



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 5 OF 2017

IN THE MATTER OF ARTICLES 50(6)

OF THE CONSTITUTION OF KENYA

BETWEEN

BOND DAVID ONYANGO.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner, **Bond David Onyango**, (hereinafter the petitioner) was convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the Penal Code in **Maseno Criminal Case No. 765 of 2003**. He lodged an appeal in the High Court, being **High Court Criminal Appeal No. 143 of 2005** and the conviction and sentence were upheld. He then appeal to the **Court of Appeal Criminal Appeal No.312 of 2007**. The Court of Appeal similarly upheld his conviction.

The Petitioner's Case

2. The petitioner's case is contained in the Petition dated 9th March, 2017 supported by the affidavit in support sworn by the petitioner on the same date. Together with the Petition, petitioner filed a Notice of Motion seeking that he be provided with:

i. **OB No. 21/07/10/02**

ii. **OB No. 41/07/10/02**

iii. **OB No. 04/26/12/03**

iv. **Inventory of recovered goods**

3. **OB No. 21/07/10/02** and **No. 41/07/10/02** were availed and OCS Maseno Police Station explained that he could not tell the whereabouts of **OB No. 04/26/12/03** and **Inventory of recovered goods** since they were not handed over to him when he took over the station in April 2016.

4. The gist of the petitioner's case is that the trial court convicted him, and the appellate courts upheld a conviction, that was based on **OB No. 04/26/12/03**. The petitioner challenges the existence **OB 04/26/12/03** on the charge sheet introduced new evidence for the reason that his defence was based on **OB No. 21/07/10/02**.

5. The petitioner also submits that failure by the respondent to avail **OB No. 04/26/12/03** and **Inventory of recovered goods** was a contravention of his constitutional right to Access to Information.

6. Petitioner submitted that this petition was the only option open to him since his appeal had been dismissed by the Court of Appeal. In support thereof, he relied on **Michael Ochieng' Odongo V Republic [2008] eKLR** where the court held that the highest court which could deal with such an appeal was the Court of Appeal.

7. Petitioner submitted that **OB No. 04/26/12/03** was new and compelling evidence that was not available to him at the trial and on this end

relied on the case of **Tom Martins Kibisu V Republic [2012] eKLR** that defined New and Compellable Evidence.

8. The petitioner also relied on **GeoffreyMwangiGithinji v Republic [2015]eKLR** and **Lawrence MutukuMusyoka v Republic [2010] eKLR** whose petitions had succeeded. **Francis Muchiri Joseph v Republic [2014] eKLR** dealt with failure by a complainant to name his assailant at the earliest opportunity, **Michael NasiaiSabatia v Republic [2017]eKLR** dealt with evidence of recognition, **Zebedeo John OporevI.E.B.C& 2 others [2017] eKLR**reiterated that right to information was part of human rights and freedoms while the court commuted the sentence imposed to period served in **SabastianOkweroMrefu v Republic [2014] eKLR**.

The Respondent's Case

9. The respondent wholly relied on the reply to the Petition dated 6th April, 2017.

10.It is the respondent's case that the prosecution proved their case against the petitioner beyond any reasonable doubt and discharged its burden, a fact which was reaffirmed by the High Court and the Court of Appeal. That the petitioner was therefore accorded a fair hearing as provided by the Constitution was convicted in accordance with the law and that **OB No. 04/26/12/03** and **Inventory of recovered goods** would not have had any influence on the result of the case.

Determination

11. To advance his case for the proposition that there was a reasonable probability that the outcome of the trial would have been different if the evidence had been disclosed, the petitioner has made lengthy but somewhat convoluted submissions on the alleged violation of his rights and the relief that he seeks from the court. A close examination of the submissions shows that the gravamen of the petitioner's grievance is that his defence was based on **OB No. 21/07/10/02** while the charge sheet refers to **OB No. 04/26/12/03**.

12. The issues that fall for determination are as follows:

- i. Whether the petitioner has met the threshold for ordering a new trial under Article 50 (6) of the Constitution.**
- ii. Whether there has been a violation of the petitioner's right to information under Article 35 (1) (a) of the Constitution.**

Whether the Petitioner has met the threshold for ordering a new trial under Article 50 (6) of the Constitution.

