased.

18. It was contended that the petitioners’ failure to learn about the evidence before the verdict was not because of lack of diligence. It was averred that the said petitioners were critical all along during the trial process of the lack of nexus between the charge that was levelled on them and the evidence that was tendered and this explains the long period they were placed under pre-trial detention before they were taken to court and though they tried to raise this with both trial court and the counsel that was handling the matter on their behalf, there was no avail.

19. The Petitioners’ case was that the new evidence is significant enough that it would likely result in a different outcome if a new trial is granted. In their view, the new evidence would- (i) have shown lack of existence of malice aforethought on the part of the accused persons which is a critical element to be proved in a case of murder. (ii) Definitely have shown culpability of other persons other than the accused persons to have committed the offence in question. (iii) Definitely have persuaded the Court of Appeal to arrive at a different verdict if coupled with the missing captioned proceedings of the evidence of Pw6.

20. In support of their case, the said Petitioners cited the decision of **Mativo, J** in the case of **Philiph Mueke Maingi vs. R [2017] eKLR**.

21. The petitioners urged the Court to find that had the above evidence been considered by the trial court, justice would have been served as reasonable doubts would have been created on their culpability to commit the fatal offence for which they were charged.

22. As regards the question whether the petitioners are entitled to a new trial based on satisfying the threshold set under Article 50 (6) of the Constitution, it was contended that the Petitioners have made persuading arguments to warrant this court’s consideration for a new trial for them. According to them, the historical facts bestow the glaring fact of their being kept unconstitutionally in pre-trial custody for forty (40) days because the prosecution went on a fishing expedition to scout for evidence to convict them with which was insufficient to mount a case against them. Had this been a straight forward case, it was contended, nothing would have barred the prosecution from swiftly bringing the accused persons to book.

23. The said Petitioners therefore prayed for:

- a) A declaration that the petitioners have made an arguable case as provided under Article 50 (6) (a) and (b) of the Constitution on new and compelling evidence.
- b) A new trial based on the new evidence that has been tendered and in light of the omitted evidence of PW6.
- c) The Court be pleased to make such other order(s) as it shall deem just.

24. In response to the submissions made by the Respondent, it was contended that on the 22nd November, 2016, the matter came at the Court of Appeal for case management hearing before **Visram, JA** when a request to have the missing proceedings availed, a request which was acceded to by the state counsel. However, despite the said Court making an order for them to be availed, by the time of the hearing of the appeal this had not been done and the hearing proceeded without the said records to the prejudice of the Petitioners.

Respondent’s Case

25. In response to the petition, the Respondent filed the following grounds of opposition:

1. That the instant petition is frivolous, vexatious and an abuse of the court process.
2. That the petition does not meet the legal requisite for the orders sought.
3. That the alleged new and compelling evidence was available to the petitioners and was admitted by the trial court.
4. That the investigation officer testified in court as Pw 6 and the petitioners were given humble time to cross examine him during trial.
5. That there are is no new and compelling evidence to warrant a retrial as contemplated under Article 50 (6) of the constitution.
6. That no valid grounds have been adduced by the petitioners to justify the urged re-trial.

26. On behalf of the Respondent, it was submitted that the 2nd and 3rd Petitioners were charged, tried, convicted and sentenced to death for the offence of murder, the particulars being that on 21st June 2007 at Kathumani village, Kakutha Location in Makueni District, they jointly murdered **Richard Ndula Mwanja**. The Petitioners appealed to the Court of Appeal against the conviction and the sentence which appeal was allowed and the death sentence was set aside for each petitioner and substituted for a jail term of 30 years which was to run from 21st July, 2007 when they were arrested. The issue of new and compelling evidence under Article 50 (6) of the Constitution has been a subject in many cases. In support of the submissions the Respondent relied on the case of **Maurice Odhiambo Wesonga -vs- Republic 2014 eKLR** and it was submitted, the Petitioners must demonstrate the following in order for their petition for a retrial to succeed;

- (a) Their Appeal were dismissed by the Highest court of Appeal in the land, or
- (b) they did not Appeal
- (c) New and compelling evidence has become available and which was not available during their trial.

27. According to the Respondent whereas one of the grounds that the petitioners must show is that their Appeal to the highest court in the land was dismissed, the highest court in the land being the Supreme Court, the petitioner must show that his appeal went to the highest court in the land since the Court of Appeal is no longer the highest court of the land. After the promulgation of the New Constitution 2010, the Supreme Court was established and it became the highest court in land.

