



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CRIMINAL APPLN. /PETITION NO. 38 OF 2016

CHACHA MARWA JOSPHAT.....APPLICANT/PETITIONER

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Chacha Marwa Josphat**, the Applicant/Petitioner herein, was charged, tried and convicted of the offences of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya in **KehanCHA Senior Resident Magistrate's Court Criminal Case No. 1672 of 2009** (hereinafter referred to as '***the criminal case***'). He was subsequently sentenced to suffer death.

2. The Applicant then lodged an appeal before the High Court which was dismissed. His further appeal to the Court of Appeal was also unsuccessful. He has now petitioned this Court for a retrial of the criminal case under **Article 50(6)** of the **Constitution**. That was vide the Notice of Motion filed on 12/06/2016 which was supported by the Applicant's Affidavit. The hearing of the application delayed due to various attempts and efforts in getting the records before the three Courts. Eventually the matter was heard.

3. At the hearing of the application the Applicant appeared in person while **Miss. Owenga** Learned State Counsel appeared for the State. The Applicant relied on his written and filed submissions in urging this Court to allow his application whereas the State opposed the application orally. The Applicant submits that he has by now gathered additional and compelling evidence on which this Court ought to order a retrial. He contends that he was not accorded the services of an Advocate despite the gravity of the charges he faced, that he was not provided with the Occurrence Book entry on the first report, that there were unreconciled inconsistencies between the witness statements and the evidence tendered before the trial court, that crucial witnesses did not testify, that the Charge Sheet was defective and that no medical evidence was adduced.

4. On enquiry by this Court the Applicant disclosed that he had raised all the issues in both appellate Courts.

5. That being the background of this application/Petition, I will now subject the application to the provisions of the said **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."

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

(a) The Applicant'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 Applicant has new and compelling evidence relating to the criminal case.

7. Since the Applicant's second appeal at the Court of Appeal was unsuccessful, which was then the highest Court in the land, this application is hence competent and ought to be considered on its merit. Having said so, the Applicant must now demonstrate that indeed new and compelling evidence has become available and which evidence ought to be tendered for consideration by the trial court.

8. What is new and compelling evidence was considered by the now highest Court of this land in the case of **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).

9. The Applicant is 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, is of high probative value and capable of belief, and which, if it had been adduced at the trial it would probably have led to a different verdict.***

10. It must be clear that ***"new and compelling evidence"*** is not and does not involve the rehearing of the appeal. I will now deal with the first limb as to whether the intended evidence was available at the trial and which despite exercise of due diligence, could not have been availed. I have carefully perused the record before me. I also asked the Applicant at the hearing who confirmed that he had unsuccessfully raised all the issues in this application before the two appellate Courts. Therefore, the intended evidence is not new and as such the Applicant's contention is lacking in basis and is hereby rejected.

11. Given that there is no new evidence for consideration as all what is before this Court has already been subjected to legal scrutiny by the two appellate Courts, the application cannot stand. From the analysis this Court now returns the verdict that the Applicant has failed to prove the existence of 'new and compelling evidence' as to succeed in his application.

12. Consequently, the Notice of Motion filed on 12/06/2016 be and is hereby dismissed.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of April 2018

A. C. MRIMA

JUDGE

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

Chacha Marwa Josphat - Applicant in person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Prosecutor.

Miss Nyauke – Court Assistant.