**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 229 OF 2013**

**LEONARD MUTUA MUNYAO.....1ST PETITIONER**

**QUEEN ELIZABETH MUTUA.....2ND PETITIONER**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT**

**RULING**

**BACKGROUND**

1. On 7th May 2013, the petitioners filed the petition seeking redress following the shooting, wounding and maiming of the 1st petitioner and the arrest and detention of the 2nd petitioner who was at the time 37 weeks pregnant it was alleged that the shooting and arrest incidents took place on 21st August 2003. It was the 2nd petitioners case that she as a result of the arrest delivered a premature baby who died 6 weeks after delivery.

2. In its judgment rendered on 14thApril 2014, this court,(differently constituted)presided over by Majanja J. found that the petitioners rights under Section 76 of the Old Constitution had been violated as a result of unauthorized search of their house conducted by the police on 21st August 2003. The court then awarded the petitioners kshs 80,000 as general damages together with costs of the suit.

On 20th June 2017, the applicants filed the instant application under Order 45 Rule 1 Section 80 of the Civil Procedure seeking orders that:

> **1. That this Honourable court be pleased to reopen this matter and allow the petitioner to present evidence.**
>
> **2. That this Honourable court be pleased to review the judgment of the Honourable D.S. Majanja delivered on the 14th day of April 2014.**
>
> **3. That the costs of this application be provided for.**

**APPLICANTS CASE**

3. The application is supported by the 1st applicants affidavit sworn on 20th June 2017 wherein he avers that after the delivery of the impugned judgment he met a lady one **Mbinya Ndeti** at Machakos County Bus Station who informed him that she had witnessed his shooting and that she was sure that it was the police who had shot him. He attached the witness's statement as annexture **LMM1** to his supporting affidavit.

4. The applicant further averred that he also learnt that there were inquests relating to the shooting that were going on in the City Courts and that the same had not been concluded. It was the applicant's case therefore that he had discovered new and important evidence which was not in his knowledge at the time of the hearing thereby necessitating the filing of the application for review and reopening of the case.

5. The 1st applicant further averred that he was at the time of the hearing not aware that there was an eye witness to be shooting and that this information came to his attention/knowledge after the impugned judgment had been delivered when the said witness went to his business

premises to give him the information.

6. In his submissions on the application Mr. Ngunjiri, learned counsel for the applicants stated that this court has discretionary powers to reopen the case and that the said powers must be exercised judiciously in order to deliver justice to the parties. He urged the court to consider that the case before Majanja J. did not fail in its entirety as it succeeded partially. Counsel urged the court to uphold the constitutional principle that constitutional matters be ventilated to the fullest where sufficient reason has been shown. He added that there were several authorities where the reopening of cases was allowed especially where the injured party continues on the decision on the case of **Peter Ndegwa Kiai t/a Pema Wines & Spirits vs Attorney General & 2 others[2017]e KLR** wherein the court relied on the South Africa case of **Ntanda Zeli Fose vs Minister of Safety and Security** where Kriegler held that:

> ***"……..our object in remedying these kinds of harms should, at least be to vindicate the Constitution, and to deter its further infringement. Defense speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to "defend against encroachment or interference." It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It recognizes that a constitution has as little or as much weight as the prevailing political culture affords it. The defense of the constitution- its vindication is a burden imposed not exclusively, but primarily on the judiciary. In exercise of our discretion to choose between appropriate forms of relief, we must carefully analyses the nature of a constitutional infringement and strike effectively at its source…"***

7. The applicants contended that the reopening of the case will not prejudice the respondents in any manner as they will have the opportunity to cross examine the new witness so as to test the veracity of her evidence. The applicants maintained that the issue of laches does not arise in the instant case as it is a constitutional claim where various courts have held that limitation does not arise.

**The 1st respondents case**

8. The 1st respondent opposed the application through filed grounds of opposition filed on 18th May 2018. At the hearing of the application, Miss Mwasan, learned counsel for the 1st respondent submitted that while it is true that this court has powers to reopen a case, those powers must be exercised judiciously and that the 2 critical issues to be considered are, firstly; that the new evidence to be adduced is not intended to fill the gaps in the earlier evidence adduced in court and secondly; the applicant must show why the said evidence was not adduced during the hearing of the petition.

9. Counsel observed that the upshot of the court's earlier judgment that is subject to the application for review was the finding that the shooting of the 1st applicant was accidental and that the intended new evidence was meant to fill the gap on whether or not the shooting was accidental.