28. According to the Respondent, the Supreme Court has appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal when the case involves interpretation or application of the Constitution or a matter certified by the Supreme Court or the Court of Appeal as one that involves a matter of general public importance. In this regard reliance was placed on **Hassan Joho & others vs. Suleiman Said Shahbal Supreme Court Appeal No 10 of 2013** and it was submitted that the petitioners appealed to the highest court that could hear their appeal and that their appeal to the Court of Appeal was dismissed.

29. Regarding the issue whether there was new and compelling evidence, the Respondent relied on the case of **Rose Kaiza vs. Mpanju Kaiza (2009) eKLR** in which the court outlined the principles that a litigant must satisfy the court in claiming new and compelling evidence the court outlined the principles as:

- (a) *The materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged.*
- (b) *That the existence of the evidence was not within his knowledge;*
- (c) *The applicant acted with due diligence.*

30. The Respondents also relied on **Ramathan Juma Abdalla & 2 Others vs. Republic (2012) eKLR** in which **Lenaola, J** noted that:

‘Black Law Dictionary, 8th edition defines ‘new’ as ‘recently discovered, recently come into being’ and the concise oxford dictionary defines compelling as ‘powerful evoking attention or admiration’. It follows therefore that the evidence must have been recently discovered or has just come into being and is evidence that will evoke attention and arouse a great deal of interest’.

31. The Respondent also cited *Taxmann’s Law Dictionary* to the effect that the word “new” must be construed as meaning “*not existing before, newly made, or brought into existence for the first time,*” and in contradistinction and antithesis of the word “used” while the *Concise Oxford English Dictionary* defines “compelling” as “*powerfully evoking attention or admiration.*”

32. Reliance was also placed on **Tom Martins Kibisu vs. Republic Supreme Court Petition No. 3 of 2014**, **Mzee wanjie & 93 Others vs. A.K Sakwa & 3 Others (1982-88) 1 KAR 465**, and **James Macharia Anumbi vs. Republic [2017] eKLR**.

33. According to the Respondent, the new evidence generally must have been unknown to the petitioner during trial, could not have been reasonably possible to discover before or during trial, and can be capable of causing the court to reach a different verdict. The evidence will

be fresh if it was not adduced in the proceedings at which the person was convicted and it could not, even with the exercise of reasonable diligence, have been adduced at that trial. The evidence should be reliable, of high probative value, admissible and in relation to the crime in question.

34. In this case it was submitted that looking at the petition, it is clear that the investigation officer testified in court as PW6. Further looking at the judgement delivered by **Mutende, J**, No. 231069 CI Wilfred Mongere testified as PW6. Further, the petitioners also complain about missing pages in the typed proceedings, which they claim prejudiced their appeal and while noting there are no typed proceedings from 15/5/2012 to 27/2/2013, it was submitted that the petitioners were represented by an advocate at the murder trial and also at the appeal stage at the Court of Appeal but their advocate did not raise the issue.

35. In the Respondent's submissions, the evidence of the investigation officer was available to the petitioners at the trial and it was admitted as evidence. Since the petitioners counsel was given an opportunity to cross examine the witness, the evidence cannot be termed as new and compelling under Article 50 (6) of the Constitution.

36. It was therefore submitted that the petitioners have not brought out any new and compelling evidence to warrant for a retrial and the instant petition has no merit and should therefore be dismissed.

Determination

37. I have considered the issues raised in this petition. The issues herein revolve around the application and interpretation of Article 50(6) of the Constitution, a provision which prior to the promulgation of the present Constitution did not exist in the retired Constitution.

38. The Constitution of Kenya, 2010, as I have said before, is meant to correct historical injustices resulting from our experience as a country during the single party era. The said Article 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.

39. Therefore, for one to invoke the above provision two conditions must therefore be fulfilled. The first condition is that the Petitioner's appeal must have been dismissed by the highest court to which the Petitioner is entitled to appeal or that the Petitioner did not appeal within the time allowed for appeal. In my understanding the Petitioner can only exercise this right where legally he has reached the end of the road in so far as his appellate options are concerned or where he is by law barred from lodging his appeal due to effluxion of time. In other words, a person who is appealing is not entitled to exercise his right under the above provision. My position reflects that in **Jona Ngala Kilimbi vs. Republic [2016] eKLR**, where the Court rendered itself as follows:

“In so far as there is no evidence that the applicant ever appealed against the Judgment on appeal dated by M.Odero J, we are of the view that we could conveniently treat this petition as one falling under Article 50(6)...we say so noting that one is entitled to invoke the provision provided his appeal to the last ultimate court has been dismissed or he never filed an appeal within time. Having taken the position that no appeal was filed to the court of appeal, the 1st prerequisite under Article 50(6) 1 a has thus been met.”

