REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MISC CRIMINAL APPLICATION NO. 13 OF 2018

(CORAM: F.M. GIKONYO J.)

PETER MUNGAI KANYONYO.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

Flurry of applications

[1]. **Peter Mungai Kanyonyo,** the Applicant herein, was charged, tried and convicted of the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code Cap.** He was subsequently sentenced to suffer death on 12/07/2013 in **Narok Chief Magistrate's Court Criminal Case No. 643 of 2012**

[2]. The Applicant then lodged an appeal before the High Court at Nakuru, to wit, Criminal Appeal No. 150 of 2013. The appeal was heard and dismissed according to the applicant.

[3]. Thereafter, the applicant filed several applications under **Article 50(6)** of the **Constitution** seeking varied reliefs. He sought a retrial in the application before me, as well as in **Misc. Application No. 3 of 2017 and Misc. Appl. No 16 of 2016 at Narok.**

[4]. While **Misc. Application No. 3 of 2017 and Misc. Appl. No 16 of 2016 at Narok** were pending, the Applicant filed a petition in **Misc. Application No. 13 of 2018** seeking a sentence re-hearing on 10/07/2018.

[5]. On 30/09/2021, the applicant herein told this court that on 26/2/2018 he filed a retrial application. He prayed for retrial and bond since he has been in custody for long. He also indicated that he had withdrawn his appeal in the court of appeal. He insisted that he filed a petition for retrial and not resentencing.

[6]. The applicant in his written submission submitted that his case was admitted for retrial on 26/02/2018 and as a result he urges this court to relook the whole evidence. That he was informed by the forensic expert that the forensic standards of evidence management was not met. He prayed that this court orders the prosecution to supply him with prosecution material including crime scene first report, hand over notes, witness statement, police OB report, Safaricom request requisition form and all previous proceedings.

[7]. Mr. Karanja counsel for the Respondent submitted that the misc. application indicates that the applicant had an appeal at Nakuru but the result of the appeal is not indicated. He should therefore pursue the appeal. That the applicant has not exhausted his appeal opportunities. His application is for resentencing on the basis of *Muruatetu.* On that basis his application is incompetent as *Muruatetu* is limited to murder cases.

ANALYSIS AND DETERMINATION

[8]. It is not strange that a convicted person who has exhausted all his appeal processes should feel doomed and hopeless. It is worse, if the convicted person is innocent; the conviction is just but a scourge, a tormentor and total devastation. To the latter, the novelty in Article 50(6) of Constitution of Kenya, 2010, grants real justice in a new trial. In other words, the article is to be invoked to correct an injustice. The said Article 50(6) of the Constitution provides as follows: -

> **"50 (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if –**

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

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

[9]. The true essence of this article was enunciated in the **Wilson Thirimba Mwangi case** (above) thus: -

> ***"Article 50 (6) seeks to balance the public interest in having finality in criminal cases on the one hand and ensuring that where there is new and compelling evidence, an innocent person should not suffer the penalty of a conviction."***

[10]. The jurisdiction under Article 50 (6) of the Constitution, is however, to be exercised with great caution as it is not an appeal on matters which have already been decided upon by a higher court.

[11]. The duty of the court under the article is to establish whether there is new and compelling evidence to warrant a new trial. The focus of this jurisdiction is the existence or otherwise of new and compelling evidence for purposes of a new trial.

[12]. See ***Tom Martins Kibisu -vs- Republic, Supreme Court Petition No. 3 of 2014 (eKLR),*** that;

> **"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. (emphasis mine) 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'.**

Competency of the petition

[13]. A perusal of the record reveals that the petitioner was originally tried and convicted in **Narok Chief Magistrate's Court Criminal Case No. 643 of 2012.** He appealed to the **High Court in Nakuru Appeal No. 150 of 2013** which was later transferred to Narok and assigned **Narok HCCRA NO. 53 OF 2016**. The appeal was dismissed. He further appealed to the Court of Appeal. The appellant has claimed that he withdrew his appeal to the Court of Appeal.

[14]. From the foregoing, the petition is competent under Article 50 (6) of the Constitution.

