REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CRIMINAL APPLN. NO. 25 OF 2016

KENNEDY OCHIENG AMIR...........APPLICANT

-versus-

REPUBLIC......................................RESPONDENT

-consolidated with-

CRIMINAL PETITION NO. 17 OF 2018

KENNEDY OCHIENG AMIR........PETITIONER

-versus-

REPUBLIC......................................RESPONDENT

JUDGMENT

1. **Kennedy Ochieng Amir,** the Applicant herein, was charged, tried and convicted of the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code Cap. 63** of the Laws of Kenya. He was subsequently sentenced to suffer death. That was in **Migori Senior Principal Magistrate's Court Criminal Case No. 460 of 2005** (hereinafter referred to as **'the criminal case'**).

2. The Applicant then lodged an appeal before the High Court at Kisii. It was Criminal Appeal No. 99 of 2006. The appeal was heard and dismissed by **Musinga & Karanja, JJ.** on 31/07/2008. The Applicant then preferred a second appeal to the Court of Appeal at Kisumu in Criminal Case No. 136 of 2008. The appeal was also dismissed by a judgment rendered on 13/04/2011.

3. The Applicant then opted to exercise his right under **Article 50(6)** of the **Constitution** in seeking for a retrial of the criminal case. That was vide the Notice of Motion filed on 05/10/2016 which was supported by the Applicant's Affidavit. That was in **Misc. Criminal Application No. 25 of 2016.**

4. As the Notice of Motion (hereinafter referred to as '**the Application'**) was pending, whose finalization was delayed due to inability to timely secure the record of the trial court and the twin appellate Courts from the Court of Appeal Registry in Kisumu, the Applicant filed **Petition No. 17 of 2018** (hereinafter referred to as '**the Petition'**) seeking a sentence re-hearing on 12/06/2018.

5. The Application was heard by way of oral evidence where the Applicant testified on 21/03/2018. At the hearing of the application the Applicant appeared in person while **Miss Owenga** Learned Senior Principal Prosecution Counsel appeared for the State. The Applicant challenged the way the criminal case was investigated and contended that he was not accorded a fair trial. He raised the issues of his identification and strenuously challenged the evidence. He further contended that he never took a plea before the trial court. The State did not call any evidence. At the close of the cases the Applicant filed his written submissions, but the State did not despite having been accorded such an opportunity.

6. As the application was pending judgment, the Applicant filed the Petition which this Court consolidated it with the application *sue moto* hence this judgment.

7. I will deal with the application first in light 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."

8. For the Applicant to benefit from the above provisions, he must positively demonstrate the following two 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.

9. Applying the said principles to this case, the Applicant appealed to the Court of Appeal, but his appeal was disallowed. By then the Court of Appeal was the highest court in the land. That being so, the application is competently before this Court.

10. Having said so, the Applicant must now demonstrate that indeed new and compelling evidence has become available and which evidence ought to be considered by the trial court.

11. What is new and compelling evidence was considered by the 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).

12. 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, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict.***

13. It however must be remembered that ***"new and compelling evidence"*** does not involve the rehearing of the appeal. I have carefully perused the proceedings before the trial court in the criminal case and the decisions before the twin appellate Courts and found that all the grounds put forth in the application were fully canvassed before the two Superior Courts. I hence find that there is no new evidence which is intended to be adduced at the retrial. The application is unsuccessful and is for rejection.

14. Turning to the Petition, the Applicant contended that the mandatory death sentence handed to him was unconstitutional for want of discretion on the part of the sentencing court. He therefore prayed that he be accorded another opportunity for sentencing. The legal position in respect to the mandatory nature of the sentences upon conviction in capital offences has by now changed courtesy of the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR**. The Court, rightly so, found and held that the mandatory nature of the death sentence in capital offences is unconstitutional since mitigation is an important congruent element of fair trial.

15. On that finding the Supreme Court remitted the matter to the High Court, being the trial and sentencing court, for purposes of sentence re-hearing. I have no doubt that such remain the only reasonable way forward as the sentencing court will receive appropriate submissions from the prosecution and the defence prior to the sentencing.

16. One thing which I must clarify is that although the decision in **Francis Karioko Muruatetu** (supra) was on a murder case, the position changes not in the case of robbery with violence cases since **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides the only sentence on conviction to be a death sentence.

17. The upshot is that the application for retrial is hereby dismissed and the Petition seeking a sentence rehearing is allowed. The matter is hereby remitted to the Chief Magistrate's Court at Migori for hearing on sentence only and on a priority basis.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of August 2018.

A. C. MRIMA

JUDGE

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

Kennedy Ochieng Amir the Applicant/Petitioner**.**

Miss Awino Learned Prosecution Counsel instructed by the Office of Public Prosecutions for the Respondents.

Evelyne Nyauke – Court Assistant