40. In so far as the first limb is concerned, the Article talks about *the highest court to which the person is entitled to appeal* as opposed to the highest appellate court in the land. In other words, what is to be determined is that Appellate avenue that is legally available to the Petitioner by entitlement as opposed to the discretionary avenue since the Constitution deliberately applies the phrase “entitled to” or opposed, for example to “available”. My understanding of this provision is informed by the provisions of Article 259(1) of the Constitution which enacts as follows:

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

41. In interpreting the Constitution, unlike an Act of Parliament, which is subordinate, it was held by a majority in **Njoya & 6 Others vs. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR**, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles. That purposive approach as explained by the Supreme Court **In the Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012**, would take into account the agonized history attending Kenya's constitutional reform.

42. In order to live up to that spirit the interpretation of the phrase “*the highest court to which the person is entitled to appeal*” must

similarly be broad in order to achieve the constitutional objective of advancing the rule of law, and the human rights and fundamental freedoms in the Bill of Rights permitting the development of the law.

43. It is argued that the Petitioners ought to have appealed all the way to the Supreme Court before invoking this Court's jurisdiction under Article 50(6) aforesaid. However, there is no automatic right of appeal to the Supreme Court in criminal cases, since the 2010 Constitution of Kenya clearly provides for the jurisdiction of the Supreme Court which includes automatic right of appeal at Article 163(4)(a) and section 15(2) of the *Supreme Court Act*. Article 163(4)(a) provides as hereunder:

(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) as of right in any case involving the interpretation or application of this Constitution.

44. Section 15 of the *Supreme Court Act*, on its part provides that:

(1) Appeals to the Supreme Court shall be heard only with the leave of the Court.

(2) Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

45. These provisions have been interpreted by the Supreme Court in a number of decisions. In *Lawrence Nditu & 600 Others vs. Kenya Breweries Limited and Another Petition 2013 No 3 of 2012 eKLR*, the Supreme Court held that it has a constitutional duty to operate within its constitutional limits by stating at paras 27 and 28 that:

“This article 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 leadings by a party that clothes an appeal with the attributes of the constitutional interpretation or application...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 or application of the constitution, it cannot support a further appeal to the supreme court under the provisions of article 163[4] (a).” [Emphasis provided].

46. Similar position was adopted in *Hassan Joho & Others Application No. 2 of 2011, Hassan Joho & others vs. Suleiman Said Shahbal [unreported Supreme Court Appeal No 10 of 2013]* where the Supreme Court held at para 37 that:

“In light of the foregoing, the test remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the constitution...”

47. In the above decisions the Supreme Court was clear in its mind that not all intended appeals lie from the Court of Appeal to the Supreme Court and that for a matter to fall under the said provision for the purposes of an appeal, the appeal must arise from cases involving the interpretation or application of the Constitution and the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. What it means is that the avenue to the Supreme Court on appeal is not open-ended. It only entertains appeals, firstly where the matter involves the interpretation or application of the Constitution and secondly, that very question must be one that originated from the Court of Appeal. In other words, the very subject of the appeal must have been the subject before the Court of Appeal so that what is being faulted before the Supreme Court is the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Otherwise, the issue would not be supported under the provisions of article 163[4](a) of the Constitution. That position comes clearly from the holding of the Supreme Court in *Gitirau Peter Munya vs. Dickson Mwenda Kithinji & others S.C Petition No. 2B of 2014 (2014) eKLR [Munya 2]* where the Court held that:

a. a court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent.

b. the chain of court in the constitutional set up have professional competence to adjudicate upon dispute coming up before them, and only cardinal issues of law or jurisprudential moments deserve the further input of supreme court

c. the lower courts determination of the issues of appeal must have taken a trajectory of constitutional application or interpretation of the course to merit hearing before the supreme court.

d. an appeal with the ambit of Article 163(4) (a) is to one founded on cogent of constitutional controversy.

48. That decision was affirmed by the same Court in *Supreme Court Petition No.11 of 2017 - Charles Maina Gitonga vs. Republic* where it was held at para 69 that:

“The import of the Court's statement in the Ngege Case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant would demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to

have taken a trajectory of constitutional interpretation of application.”

