



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 335 OF 2017

IN THE MATTER OF ARTICLE 21 (1) IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 50 (1) (2) (10),(G),(H),(40 (6) (A) & (B) OF THE CONSTITUTION OF KENYA,2010 AND SECTION 72 (30 (B) (B) & (5) OF THE REPEALED CONSTITUTION

AND

IN THE MATTER OF SECTION 26 (3) OF THE CRIMINAL PROCEDURE CODE, CAP 75, LAWS OF KENYA

AND

IN THE MATTER OF SECTION 311 (5) OF THE PENAL CODE, CAP 63,LAWS OF KENYA

AND

IN THE MATTER OF SECTION 63 (3) OF THE EVIDENCE ACT, CAP 80, LAWS OF KENYA AND IN THE MATTER OF CRIMINAL CASE FILE NUMBER 3618 OF 2014, REPUBLIC VS PETER KARIUKI MANTHI, KIBERA CHIEF MAGISTRATES COURT.

BETWEEN PETER KARIUKI MANTHI.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1STRESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2NDRESPONDENT

**JUDGMENT**

1. I find it appropriate to start by highlighting a fundamental issue, namely; the function and purpose of pleadings. This Petition was prepared by an advocate, but with tremendous respect, it does not conform to the provisions of Rule **10** of *The constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*<sup>[1]</sup> which provides as follows:-

**10. (1)** *An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.*

*(2) The petition shall disclose the following—*

*(a) the petitioner’s name and address;*

*(b) the facts relied upon;*

*(c) the constitutional provision violated;*

*(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;*

*(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;*

*(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and*

*(g) the relief sought by the petitioner.*

**(3)** Subject to rules **9** and **10**, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

2. Rule **10 (3)** above allows the court to admit informal documentation in matters seeking redress for violation of constitutional rights. However, I must point out that this Petition does not conform to the above provisions.

3. Perhaps I should recall the function of pleadings, an issue I have addressed in several of my previous decisions. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court [2] where Vickery J said this of the principles of good pleading:-

*"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.*

*... Elegance is the simplicity found on the far side of complexity.*

*While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.*

*Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.*

*Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination. [3] (Emphasis supplied)*

4. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). Material facts are only those relied on to establish the essential elements of the cause of action. A pleading should not be so prolix that the opposite party or the Court is unable to ascertain with precision the causes of action and the material facts that are alleged.

5. Despite the shortcomings in the Petition, the Petitioners supporting Affidavit offers some clarity on the Petitioners claim. He avers that he was arrested on **14<sup>th</sup>** April 2004 at Kisii Town, was charged with the offence of Robbery with violence contrary to Section **296 (2)** of the Penal Code [4] in Criminal Case Number **3618** of 2004, Kibera and was convicted of the said offence on **20<sup>th</sup>** February 2008 and sentenced to suffer death.

6. He avers that he was unrepresented during the trial and he was not notified of his right to legal representation at the expense of the state. He also avers that the complainant, a one **Dominic** has since disclosed to him that he could not recall his assailants who robbed him and that he was threatened by a police officer that if he would be prosecuted with the offence of theft of a motor vehicle if he refused to testify against him. He also avers that his appeal against the conviction both in the High Court and the Court of Appeal were dismissed, hence, he has exhausted his rights of appeal. He seeks a review of the said conviction on two grounds, namely, he was not informed of the right to legal representation and that he was subjected to illegally obtained evidence.

7. In support of his Petition in an affidavit sworn by a one **Dominic Kihuri Muriuki** dated **20<sup>th</sup>** June 2017, who was a prosecution witness at the criminal trial. He avers that he was threatened by a CIP Mutua with being charged with theft of a motor vehicle if he refused to be a prosecution witness. He alleges that he was exposed to physical and psychological torture while in custody and that had not been threatened, he could not have claimed that he could identify the Petitioner.