[15]. The next hurdle…

New and compelling evidence

[16]. What is new and compelling evidence in the context of article 50(6) of the Constitution?

[17]. The critical condition in Article 50 (6) (b) of the Constitution is whether there is **"new and compelling evidence''** "as to warrant a new trial.

[18]. It was observed in **Wilson Thirimba Mwangi** case (supra) that, there is no definition of the phrase **"new and compelling evidence"** in the constitution. The core essentials of the said phrase are developing through jurisprudence by courts. And, substantial borrowing has been made from *inter alia* the CPR, and in particular Order 45 on review on the ground of **"--- discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed ---."**

[19]. See the case of ***Col. Tom Martins Kibisu vs. Republic Sp. Ct. Petition No. 3 of 2014 (2014) eKLR*** where the Supreme Court rendered itself thus: -

> **"[42] We are in agreement with the Court of Appeal that under Article 50(6), "new and compelling evidence" means "evidence which was not available at the 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, a 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 the accused person." (Emphasis added).**

[20]. The applicant bears the burden of proof of existence of new and compelling evidence in a request under article 50(6) of the Constitution. Notable also is that, he is a convicted person, thus, he is without the advantage of presumption of innocence. Of essence, the Applicant should demonstrate that the evidence intended to be adduced:

i) W**as not available at the trial and which despite exercise of due diligence, could not have been availed at the trial** and

ii) W**ould 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.

Applicant's gravamen

[21]. The applicant in his written submission submitted that his case was admitted for retrial on 26/02/2018 and as a result he urges this court to relook the whole evidence. He urged further that he was informed by the forensic expert that the forensic standards of evidence management were not met. He prayed that this court orders the prosecution to supply him with prosecution material including crime scene first report, hand over notes, witness statement, police OB report, Safaricom request requisition form and all previous proceedings.

[22]. According to him, the forensic experts evidence constitutes new and compelling evidence. Further, in his affidavit in support of the application, he avers that the new evidence was not within his knowledge during trial or at any stage during appeal.

Applying the test

[23]. Does these allegations meet the threshold?

[24]. The applicant has filed a number of applications. In the chamber summons application filed on 26/02/2018, the applicant states that he has new witness available and that he wishes to call in evidence of the first report pertaining the report of the complainant.

[25]. In the chamber summons application dated 12/9/2018 the applicant stated that he has new fact and that he has discovered important material that is relevant to the case which was not available to him during primary hearing and appeal stage.

[26]. In the originating notice of motion filed on 12/9/2018 the applicant seeks that the case be heard afresh and that he be supplied with all prosecution materials.

[27]. I have carefully perused the petition of appeal filed before this court and find that all the grounds put forth in the applications now before this court were fully canvassed before this Court in the appeal. For clarity, he claims that he was informed by the forensic expert that the forensic standards of evidence management were not met. Such challenge of evidence already produced in court was a matter for the original trial and appeals thereto, and is not new and compelling evidence in the sense of the law and for purpose of article 50(6)(b) of the Constitution. Accordingly, it is a hyperbole to suggest that such is evidence that; (i) **was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial; and (ii) 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.**

[28]. The Petition for re-sentencing was abandoned by the applicant; that is its fate and is so marked.

[29]. The notice of motion filed on 23/09/2021 seeking for reasonable bond pending hearing and determination of this application has been overtaken by events since this application is now at the judgment stage. It is so ordered.

[30]. In light of all the above, I find and hold that the petitioner herein has not met the conditions of Article 50 (6) of the Constitution to warrant an order for a new trial.

[31]. In the upshot, I find that there is no new and compelling evidence which warrants a new trial herein. The request for a new trial is a perfect candidate for rejection. Accordingly, the application and petition fail and is accordingly dismissed.

[32]. Unless it is specifically allowed, all the applications to which this judgment relates are deemed to have been denied. This judgment be placed in all the other files stated in the judgment. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 23RD DAY OF NOVEMBER, 2021

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F. GIKONYO M.

JUDGE

In the presence of:

1. Applicant

2. Ms. Torosi for Respondent

3. Kasaso - CA