49. For a matter to fall within the ambit of Article 163(4)(a) of the Constitution, its substance must revolve around the interpretation or application of the Constitution. The denial of an application for adjournment for example, to an extent may be termed as a denial of the right to be heard. However, such an issue cannot be extrapolated to an issue revolving around the interpretation or application of the Constitution. That is my understanding of the holding in Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission [2020] eKLR, where the Supreme Court of Kenya made a finding that where matters of constitutional interpretation/application are introduced for the first time at the Court of Appeal and do not form the substratum of the appeal/finding by the Court of Appeal, this does not confer jurisdiction (on the Supreme Court) under Article 163(4) of the Constitution by observing that:

“reference to Articles 40 and 50 of the Constitution were introduced by the Appellant at the Court of Appeal and even then, peripherally so. The Court of Appeal thereafter rendered itself in passing only and the bulk of its Judgment was saved to an evaluation of the evidence on record in the context of Sections 26 and 55 of ACECA and not the Constitution per se...the mere reference to the rich generality of constitutional principle as the Court of Appeal did in the present case, is not a sufficient ground to invoke Article 163(4) (a).”

50. This is also my understanding of the decision of the same Court in Nyutu Agrovat Limited vs. Airtel Kenya Limited & Another Supreme Court Petition No. 12 of 2016 where it expressed itself as hereunder:

“Is jurisdiction therefore synonymous with a right of appeal" In other words, does Article 164(3) grant a litigant a right of appeal to the Court of Appeal" Nyutu urges that Article 164(3) indeed grants such a right of appeal. We disagree. As urged by Airtel, this provision does not confer a right of appeal to any litigant. It only particularizes the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. In this case, the appellate Court only has powers to hear matters arising from the High Court or any other defined Court or Tribunal. There is thus no direct access to the Court of Appeal by all and sundry. As such, Article 164(3) defines the extent of the powers of the Court of Appeal but does not grant a litigant an unfettered access to the Court of Appeal”.

“[34] With regard to a right of appeal, our position is that such right can either be conferred by the Constitution or a Statute. For example, under Article 50(2)(q), a person who has been convicted of a criminal offence has a right to appeal or apply for review to a higher court as prescribed by the law. Further, with regard to disqualification from being a Member of Parliament or County Assembly (Articles 99(3) and 199(3), respectively), a person is not disqualified until all possibilities of appeal or review of the relevant sentence or decision have been exhausted. Our statutes have also provided for circumstances when an appeal may be specifically preferred to the Court of Appeal or any other Court. For example, Section 39(3) of the Arbitration Act provides circumstances when an appeal may lie to the Court of Appeal.”

51. What that holding states is that the Court of Appeal only hears appeals from the High Court or any other defined Court or Tribunal and nowhere else. In other words, it deals with the forum from which an appeal to the Court of Appeal may lie. It does not prescribe what matters are actually appealable to the Court of Appeal.

52. I therefore find that this Court has the jurisdiction to entertain this Petition.

53. In my view, where the Petitioner’s petition under Article 50(6) of the Constitution is based on new and compelling factual evidence which has become available it would not advance the rule of law **and the human rights and fundamental freedoms in the Bill of Rights** or develop the law as required under Article 259(1) to argue, as the Respondent herein seems to do, that a Petitioner whose right of appeal is restricted only to law ought to have exhausted all his appellate options. Such a person is clearly barred from arguing that he has a new and compelling factual evidence in a second or subsequently appeal. In my view and I find, based on the decision of the Court of Appeal in respect of the 1st Petitioner’s appeal that a person who is relying on the ground of existence of new and compelling factual evidence must for the purposes of Article 50(6) of the Constitution be deemed to have had his appeal **“dismissed by the highest court to which the person is entitled to appeal”** once his first appeal has been dismissed. In other words, the highest court to which he is entitled to appeal on matters of facts is the first appellate court and no further unless the Court of Appeal grants him leave to adduce fresh or additional evidence. Having been denied an application to adduce fresh evidence, it is clear that he had reached a dead end in so far as he could adduce new evidence. The position was appreciated in James Mwaniki Kamau vs. Republic Makeni High Court MSC. Application No. 179 of 2014 where the it was held that:

“(41). A perusal of the record reveals that the petitioner was originally tried and convicted in Machakos CM’S Criminal case No. 5043 of 2014. He appealed to the High Court in Machakos Criminal Appeal No. 67 of 2006. The appeal was dismissed. He further appealed to the Court of Appeal in Nairobi Criminal Appeal No. 407 of 2017. The appeal was also dismissed. From the foregoing, it is clear that the petitioner has appealed to the highest Court to which a person is entitled to appeal hence satisfying the first limb of Article 50 (6).”