### **Second Respondents' Replying Affidavit**

8. **Jalson Makori**, a senior Principal Prosecution Counsel in the Office of the DPP swore the Replying Affidavit dated **24<sup>th</sup>** August 2017. He avers that the Petitioner was accorded a fair trial both at the lower court, the High Court and the Court of Appeal. He avers that the Petitioner was represented by a **Mr. Memusi** advocate as evidenced by the court record of **16<sup>th</sup>** October 2007, a **Mr. Mungaro** Advocate, as shown by the court record of **7<sup>th</sup>** November 2007 and a **Mr. Ochiel** as recorded on **14<sup>th</sup>** December 2007, hence it's not true that the Petitioner was not represented. He also avers that the basis of the conviction was not entirely the evidence of the said **Dominic Kihuri Muriuki** but on the doctrine of recent possession, and referred to the Petitioners mitigation whereby he sought leniency on grounds that he was a first offender. He avers that there is no new and compelling evidence.

### **Petitioners' Replying Affidavit**

9. In his Replying affidavit, the Petitioner averred that the charge sheet was defective for want of description of the weapon and for lack of signature and a stamp contrary to Section 89 of the Criminal Procedure Code. [5] This averment warrants further interrogation by the court in that it raises totally new issues not pleaded in the Petition. Similarly, on record is the Petitioners' Advocates' supplementary submissions filed on **31<sup>st</sup>** October 2017. He argues that Section **296 (1)** and **(2)** of the Penal Code [6] are ambiguous. Again this is a new issue not grounded in the Petition. Further, in his supplementary submissions filed on **22<sup>nd</sup>** December 2017, the Petitioners advocate argued that mitigation is not part of trial process and that the mandatory death sentence is contrary the constitution. Again, these matters are not grounded on the Petition.

10. All the above issues were not pleaded in the Petition or the supporting Affidavit. It is trite that parties are bound by their pleadings. In any event, whether or not the charge sheet was defective is a matter for appeal not for this Petition. Secondly, the alleged ambiguity or otherwise of the above provisions or whether mitigation is part of the trial process or the constitutionality or otherwise of the death penalty are substantive issues that cannot be introduced in this Petition by way of supplementary Affidavits or supplementary submissions. Such issues ought to have been pleaded in the Petition to afford the Respondents the opportunity to respond. The object of pleadings is to define the issues. And parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry.<sup>[7]</sup>

11. I now address the core issue in this Petition namely, whether or not the Petitioner has established a case for the court to order a retrial under Article 50 (6) of the Constitution.

12. The Petitioners counsel submitted that the basis of the Petition is denial of legal representation which resulted in substantial injustice.<sup>[8]</sup>In my view, this ought to have been a ground of appeal. It is not a new matter to fall within the purview of Article 50 (6) of the Constitution.

13. The Petitioner also alleges that the evidence relied upon was illegally obtained which information is new and compelling evidence. He placed reliance on the affidavit of **Dominic Kihuri Muriuki** referred to above.

14. **Mr. Ogosso** for the AG submitted that the evidence contained in the Affidavit of **Dominic Kihuri Muriuki** meets the said criteria for new evidence and urged the court to exercise its discretion and order a retrial.

15. **Mr. Makori** for the DPP submitted that in order for a Petition to succeed under Article 50 (6), it must be established that new and compelling evidence has become available.<sup>[9]</sup>He also argued that the evidence of **Dominic Kihuri Muriuki** is not credible since the lower court treated him as an accomplice.

### Determination

16. Article 50 (6) (a) & (b) of the Constitution postulates 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; and*

*(b) new and compelling evidence has become available.*

17. Sub-article (a) contemplates two scenarios, namely, where a person has exhausted his rights of appeal to the highest court in the land or where the person did not appeal within the time allowed. In both scenarios there must be new and compelling evidence.

