



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. 13 OF 2019

MOHAMMED BARISA GUYO.....PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Petitioner in person

Ms. Sombo for the Respondent

RULING

The reason for this textual petition is to accord the meaning of the rights accorded to the petitioner under Article 50 (6) (a) (b) of the Constitution which 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 persons is entitled to appeal or the person did not appeal within the time allowed to appeal, and

(b) New and compelling evidence has become available.

Various cases have set out the principles under certain justifiable circumstances to denote the concept of compelling and new evidence that would be sufficient to entitle a convicted person a second chance before the High Court. See **(Tom Martin Kibisu v R Supreme Court Petition No. 3 of 2014 eKLR D. J. Lowe & Company Ltd v Banque Indosuez Civil Appeal, Philip Maingi v R {2017} eKLR.**

A key purpose distinguishable on the legal definition that furnishes the test expounded in Article 50 (6) (a) and (b) of the Constitution is for the evidence to tacitly to comprise of the following components:

(a) Relevance, materiality and admissibility in terms of the fundamental principles in the Evidence Act Cap 80 of the Laws of Kenya.

It is required in my view that compelling and new evidence to be grounded on something more than a minimum of probative value. That each single piece of evidence must have a plus value. **(See Patten den v R {1996 – 7} “International journal of Evidence and proof.”** To me not every case should fit this provisions to seek a second bite at the cherry.

The evidence satisfying Article 50 (6) (a) (b) of the Constitution should be evidence that is clear and of a convincing standard that there are serious and substantial issues that motivates the second trial to protect the fundamental rights of the convict.

In constitutional and case law interpretation the meaning and purpose of this provisions are for the convict to provide evidence which satisfies reliability, substantial and highly probative in respect of the issues in contention. Secondly, of necessity is the requirement that the evidence is fresh and was not adduced and could not have been adduced in the earlier trial even with the exercise of reasonable diligence.

Thirdly, the court must consider whether it is in the interest of justice to admit the compelling and new evidence to analyze and appraise to warrant a review of the decision.

The rationale underpinning this section is not to substitute the Judgments of the trial or appeal court with a new decision but instead its meant

to ensure that such trials are within the bounds of Article 50 (6) (a) (b) of the Constitution.

I have subjected the petition to the maximum extent possible in line with the provisions under Article 50 (6) (a) (b) of the Constitution. The evidence in support of the petition as weighed with the record is below the test permitted to adequately sustain the action. Therefore, viewing the evidence as a whole, the petition lacks merit and I find no good ground to interfere with the Judgment of the Court of Appeal.

Accordingly, the petition fails and is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF JANUARY 2020

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R. NYAKUNDI

JUDGE