54. Based on that finding, I hold that the Petitioners herein have successfully surmounted the first hurdle. They have proved that their appeal was dismissed by the highest court to which they were entitled to appeal.

55. That now brings me to the second limb of Article 50(6) of the Constitution. Has the Petitioner satisfied the Court that new and compelling evidence has become available?

56. It is important to understand the background of this provision. As was opined by **Mutunga, CJ** in Speaker of the Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR, it is essential to paint a historical canvas that helps to illuminate the discourse, and the resultant determination of the question at hand. The history of this country is

replete with situations where people particularly human rights activists, proponents and crusaders were apprehended and detained incommunicado only for them to find themselves before courts of law at very unholy hours of the day or night having been literally dragged from the dungeons where they were kept in solitary confinement under very inhuman conditions in very pathetic bodily and mental states for the charges to be read out to them. It was said that despite the fact that those charges were invariably trumped up but due to the vegetative conditions in which the said persons were presented before the court, they invariably sang guilty pleas even before the charges were read out. See (KHRC, *'Independence without Freedom: The Legitimation of Repressive Laws and Practices in Kenya'* in Kivutha Kibwana (ed), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 113, 136; Amnesty International, Kenya: *Torture, Political Detention and Unfair Trials* (1987). For use of torture in Kenya, see generally William Mbaya, *'Criminal Justice in Kenya: Role of the Judiciary in Safeguarding the Pre-Trial Rights of Suspects,'* in Kivutha Kibwana (ed), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 998) 298.

57. In my view this must have been one of the circumstances which informed the enactment of Article 50(6) of the Constitution. It was a realisation of the fact that in the past innocent people were placed in circumstances under which they literally came to Court singing guilty pleas as if they were chanting pre-rehearsed prayers to charges without caring whether they were true or not notwithstanding the consequences of such pleas. To my mind it is cases such as these that **Mutunga, CJ** had in mind in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR (SCK)** when he expressed himself as hereunder:

“I do not know how many cases in our judicial system will go down in the annals of history as a reflection of gross injustice, meted out in the very temple of justice...This matter before us also reflects the impunity of the judiciary, and the unacceptable face of the jurisprudence...that had become the handmaiden of gross injustice. It is apposite to recall the unfortunate details of this injustice, that will forever remain a glaring stain on our justice system.”

58. Accordingly, the said Article was meant to deal with the past historical injustices and to also remedy future violations of the rights and liberties of Kenyans. Article 50(6), in my view, provides a window of opportunity and places a future obligation upon this Court to address historical or traditional injustices that may have been encountered or visited upon a particular segment of the people of Kenya under the guise of judicial pronouncements.

59. In my respectful view, where credible, new and compelling evidence is placed before this Court which show that a person may have suffered injustice as a result of concocted evidence, this court would be shirking from its duty placed on it by the people of this Republic vide the Constitution of ensuring that justice is rendered to the people. The Court would have let the people and the country down if despite glaring injustice meted at the people, it declined to rise to the occasion and correct a patent decision arrived at from concocted and contrived evidence simply because the fresh matters which were not available during the trial were never made known to the trial court. I therefore associate myself with the position adopted in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 (HCK)** where the Court held that:

“The matter before us is of considerable importance. The High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system... In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time.”...In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right... In the case of *Patel vs. Attorney General [1968] ZLR 99* the Zambian High Court opined that the Court should lean on the construction that favoured the applicant rather than that which favoured the state. In the American case of *Gran vs. US 77 LLaw Ed 212* cited in *Patel vs. Attorney General* (supra) it was held that “the provisions of the Bill of Rights are to be broadly construed” so that they may be protected against gradual encroachment that seeks to deprive them of their effectiveness.”

60. Speaking for myself, I would not countenance an argument which perpetuates an injustice when such injustice is driven home to me after the parties are afforded an opportunity of being heard. I am inclined to adopt the position in the case of **Philiph Mueke Maingi vs. R [2017] eKLR** that:

“fundamentally, the objective of the CJS is that after a fair trial there should be a true verdict. So far as humanly possible there should be no wrongful convictions, and where they occur or if new evidence emerges which undermines the safety of a conviction, they will be quashed and re-trial may be ordered...in my view, the architect of article 50 of the Constitution is that after a criminal trial ends in a conviction, the defendant can file a motion for a new trial only after the conditions stipulated in article 50 (6) are satisfied. The High courts can grant an order or re-trial – though rarely - to correct significant errors that happened during trial or if substantial new evidence of innocence comes to light.”

