



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO. 53 OF 2017

BETWEEN

STEPHEN ONDIEKI ASIRI.....1ST PETITIONER

RICAHRD ASIRI MOREMO.....2ND PETITIONER

JOSEPH ONGOTO ONGOTO.....3RD PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

**IN THE MATTER OF HCCRA NO. 100 OF 2014 AT THE COURT OF APPEAL EMANATING FROM HCCR NO. 28 OF 2008
AT THE HIGH COURT AT KISII**

AND

IN THE MATTER OF ARTICLES 50 (6) (A) AND (B), 22 (1) 23 (1) OF THE CONSTITUTION

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013.**

JUDGMENT

1. This is a petition filed by the 3 petitioners who were convicted for the offence of murder by the High Court of Kisii on the 14th day of June 2012. The said conviction was upheld by the Court of Appeal in its judgment dated the 12th February 2016. The petitioners in their petition aver that;

i. They have discovered new and compelling evidence that go to the root of the conviction and if this evidence had been considered then they would not have been convicted.

ii. That the new evidence is the revelation by the only identifying witness, Joseph Gisemba Ondieki that on the material date, he arrived at the scene after the attack of the deceased and not during the attack as he stated in court.

iii. That despite the fact that it was stated to court that there were other members of the public at the scene and the incidence happened at 3pm, only the above named Joseph Gisemba Ondieki, the son of the deceased was called as an identifying witness and if his testimony was unreliable as it now turns out, then the Petitioners right to a fair trial was seriously prejudiced and they were wrongly convicted.

iv. That if this new evidence is considered in light of the fact that the single identifying witness was mistaken, then there is no way he could have seen the petitioners attack the deceased on the stated day.

2. In support of the petition the petitioners have filed the affidavit of Joseph Gisemba Ondieki and the judgments of the High Court and Court of Appeal. Joseph deposes that at the trial he was PW2 and that he testified seeing the petitioners among the crowd that lynched his father the deceased on suspicion that he practised witchcraft. That he now wishes to inform the court that what he testified to on the day was not entirely correct. That though his father was lynched by a mob and although the petitioners were present, they did not at all participate in the attack on his father. That infact the 1st and 2nd petitioners tried to prevent the huge crowd of people from lynching his father but they

were unsuccessful. That he heard the 1st petitioner pleading with the mob to take his father to the chief or police station and that the 2nd petitioner arrived at the scene after the deceased had been burnt to death. That the 3 petitioners did not participate in the killing of his father. That the reason he gave the information that was not true to the police and to court was because he was bitter about the death of his father especially since it was the son of the 1st accused who had claimed that he had been abducted by witches and the crowd pointed an accusing finger at my father leading to his lynching. That since he gave the testimony his life has not been the same and he has suffered a lot of guilt for sending 3 innocent people to incarceration for a crime they did not commit and that he is not recanting his testimony merely because of guilt but also because he cannot continue to hide the truth about their involvement.

3. In the petitioner's submissions filed on the 19th September 2018, it is submitted that they have come to court under Article 50 (6) (a) and (b) seeking a retrial of their case because of new and compelling evidence that has become available. They refer to the affidavit of Joseph Gisemba Ondieki. The petitioner rely on **Petition No. 3 of 2014 Lt. Col. Tom Martins Kibisu vs. Republic [2014] eKLR** where the Supreme Court defined what is new and compelling evidence. that the affidavit of Joseph has new evidence but also compelling because it is material to, capable of affecting the charges and the conviction entered because had he told the truth the 3 petitioners would not have been convicted. That Joseph is admitting to perjury and is stating categorically that he lied not mistaken and that he did this so that the petitioners could be convicted for the murder of his father. That having admitted that he lied the petitioners were wrongly convicted. They sought to have the court look objectively at the new evidence by PW2 and to allow the application under Article 50 (6) (a) and (b).

4. The respondent in reply submitted that recanted evidence does not necessarily become new evidence because no one knows Joseph's motive for swearing the affidavit and he is now not believable when he says that he initially lied on oath when he saw the petitioners murder his father. That in **Petition No. 3 of 2014(supra)** the Supreme Court stated that a court considering what evidence is new and compelling for a given case must ascertain that it is prima facie material or capable of affecting or varying the subject charges, the criminal process, the conviction entered, or sentence passed against an accused. That the affidavit of Joseph does not necessarily vary the conviction and the sentence passed on the petitioners, as he is the same person who testified to witnessing the murder and is again stating he lied. That the affidavit is not new evidence to warrant court ordering a retrial.

5. The issue for determination is whether the petitioners have made a case for retrial under Article 50(6) (a) and (b) of the Constitution on the basis that there is new and compelling evidence. Article 50 (6) (a) and (b) 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

6. The petitioners have to demonstrate their appeal was dismissed by the highest court dismissed to which the petitioners was entitled to appeal to or that the petitioners did not appeal within the time allowed for such an appeal and that the petitioners have new and compelling evidence that has become available. The petitioners appealed to the Court of Appeal and their appeal was dismissed.

7. The petitioners must demonstrate that they have new and compelling evidence that has become available and which ought to be considered by this court. What is new and compelling evidence was considered by Supreme Court in the case of **Col. Tom Martins Kibisu vs. Republic Sp. Ct. Petition No. 3 of 2014 (supra)** the Supreme Court pronounced itself as follows-

“[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.”

8. The petitioners are required to demonstrate that evidence they now state is new and compelling 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.

9. I have considered the judgments of the High Court and the Court of Appeal, the conviction of the High Court which was upheld by the Court of Appeal was solely on the evidence of Joseph, who now claims that he did not tell the high court the truth. Joseph in his affidavit is recanting his earlier evidence. This in my view is not new and compelling evidence, nor is it evidence that can be adduced at a retrial. The application has no merit and it's dismissed.

Dated signed and delivered at Kisii this 27th day of March 2019

R.E.OUGO

JUDGE

In the presence of;

1st Petitioner Present in person

2nd Petitioner Present in person

3rd Petitioner Present in person

Mr. Otieno Senior Prosecution Counsel/Respondent

Rael Court clerk