REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. NO. 360 OF 2017.

CLEMENT MUNYAO KATIKU.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. Clement Munyao Katiku, hereafter the Applicant, filed the present Petition on 18th July, 2017. He amended the same on 20th November, 2018 and focused in seeking one prayer, namely; that the court be pleased to order a retrial under the provisions of Article 50(6) of the Constitution.

2. The Applicant canvassed the Petition through written submissions filed on 31st December, 2018, as well as oral submissions when the matter came up for hearing on 25th September, 2019. His submissions revolved around the issue of a mobile phone make Nokia 1200 which he submitted was relied upon by the High Court and Court of Appeal to convict him. He submitted that from the findings of the trial court it was apparent that there was a mix up in the phone model which led to his wrongful conviction on the basis of being in possession of stolen items. He submitted that it was also clear from the evidence that the phone that was adduced in court was different from the phone that was described by the witnesses, primarily with regards to its colour. He submitted that the trial court had distorted the facts of the case leading to his conviction. Further, he urged the court to consider Kilimani Police Station Occurrence Book entry number 70/13/11/2009.

3. He relied on a number of cases to buttress his submission, namely; **Geoffrey Mwangi Githinji *v.* Republic[2015]eKLR, Hassan Mohamed Namwiba *v.* Republic[2014]eKLR, Protus Buliba Shikuku *v.* Republic[2012]eKLR** and **Rodgers Ondiek Nyakundi & 2 others *v.* Republic[2012]eKLR.**

4. In further urging the court to order a retrial the Petitioner submitted that since his incarceration he was reformed and he produced a number of certificates to buttress this submission. Further, he submitted that he was a man of advanced age, being 63 years old, and that his family was suffering in his absence.

5. Learned State Counsel, Mr. Momanyi for the Respondent opposed the application. He submitted that the Applicant was accorded a fair trial during the trial and on appeal both in the High Court and Court of Appeal before being convicted on the basis of the application of the doctrine of the doctrine of recent possession. That Article 50(6) of the Constitution contemplated a retrial only where there is new and compelling evidence and in the present case the Applicant had not demonstrated that the issues raised were new as they were canvassed and determined by the trial court and the appellate courts. He therefore urged the court to dismiss the application.

6. I have considered the submissions of the respective parties. The main issue for determination is whether an order for a retrial is warrant in this case under the scope of the application of Article 50(6) of the Constitution. It provides that:

> ***"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 time allowed for the appeal; and***
>
> **(b)** ***new and compelling evidence has become available."***

7. From the provision it is clear that a necessary precursor to the exercise of the powers set out under the Article is ensuring that the Applicant has exhausted the avenues of appeal. This is either having their appeal dismissed by the highest court or by failing to appeal within the stipulated timelines. In the present case, the Applicant and other co-accused had their day before the Court of Appeal at Nairobi, in **Criminal Appeal No. 88 of 2014**, reported as **Janet Karamana Gituma & 5 others *v.* Republic[2015]eKLR,** and his appeal was

dismissed.

8. It is trite that there is no appeal as of right to the Supreme Court of Kenya and the Applicant has therefore met the criteria laid out in sub-article (a).This court is accordingly called upon to test the evidence before it and evaluate and determine whether it constitutes *"new and compelling*" evidence.

9. With regards to what is characterized as "*new"* this court relies on the definition given in the Black's Law Dictionary, 9th Edition, namely:

> ***". ….recently discovered .***"

10. The issue of what constitutes '*compelling evidence'* has been considered a number of times. In a succinct manner of what constitutes compelling evidence can be found at Section 78(3) of the English Criminal Justice Act, 2003. Although the provision deals with an application for a retrial by the prosecution, it may set an applicable standard even in an application by the accused. It provides as under:

> ***"(3) Evidence is compelling if-***
>
> ***(a) it is reliable***
>
> ***(b) it is substantial, and***
>
> ***(c) in the context of the outstanding issues, it appears highly probative…*** *"*

11. It is clear from the submissions of the Applicant that the evidence he wishes to adduce is highly probative as it is directly linked to the reason for his conviction under the doctrine of recent possession of stolen goods. The Applicant was adjudged to have been in possession of a mobile phone that was stolen during the incident the subject matter of the trial. However, he submits that mobile phone that was adduced in evidence was not the phone that was stolen and alternatively that the phone in question was not the phone stolen in light of contradictory evidence relating to a Nokia 1200 and Nokia 1208. This explanation is no doubt substantial as it calls into question the prudence of relying on the circumstantial evidence that led to his conviction. But is it "new" in the meaning accorded by Article 50(6)(b)

12. It is also clear that the submissions that have been raised before this court were considered by the appellate courts. A cursory look at the judgment of the Court of Appeal indicates that the issues of the phone make and colour were raised by learned Counsel. Mr. Nyachoti who acted for the Applicant. See: Paragraph 26. Further, it is clear that the evidence was considered when the Court made its findings. See: Paragraphs 48-51. That being the case this Court is estopped from considering the evidence as the Court of Appeal has considered it and pronounced itself on its veracity.

13. Therefore, the consideration of this evidence by the Court of Appeal fatally limits the Applicant's reliance on the provisions of Article 50(6).

14. The Applicant also urged the court to consider Kilimani Occurrence Book entry 70/13/11/2009 which detailed the booking of two prisoners who would later give evidence against the Applicant as to the source of the phone at the center of the case. The court was not addressed on why the evidence in question was compelling and its own attempts to decipher the relevance of the Occurrence Book entry have been futile.

15. That being said this court hereby finds that the Applicant has not demonstrated why the matter should be referred for a retrial under Article 50(6) of the Constitution. His application is therefore hereby dismissed.

16. However, all is not lost to the Applicant who by dint of the sentence that was passed by the Court of Appeal may now apply for resentencing in light of the Supreme Court' s decision in the case of **Francis Muruatetu & Another v Republic (2017) e KLR.**

Dated and Delivered at Nairobi this 30th day of October, 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Applicant in person*
2. *Mr. Momanyi for the Respondent.*