10. Counsel submitted that it was incumbent upon the applicants, who had the advantage of being represented by an advocate during the hearing to do a thorough research on their case before presenting it in court in order to address all the issues arising from the responses filed by the respondents which responsibility the applicants did not discharge. Counsel also submitted that the applicants did not tender any reasonable explanation why the 'new' evidence was not adduced at the trial yet the statement of the intended new witness shows that she had interacted with the applicants at the time of the incident which occurred at a public place. Counsel relied on the decision in the case of **Nakuru Antomobile House Ltd vs Lawrence Maina Mwangi & Another[2017] e KLR** where the court held:

> ***"There is no doubt that the court has discretion to allow re-opening of a case in appropriate circumstances. Needless to state, such direction must be exercised judiciously and with a view to doing justice between the parties. The court must also be careful not to allow abuse of its processes. Re-opening of a case is an equitable remedy. Therefore, he who seeks his remedy must act equitably and must approach the court with clean hands……Other principles governing an application such as the one before the court are that the court need to find out why the evidence was not adduced prior to the hearing of the case being closed. Reopening will not normally be allowed if failure was deliberate (underline mine)."***

11. Counsel further submitted that under Order 45(1) of the Civil Procedure Rules, the only time when a review is allowed is when it is shown that the applicant exercised diligence and that the evidence was not within his knowledge at the time the case was heard. It was the 1st respondents contention that had the applicants been diligent, the evidence that they seek to introduce now would have been adduced at the hearing.

**2nd respondents case**

12. Miss Spira, learned counsel for the 2nd respondent relied on the grounds of opposition filed by the 2nd respondent on 1st November 207 in which it states that the evidence that the applicants seek to introduce is not new evidence as envisaged under the law as it was all along within the applicant's reach the 2nd respondent further states that the applicants did not demonstrate that they made any efforts to procure the attendance of the witness. It was the 2nd respondent's case that the application was an afterthought and an abuse of the court's process. At the hearing of the application Miss Spira for the 2nd respondent submitted that the applicants were all along aware of the inquests pending before the City Courts since the same was disclosed in the 2nd respondents deponents replying affidavit to the petition.

13. Counsel further submitted that reopening the case would prejudice and embarrass the respondents who had already testified and closed the case after judgment was entered. Counsel relied on the decision in the case of **Vincent Moseti vs Charles Somoke Onsare & Another [2017]eKLR** in support of her submission that an application to reopen a case allowed be filed timeously and must not be used to plug any gaps that may have been exposed by the evidence of the opposing party.

**Determination**

14. I have carefully considered the instant application and the grounds of opposition filed by the respondents. I have also considered the rival submissions made by counsel for the applicants and the respondents. I note that the main issue for determination is whether the applicant has made out a case to warrant the re-opening of the case and review of the judgment delivered by Majanja J. on 14th April 2014. Section 80 of the Civil Procedure Rules stipulates as follows on application for review of judgment.

> ***Any person who considers himself aggrieved-***
>
> ***a) By a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred; or***
>
> ***b) By a decree or order from which no appeal is allowed by this Act,***
>
> ***May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

Order 45 Rule 1 of the Civil Procedure Rules on the other hand provides as follows:

**1) Any person considering himself aggrieved-**

> ***a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred; or***
>
> ***b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."***

15. In the case of **Jeremiah Muku vs Methodist Church of Kenya Registered Trustees & Another [2009]eKLR,** Emukule J. expressed himself as follows on the three conditions to be fulfilled when applying for review of a courts decree or order as follows;

> ***" The three conditions for applying for a review of either the decree of order of court may be summarized from the above rule 1(1) of Order XLIV of the Civil Procedure Rules as- Firstly the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or the order was made;- secondly on account of some mistake or error apparent on the face of the record, or thirdly, any other sufficient reason."***

16. Courts have severally held that the decision on whether or not review or reopen a matter is at the courts discretion.(see **Samuel Kiti Lewa vs Housing Finance Company of Kenya Ltd &Another [2015] e KLR.** It is however trite law that where a matter falls for determination at the discretion of a court, such discretion has to be exercised judiciously and orders sought granted only in the most deserving cases and in the wider interest of justice for both parties. This means that the court must, in making its finding on an application to reopen a case, strike a delicate balance between the rights of the applicant to have another go to the hearing and the right of the respondents to the inconvenience of having to deal with a matter that they could as well as marked as closed, as is the case in the instant application.

17. In the instant case, the applicants reason for seeking the review and reopening of the case is that they have recently come across an eye witness to the shooting incident. Under the conditions for review as stipulated under Order 45 Rule 1, the discovery of new evidence *per se* is not sufficient ground for review as the Rule further to states that applicant must demonstrate that the firstly; the discovered evidence is important and secondly: that the evidence was such that, after exercise of due diligence, not within the applicants knowledge or could not be produced by him at the time the case was heard and the decree passed.