13. **Article 50** of the **Constitution** provides that:

(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.

14. The issue of the circumstances in which the provisions of Article 50(6) will apply has been considered in several decisions. The Supreme Court approved the Court of Appeal definition of new and compelling evidence in the case of **Tom Martins Kibisuvs Republic [2014] eKLR** as:-

"Evidence that was not available at the time of the trial or could not have been available upon exercise of due diligence, and evidence sufficiently weighty that if it was available to the trial or the appellate court, the conviction would probably not have been sustained."

15. As stated herein above, petitioner has appealed against his sentence to the High Court and the Court of Appeal. In the circumstances, therefore, I am satisfied that the petitioner has met the first criteria set in Article 50(6) as he has exhausted the appeal mechanism open to him.

Whether there is New and Compelling Evidence to Warrant a New Trial

16. The question, however, is whether he has met the second, and in my view, more critical criteria under Article 50(6).

The core of the petitioner's case is that he saw **OB 04/26/12/2003** for the first time at the tail end of the appeal in the Court of Appeal and that **Inventory of recovered goods** was not produced in any of the courts. He goes further to challenge the evidence of identification.

17. The operative words in the Constitution are **"new and compelling evidence"** if a petitioner's case is to warrant a retrial. So what does the phrase **"new and compelling evidence"** mean? Black's **Law Dictionary, 8th Edition**, defines **"new"** as: **"recently discovered, recently come into being."** **Taxmann's Law Dictionary** states that the word **"new"** must be construed as meaning **"not existing before, newly made, or brought into existence for the first time."** The **Concise Oxford English Dictionary 9th Edition** defines **compelling** as **"powerfully evoking attention or admiration."**

18. In my considered view, **new and compelling evidence"** implies that the evidence said to be new and compelling must have been recently

discovered or has just come into being and is evidence that will evoke attention and rouse a great deal of interest.

19. Records from the 3 courts that tried the petitioner clearly show that the issue of identification and recovery of the stolen goods was addressed. This court declines to render an opinion on the two issues because to do so would amount to sitting on appeal in the Court of Appeal decision.

20. The charge sheet filed together with the petition clearly bears **OB 04/26/12/2003**. There is no evidence that this was not the same charge sheet presented to the court in **Maseno Criminal Case No. 765 of 2003**. There is also no evidence that this was not the same charge sheet presented together with the record of appeal in **High Court Criminal Appeal No. 143 of 2005**.

21. It is worthy to note that the petitioner's appeal was dismissed by the Court of Appeal on 5th December, 2008. It is at the trial of that appeal that the petitioner alleges to have discovered the existence of **OB 04/26/12/2003**. The petitioner does not explain why that issue was not raised in **Misc. Criminal Application No. 12 of 2012** where the court observed that he was "**making a trial and error attempt to challenge what had already been passed by the three courts**".

22. It was not the intention of Article 50(6) of the Constitution that petitioners engage in filing of a multiplicity of petitions as is the case here. This court declines to sanction such actions which amount to an abuse of the court process. I therefore find and hold that the petitioner has not met the second test under Article 50(6) of the Constitution in that there is no new and compelling evidence to warrant a new trial. His petition therefore has no merit.

Violation of the Petitioner's Right to Information

23. The petitioner has also premised his petition and motion on Article 35 (1) (a) of the Constitution, which provides that:

1. Every citizen has the right of access to –

a. Information held by the State; ...

24. The OCS Maseno Police Station explained that he could not tell the whereabouts of **OB No. 04/26/12/03** and **Inventory of recovered goods** since they were not handed over to him when he took over the station in April 2016.

25. As observed hereinabove, the petitioner has not satisfied the court that **OB No. 04/26/12/03** and **Inventory of recovered goods** contained any new evidence other than what was presented in the trial and the subsequent appeals to warrant a new trial. There is no evidence that the state was deliberately withholding information and I therefore find and hold that the petitioner's right to information has not been violated.

26. In light of my findings on the issues set out above, I find that the petition has no merit it is hereby dismissed with no order as to costs.

DATED AND DELIVERED THIS 15th DAY OF February 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix & Carolyne

Petitioner - Present

For the Petitioner– Mr Musumba

For the Respondent -Ms Wafula