



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL PETITION NO. 7 OF 2017**

**WYCLIFFE OPURU OYAKAPEL.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. **WYCLIFFE OPURU OYAKAPEL**, the petitioner herein, was convicted for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was sentenced to death by this court differently constituted. He appealed to the court of Appeal and his appeal was dismissed. His petition is premised on the following grounds:

- a) That there is new and compelling evidence.
- b) That the said new evidence is capable of affecting the outcome of this case.
- c) That the evidence was not available to him during the hearing of the case and at the appeal stage.

2. The petition was premised on Article 35(1) and Article 50(6) of the Constitution of Kenya. It is supported by an affidavit by the petitioner, and sworn affidavits by Silas Stephen Masai, Joab Oki Opa and Josephine Asere Oyakapel.

3. Article 35(1) of the Constitution states as follows:

*Every citizen has the right of access to—*

*(a) information held by the State; and*

*(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.*

Whereas Article 50(6) of the Constitution provides:

*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.*

4. The state did not file a response to the petition and at the time of the hearing the prosecution counsel informed the court that the state was conceding to the petition.

5. In the case **ROGERS ONDIEKI NYAKUNDI VS. STATE [2012] eKLR** it was held that in order to successfully establish that one has new and compelling evidence in an application under Article 50(6) of the Constitution, it must be shown that:

*(a) There is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of the hearing of the two appeals.*

*(b) The evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching. Such evidence must not only be favourable to the Petitioner but it must be such evidence as is likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts.*

I have perused the affidavits in support of the petition and I am satisfied that the petition has merits.

6. I therefore quash the conviction and set aside the sentence. The petitioner to be taken to court for a retrial.

**DELIVERED and SIGNED at BUSIA this 28<sup>th</sup> day of May, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**