18. I have carefully studied the submissions by the petitioner and counsel for the Respondents together with all the authorities cited. The objective of the criminal justice process is that after a fair trial there should be a true verdict. So far as humanly possible, there should be no wrongful convictions, and where they occur, or if new evidence emerges which undermines the safety of a conviction, they will be quashed and re-trials may be ordered.<sup>[10]</sup>

19. The question, however, is whether the petitioner has met the above conditions which form a critical criteria under Article 50(6). The circumstances under which the provisions of Article 50 (6) will apply were considered in several decisions of this court. In *Maurice Odhiambo Wesonga -vs- Republic*,<sup>[11]</sup> the court noted:-

*"...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 reached." (Emphasis added)*

20. "New" evidence for the purposes of Article 50 (6) is evidence not adduced in the previous proceedings. "Compelling" means evidence which is reliable, substantial and highly probative of the case in the context of the outstanding issues, that is the issues which were in dispute in the first trial.<sup>[12]</sup>

21. The petitioner's case is that **Dominic Kihuri Muriuki** has disclosed that he was compelled to testify. The first question that arises is whether the affidavit relied upon meets the above tests. It must be shown that the evidence is credible. Nothing has been stated about the credibility of this "witness."

22. Only two scenarios can be true if at all the affidavit is sworn by the said **Dominic Kihuri Muriuki** is genuine. Either, (a) he lied in the lower or he was compelled to lie; or (b) he is lying to this court. This matter proceeded by way of affidavits and submissions, hence the court did not have the benefit of examining the deponent to form an independent opinion on this crucial issue. From the record in the lower court, he gave fairly detailed evidence. The matter went to the High Court and the Court the Appeal. Years later, he wants the court to believe that the statements he recorded at the police station and the detailed evidence he gave in court was not voluntary.

23. The credibility of this witness must be beyond reproach if the court is to rely on the affidavit. The evidence in the Affidavit must be compelling and impeaching. The operative words in Article 50 (6) (b) of the Constitution are “new and compelling evidence” if a petitioner’s case is to warrant a retrial. *Black’s Law Dictionary*, [13] defines “new” as:- “recently discovered, recently come into being.”

24. *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,” and in contradistinction and antithesis of the word “used”. [14]

25. The *Concise Oxford English Dictionary* [15] defines *compelling* as “powerfully evoking attention or admiration.” This definition was also adopted in the case of *Rodgers Ondiek Nyakundi and 2 Others -vs- Republic* [16]

26. This definition implies that the evidence said to be new and compelling must have been recently discovered or has just come into being and must be evidence that will evoke attention and rouse a great deal of interest.

27. I have previously stated the need to appreciate that a difficult balancing exercise is required in determining what amounts to new and compelling evidence. What is crucial is to establish a very high test regarding the *calibre* of the fresh evidence and its likely consequences in a trial. Does the said affidavit meet this high calibre test? The dangers and high possibility of connivance or false affidavit is real in cases of this nature. It is the function of this court to not only determine whether there is enough evidence to justify quashing a conviction or ordering a re-trial, but also to satisfy itself on the calibre, reliability and credibility of the evidence adduced in which case the court should focus totally on the quality of the evidence.

28. The power under Article 50 (6) of the Constitution is immense since it amounts to exonerating a convicted person and acquitting or order a retrial. Such power must be exercised with extreme care and caution. It is a power which the Court exercises only in exceptional cases for it is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be reopened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty. [17]

29. In a case of this nature, the Petitioner bears the burden of demonstrating to the Court beyond doubt that the credibility of the witness is beyond reproach. This is because the possibility of the fabrication of testimony after conviction is an ever present danger in such matters. [18] For these reasons the Courts have in a long series of decisions laid down certain basic requirements which must be satisfied before an application for the re-opening of a case and its remittal for re-trial can succeed. These were summarize as follows:- [19]

- a. *There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.*
- b. *There should be a prima facie likelihood of the truth of the evidence.*
- c. *The evidence should be materially relevant to the outcome of the trial.*

30. In an appropriate cases the Court has the power to relax strict compliance with the requirement of a “reasonably sufficient explanation” (see (a) above), but it is only in rare instances that this power will be exercised. [20] Emphasising that the need for this power to be exercised sparingly, the Supreme Court of Appeal of South Africa stated “A study of the reported decisions of this Court on the subject over the past 40 years shows that in the vast majority of cases relief has been refused.” [21]

31. The above three tests must be present. Absence of one will be sufficient to justify the refusal of the orders sought. The justification of this high standard, as stated above is the possibility of the fabrication of testimony after conviction is an ever present danger in such matters. Hence the requirement that *There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.* The test here is that the explanation must be reasonably sufficient and must be based on allegations which may be true. I am not persuaded that the said witness recorded a statement at the police station under duress and many days later gave such detailed evidence in court still under duress. The explanation given cannot be said to be true and the burden of proving the truth of the allegations rested on the Petitioner. For example, a complaint to the police or the court hearing the case about the alleged threats could have made the difference.