18. In the instant case, the 1st applicant's claim is that it is after the delivery of the impugned judgment that he discovered that there were various inquests at the City Courts which have not been concluded. This court however notes that the issue of the inquests at City Court is not a new issue that the applicant has just recently discovered after the judgment as he claims as the same was deponed to in the replying affidavit to the petition, of the 2nd respondents, witness one Inspector Japheth Muluimo who stated as follows:

> ***" 16. That an inquiry is currently being conducted City Court 3 as to the circumstances surrounding the death of the aforementioned policemen and armed suspected robbers that were killed in the incident on 21st August 2003."***

19. From the aforesaid averment, it is abundantly clear to me that the issue of the ongoing inquests is not an issue which the applicant can claim that he only came to discover after the judgment. In any event, even assuming that the applicant was not aware of the ongoing inquests, which is not the case herein as I have already found, I find that inquests are not conducted in secrecy and the applicant having had legal representation at the trial, could, exercising due diligence, have known that in such circumstances where many people including a police officers, die in a shoot out, inquests are normally conducted to establish the circumstances that led to the shooting.

20. Turning to the issue of discovery of new evidence of an eye witness, I note that the shooting incident in question took place at Country Bus Station on 21st August 2003 at 3pm. I have perused the witness statement which was attached to the 1st applicants affidavit as annexture **"LMM1".** I note that she in part, states as follows on the sequence of events that culminated into the 1st respondent's shooting.

> ***"On the 21st August 2003 at around 300pm, I was at work. I have a business of selling potatoes at the County Bus. Police***

***officer came from town chasing people claimed to be robbers. They were shooting at them. Mr. Mutua had just passed at my place of business a few minutes ago, I asked him where he had gone and he said he had gone to buy "Muguka" at the kiosk. He was standing at the kiosk when the police officers shot him. I heard him scream and asked the police officers why they had shot him yet they knew he was a trader there. Some of the police officers were from Kamukunji and they knew that Mr. Leonard was a trader there. The police shot one robber and he fell down just infront of us. A gun was recovered from his pocket. I did not see him use the gun to shoot. I only realized that he had a gun when it was removed from his pocket. When they discovered that they had shot the wrong person they asked us to take him to hospital. We borrowed a pickup in Machakos County Bus, who is now deceased. He gave us the pickup and we took Leonard to St Mary's Hospital in Langata. Several traders were in the pickup including Mr Leonard's wife."***

21. From the above extract of the intended witness's statement, it is clear that the shooting incident took place in broad day light and at Nairobi County Bus Station which is known to be a busy area with many traders, travellers, and public service vehicle operators. This court takes judicial notice of the fact that the said County Bus Station, which is also known in common parlance as "Machakos Airport" is one of the busiest locations within Nairobi City and is always teeming with masses of people at any given time of the day and even at night.

22. The intended new witness has narrated, in her statement, the role that she played in assisting the 1st applicant after the shooting including ferrying him to hospital for treatment. Clearly therefore, the 1st respondent and his wife were all along aware the existence of this witness from the very word go and it therefore beats all logic why they did not deem it necessary to present her as a witness during the hearing of the case. I find the applicants claim that he only recently discovered that there was an eye witnesses to the shooting hard to believe. The witness further states that:

***"I have known Mutua from the year 1997 when we started working together and I know that he has a legit (sic) business and would not be a thief. We still work together up to date."***

23. From the further extract of the intended witness statement, it is also clear that at no time did the witness leave the Country Bus location where she conducted business together with the petitioner in which case, she was all along within the 1st petitioner's reach and he could easily avail her in court during the trial. Under the above circumstances, I find that the instant application does not meet the threshold of the conditions set under order 45 Rules of the Civil Procedure Rules for the granting of orders of review of a judgment. The applicant has not established that he has discovered any new or important evidence which was not within his knowledge or could not be produced by him at the hearing of the case.

24. On the issue of laches, I find that courts have held that what amounts to an inordinate delay depends on the circumstances of each case. In the instant case, the shooting incident took place in August 2003 and the petition was filed 10 years later in 2013. Judgment was delivered in 2014 and the instant application filed 3 years later in 2017. Considering the history of this case and the fact that the intended witness as I have already found, was in the same locality with the 1st applicant, I find that that there is unexplained and inordinate delay in the filing of the instant application. I find that allowing the reopening of the case, in the face of delay and the circumstances of the case would greatly prejudice the respondents who may have already closed the chapter on the case.

25. While this court appreciates that there is no limitation period in cases where a party claims a violation of his rights, the circumstances this particular case is different as the applicant has already had a chance before the seat of justice where he got a judgment in his favour and therefore, allowing him to reopen the case in the face of the apparent delay and lack of reasonable explanation why the intended witness was not called in the first place will be stretching the leavage granted to petitioners to institute suits on violation of rights abit too far for the above reasons and findings, this court further finds that the instant application is unmerited and dismisses it with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 30th day of October 2018.**

**W. A. OKWANY**

**JUDGE**

**<u>In the presence of:</u>**

Miss Mutuku for Ngunjiri for the applicant

Miss Kahoro for the 2nd respondent

Mr Mwasau for the 1st respondent

Court Assistant - Kombo