



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL PETITION NO. 5 OF 2016**

**NYONGESA MAKOKHA SIRENGO.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **Nyongesa Makokha Sirengo**, the petitioner herein, was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code in Busia Chief Magistrate's Court criminal case No. 416 of 2010. He was sentenced to death. He appealed to the High court and to the Court of Appeal where his appeals were dismissed. He now petitions this court for and order for resentencing. His petition is brought under Articles 50 (6), (a) & (b), 165 (3), (6) and (7) of the Constitution of Kenya. It is premised on the following one ground:

a) That petitioner has new and compelling evidence.

2. **Article 50 (6) (a) & (b) of the Constitution of Kenya provides as follow:**

**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.**

In the instant case the petitioner appealed to both the High Court and the Court of Appeal and his appeals were dismissed. He has however urged the court to find that new and compelling evidence has become available. He attached copies of Police Occurrence Book extracts.

3. The prosecution opposed the application on grounds that the petitioner is on a fishing expedition after exhausting his right to appeal and that the petition does not meet the threshold.

4. In **Maurice Odhiambo Wesonga V Republic [2006]** eKLR the Court while interpreting Article 50 (6) said:

**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.....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. [ Emphasis added]**

5. In the case of **Rogers Ondieki Nyakundi vs. State (2012)** eKLR the learned judge held that in order to successfully establish that one has new and compelling evidence in an application under Article 50(6) of the Constitution, it must be shown that:

**a. There is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of the hearing of the two appeals.**

**b. The evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching.**

**Such evidence must not only be favourable to the Petitioner but it must be such evidence as is likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts.**

6. The Police Occurrence Book extract in respect of entry 19 at Busia Police Station dated 30<sup>th</sup> January 2010 is as follows:

**REPORT MADE: to the station is one male adult namely SILVANUS ODUOR C/O Nambale reports that on 30<sup>th</sup> January 2010 at around 11 a.m. as he was on his way to Funyula from Matayos a man named Stephen Nyongesa stopped him (reportee (sic)) tricked him and took away the motor cycle Reg. No. KMCG 569M which the reportee (sic) was riding until this minute the suspect to be seen (sic). Now need police assist. Signed P.C Langat.**

Another Police Occurrence Book extract in respect of entry 66 of 7<sup>th</sup> March 2010 but the station is not named states:

**RETURN PRISONER IN: IP Kipsang, Cpl. Ochago, P.C. Njoka now book return to station and hand in one male prisoner Nyongesa Makokha Sirengo wanted by Busia Police station for the offence of stealing motor cycle. Now placed in cells.**

7. These two extracts of the police Occurrence Book contradict the charge that was preferred. The charge against the petitioner read:

Robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.

**Nyongesa Makokha Sirengo alias Stephen:**

**Victorine Atieno: On the 30<sup>th</sup> day of January 2010 at Rakite village, Matayos Division in Busia District within Western Province jointly while armed with a crude weapon namely knife, robbed SILVANUS ODUORI OKWARA of a motor cycle registration number KMCG 569M make Bajaj Boxer valued at Kshs.79,000/= and during the time of such robbery, threatened to use actual violence to the said SILVANUS ODUORI OKWARA.**

8. Two important issues emerge from the contradiction between the report made and the charge. One, the complainant reported that the petitioner tricked him and no where did he report a robbery. The Police Occurrence Book extract in respect of entry 66 of 7<sup>th</sup> March 2010 confirmed that as at the date of the entry of the occurrence Book the events of 7<sup>th</sup> March 2010, the police were holding him for theft and not robbery.

9. These two extracts of the Police Occurrence Book were in the possession of the police. They decided to withhold the information from the court. Had this information been volunteered to the trial court, then he could not have been convicted for the offence of robbery. Equally, had this evidence been availed on appeal, it is unlikely that the conviction would have been sustained. The offence was clearly that of theft. This evidence therefore qualifies as new and compelling.

10. It would not be just and fair for me to order a retrial. He has already served a prison term more than he would have, had he been sentenced for theft. In the interest of justice, I quash the conviction for the offence of robbery and set aside the sentence imposed therein. The petitioner is set at liberty unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 28<sup>th</sup> day of March, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE.**