32. The second test is that “*There should be a prima facie likelihood of the truth of the evidence.*” On a balance of probabilities which is the standard of prove in civil cases, I am not persuaded that the Petitioner has demonstrated that the affidavit in question is beyond reproach.

33. The third test is that *The evidence should be materially relevant to the outcome of the trial.* Again, as correctly pointed out by **Mr. Makori**, the evidence in question was not the sole determining evidence. The court analysed the entire evidence and considered such relevant factors as evidence of recent possession. The lower court, the High Court and the Court of Appeal were all satisfied on the weight and sufficiency of the evidence.

34. Perhaps phraseology such as, “*the evidence must be new and compelling, and it must be essential, in the interests of justice, that a new trial should take place*” would be appropriate. Perhaps that would sufficiently express how powerful the new evidence would need to be. It must be such evidence that if considered, the conviction cannot stand. It must be reliable, substantial and, in the context of the outstanding issues, it appears highly probative to the case in question. The new evidence must in itself be substantial and in my view it must relate to the crime in question and it would be in the interests of justice for a retrial to take place. It must be demonstrated beyond doubt that the new and compelling evidence casts doubts on the conviction. As stated above the evidence in question was not the sole determining evidence.

35. In view of my analysis above, I am not satisfied that the petitioner has met the criteria set out in Article 50 (6) (a) & (b) of the constitution and or any of the tests propounded in the above discussed jurisprudence. Accordingly, I find that this petition has no merits. Accordingly I hereby dismiss it with no orders as to costs.

Orders accordingly.

Signed, dated and delivered at Nairobi this **19<sup>th</sup>** day of **April** 2018

**John M. Mativo**

**Judge**

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[1] Legal Notice No. 117 of 28<sup>th</sup> June 2013

[2] In SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd {2011} VSC 492 at [3]-[6]

[3] See also Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2008] VSC 77 [1-4]; Hoh v Frosthollow Pty Ltd and Ors [2014] VSC 77 at [13] – [20].

[4] Cap 63, Laws of Kenya

[5] Cap 75, Laws of Kenya

[6] Cap 63, Laws of Kenya

[7] INNES, C.J., in Robinson v Randfontein Estates Gold Mining Co. Ltd., 1925 AD 173 at p. 198.

[8] Counsel cited David Macharia Njoroge vs R, {2011}eKLR and Ouma and Another vs R {1991}1KLR 539

[9] Counsel relied on Rose Kaiza vs Mpanju Kaiza {2009}eKLR, Samuel Karanja Wainaina Pet No 25 of 2016, Maurice Odhiambo Wesonga vs R, High Court Pet No. 4 of 2013 & Mzee Wanjie & 93 Others vs A.K. Sakwa & 3 Others {1982-88} 1KLR 465

[10] R -vs- A (2008) EWCA Crim 2908

[11] High Court Petition No. 4 of 2013

[12] R -vs- A (2008) EWCA Crim 2908

[13] 8th Edition

[14] (D.P Mittal, Taxmann's Law Dictionary (Taxmann Allied Services (P) Ltd, New Delhi).

[15] 9th Edition

[16] Criminal Appeal 135 of 2006.

[17] Per Holmes JA in S vs De Jager 1965 (2) SA 612 (A) at 613B.)

[18] See R v Van Heerden and Another 1956 (1) SA 366 (A) at 372H – 373A; S v Nkala 1964 (1) SA 493 (A) at 497 H; S v Zondi 1968 (2) SA 653 (A) at 655F).

[19] By Holmes JA in De Jager's case supra, (at 613C – D)

[20] S vs Njaba 1966 (3) SA 140 (A) at 143H.

[21] Case No 397/01 Reportable Johannes Myeni vs The State