61. I echo the views expressed by the Court of Appeal in **Murai vs. Wainaina (No 4) [1982] KLR 38** that:

“A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress. We do not want to have a wilted legal system in this country. We want a legal system for the common will.”

62. However, Article 50(6) of the Constitution provides that the Court can only act thereunder where new and compelling evidence has become available. In **Tom Martins Kibisu vs. Republic Supreme Court Petition No. 3 of 2014** the Supreme Court pronounced itself as follows regarding that issue:

“[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”. [Emphasis added].

63. In **James Macharia Anumbi vs. Republic [2017] eKLR**, the Court identified the key considerations to guide the determination of “new and compelling evidence” as follows:-

- 1. The evidence is newly discovered and the petitioner did not know about it prior to, or during the trial;**
- 2. The evidence must be material and not merely cumulative;**
- 3. The petitioners failure to learn about the evidence before the verdict was not because of lack of diligence; and**
- 4. The new evidence is significant enough that it would likely result in a different outcome if a new trial is granted.**

64. In this case, the Petitioners’ case is that the record that was before the Court of Appeal was incomplete as part of the evidence was missing. That evidence, according to the Petitioners, might have altered the court’s decision taken at the appellate level had it been availed. In other words, if I understand the Petitioners correctly, that evidence was indeed available and it was adduced before the trial court but somewhere along the way it went missing and was not available to the appellate Court.

65. With due respect that is not the kind of a scenario contemplated under Article 50(6). The said Article, as succinctly explained in **Tom Martins Kibisu vs. Republic Supreme Court Petition No. 3 of 2014** applies to where there is new evidence in the sense that it is evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed thereat. In this case, the evidence relied upon by the Petitioners, it is alleged, was available but somehow went missing. It is therefore not the kind of evidence that can be said to have been unavailable and that it could not have been availed despite the exercise of due diligence.

66. Whereas it may well be that the said evidence could have been compelling evidence in the sense that it would have been admissible at the trial, of high probative value and capable of belief, and which, if available at the appellate stage would probably have led to a different verdict at that stage, it certainly fails to meet the threshold of evidence that was not available at the trial. As appreciated by **Majanja, J** in Respondent relied on the case of **Maurice Odhiambo Wesonga -vs- Republic 2014 eKLR**: -

“...A person who has been convicted and has exhausted all the appeals has the right, under Article 50(6) of the Constitution to seek a fresh trial by demonstrating that there is new and compelling evidence. This provision has been the subject of several decisions of the High Court among them; *Ramadhan Juma Abdalla and 3 Others v R Nairobi* Petition No. 468 of 2012[2013]eKLR, *Wilson Thirimba Mwangi v Director of Public Prosecutions*, Nairobi Petition No. 271 of 2011, [2012]eKLR, *Mohamed Abdulrahman Said and Another v Republic Mombasa Criminal Misc. Appl. Nos. 66A and 66B of 2011 (Unreported)*. The authorities demonstrate that in order for a petition under Article 50(6) of the Constitution to succeed, the petitioner must adduce new evidence in the sense that it must not have been available to the petitioner during the trial. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals. Secondly, the evidence must be compelling meaning that it must be admissible, credible and not merely corroborative, cumulative, collateral or impeaching. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the petitioner to the extent that it may possibly persuade a court of law to reach an entirely different decision than that already reached.”

67. It is not for me in this Petition to determine the consequences of a determination of an appeal in the absence of a complete record. However, Article 50(6) is not the provision that deals with such circumstances. Article 50(6) is a special provision that deals with specific circumstances where the Constitution seeks to remedy an injustice that might have been occasioned at the stage of the trial. It is not meant to remedy circumstances where the records of the trial Court are unavailable.

68. In the premises, as the Petitioners have failed to satisfy the second limb of Article 50(6) of the Constitution, this petition fails and is dismissed but with no order as to costs.

69. Judgement accordingly

JUDGEMENT SIGNED AND DATED AND DELIVERED AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2022.

G V ODUNGA

JUDGE

In the presence of:

The Petitioners

Mr Ngetich for the Respondent

CA Susan