



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

(Coram: A. C. Mrima, J.)

CONST. CRIMINAL PETITION NO. 37 OF 2019

STEPHEN ODHIAMBO ONYANGO.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein, *Stephen Odhiambo Onyango*, was charged, tried and convicted of the murder of *John Kerario*. The particulars of the information of murder were that the Petitioner murdered *John Kerario* on 26/01/2013 at Kehancha Township within Kuria West District of Migori County.

2. The Petitioner was initially charged in *Kisii High Court Criminal Case No. 11 of 2013*. Upon the establishment of the High Court station at Migori the case was transferred to this Court. The case was assigned *Criminal Case No. 37 of 2014* (hereinafter referred to as '*the criminal case*').

3. The trial was conducted by Majanja, J. At the conclusion of the trial the Petitioner was found guilty as charged and he was convicted. He was subsequently sentenced to suffer death. That was on 16/11/2015.

4. The Petitioner then lodged an appeal before the Court of Appeal at Kisumu. It was *Criminal Appeal No. 4 of 2016* (hereinafter referred to as '*the criminal appeal*'). The appeal was heard by the Court of Appeal. It was partly allowed. The appeal on the conviction was dismissed, but the appeal on sentence was sustained. The death sentence was set-aside and the Petitioner sentenced to 25 years' imprisonment.

5. The Petitioner then opted to exercise his right under **Article 50(6)** of the **Constitution** in seeking for a retrial of the criminal case in the Petition subject of this judgment.

6. The Petition was heard by way of written submissions on the part of the Petitioner. The Petitioner submitted that the basis of the Petition was that he had come across new and compelling evidence. According to the Petitioner he had realized that the evidence of the Doctor who conducted the post mortem examination on the body of *John Kerario* (hereinafter referred to as '*the deceased*') was not in tandem with the rest of the evidence. As such there was a glaring contradiction on the cause of the death of the deceased. To him, on one hand the Doctor opined that the deceased died as a result of injuries sustained by a sharp object and on the other hand there was evidence that the fatal injuries were caused by a gun butt. It was hence submitted that the contradiction was the new and compelling evidence.

7. Learned Counsel **Mr. Kimanathi** for the prosecution opposed the Petition. He submitted that the Petitioner had not satisfied the requirements of **Article 50(6)** of the **Constitution** since he had failed to avail any new evidence. It was further submitted that the alleged contradiction was evidence which was presented before the trial court. The evidence was subjected to cross-examination. Counsel further submitted that the issue was further dealt with by the Court of Appeal in the criminal appeal.

8. It was hence submitted that there was no new and compelling evidence tendered by the Petitioner and that the Petition be dismissed.

9. The Petition is based on **Article 50(6)** of the Constitution. The said provision of the **Constitution** states 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.

10. For the Petitioner to benefit from the above provisions, he must positively demonstrate the following two principles namely that: -

(a) The Petitioner's appeal was dismissed by the highest court to which the Applicant was entitled to appeal to or that the Applicant did not appeal within the time allowed for such an appeal; **and**

(b) The Petitioner has new and compelling evidence relating to the criminal case.

11. Applying the said principles to this case, the Petitioner appealed to the Court of Appeal which was then the highest court on such an appeal. The appeal was unsuccessful. He is therefore within his right to petition under **Article 50(6)** of the **Constitution**.

12. Having so found, the Petitioner must then demonstrate that indeed new and compelling evidence has become available and which evidence ought to be considered by the trial court.

13. What is new and compelling evidence was considered by the highest Court of this land in **Col. Tom Martins Kibisu vs. Republic Sp. Ct. Petition No. 3 of 2014 (2014) eKLR** when the Supreme Court presented 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).

14. The Petitioner was therefore required to demonstrate that the evidence intended to be adduced **was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial** and that the said evidence **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.**

15. I have carefully perused the Petition and the supporting affidavit. I have also perused the proceedings and judgment in the criminal case and the judgment in the criminal appeal.

16. The issue at hand is whether the alleged contradiction in the evidence of the Doctor and the other witnesses on the cause of death amounted to new and compelling evidence. From the holding of the Supreme Court in **Col. Tom Martins Kibisu vs. Republic** case (supra) the alleged contradiction does not amount to new and compelling evidence. I say so because the evidence was available at the trial. The Petitioner countered the evidence through cross-examination by his Counsel. The evidence was also dealt with by the trial Court in its judgment. Further, the evidence was again re-considered by the Court of Appeal. The Court was satisfied on the cause of death and the appeal on the conviction was disallowed. The evidence was therefore not new.

17. I agree with Mr. Kimanthi that the Petitioner did not satisfy the requirements of **Article 50(6)** of the **Constitution**. This Court is not persuaded that the Petitioner demonstrated that he was in possession of any new and compelling evidence within the meaning of the law.

18. The foregone is sufficient to dispose of the Petition. The upshot is that the Petition cannot succeed. The same is hereby dismissed.

DELIVERED, DATED and SIGNED at MIGORI this 26th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Stephen Odhiambo Onyango, the Petitioner in person.

Mr. Joseph Kimanthi, Learned Principal Prosecution Counsel instructed by the Office of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant