



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

MISC. CRIMINAL APPLICATION NO. 5 OF 2015

RONALD NGARE OMULEGA.....APPLICANT

=VRS=

REPUBLIC.....RESPONDENT

JUDGEMENT

By a Notice of Motion filed herein on 13th March 2013 and pursuant to Article 50 (a) and (b) of the Constitution the applicant seeks orders: -

- “1. That this Honourable court be pleased to admit the applicant for a retrial of the criminal case in which he had been charged and convicted.**
- 2. That any other or further orders that the court may deem fit to grant in the circumstances of this case.”**

The application is premised on grounds that: -

- “1. The applicant is currently serving a life sentence.**
- 2. The applicant was charged in the Nyamira Senior Resident Magistrate’s Court in Criminal Case No. 49 of 2006 for Robbery with violence contrary to Section 296 (2) of the Penal Code.**
- 3. The applicant was not represented during the trial.**
- 4. The trial court relied on a single identifying witness.**
- 5. The trial court failed to notice contradictions in the evidence of Pw3 and Pw8 concerning the recoveries allegedly made in the houses of the suspects.**
- 6. It will be in the interest of justice that this court be pleased to order a retrial of the case before another Magistrate.**
- 7. This application has been made timeously and without unreasonable delay.”**

In his supporting affidavit sworn on 13th March 2013 the applicant avers inter alia that he was compelled to cross examine the witness without going through the statements of the witnesses; that the trial court did not evaluate the evidence since it completely relied on the evidence of a single identifying witness; that there was a miscarriage of justice and that the state will not be prejudiced should a retrial be ordered.

At the hearing of the application the applicant relied on written submissions filed herein on 31st July 2018. In the said submissions he reiterates that what he seeks is a new trial under Article 50 (6) (a) and (b) of the Constitution. He states that he was charged with robbery with violence and upon conviction was sentenced to death. He faults the trial magistrate for convicting him on the evidence of a single witness and wonders why other witnesses were not called to testify against him. He contends that the witness had a grudge against him (job issues) and contends that the trial magistrate for not considering that the witness did not avail herself for cross examination. He concludes by stating that if his rights will be addressed then he will be free to air his voice in open court. He reminds the court that everyone has a right to dignity under Article 28 of the Constitution as well as respect and protection of the law.

Mr. Ochieng, Senior Prosecution Counsel appearing for the State, opposed the application. He submitted that no new and compelling evidence was demonstrated and that the issues raised by the applicant are issues that can be canvassed at an appeal.

The right to a new trial is provided in Article 50 (6) of the Constitution which states: -

“.....

(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.”

The Supreme Court had opportunity to pronounce itself on what is new and compelling evidence in **Tom Martins Kibisu V. Republic [2014] eKLR** where it stated: -

“[42] We are in agreement with the Court of Appeal that under Article 50 (6) “new evidence” means evidence which was not available at the time of 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 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 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 an accused person.”

In this case the material which the applicant relies upon is the fact that the trial magistrate based his conviction on a single witness. That is all I discerned in the body of the application, grounds thereof, the supporting affidavit and the written submissions.

The applicant did not tell the court or did not demonstrate whatever new and compelling evidence he wishes to adduce at the new trial should his application be granted. I agree with Mr. Ochieng that the issues he raised are issues that ought to be canvassed in an appeal. My finding is that his application falls short of the standard required under Article 50 (6) of the Constitution.

It is instructive that the appellant was represented by an Advocate during the trial contrary to his averment in the application that he did not and even for the first witness when he was not represented he was afforded sufficient time to cross examine the witness.

As for his allegation that the trial magistrate erred in arriving at the decision that he did or that his rights were violated I can only echo the words of the privy Council in **Maharaj V. Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385 at 399** cited with approval by Majanja J in **Wilson Thirimba Mwangi V. Director of Public Prosecutions [2012] eKLR** that: -

“In the first place, no human right or fundamental freedom.....is contravened by a judgement or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person’s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court where there is no higher court to appeal to then none can say there was an error....”

It is not clear whether the applicant in this case appealed against the judgement of the trial magistrate as that was the right forum for correction of the “errors” which he refers to. The remedy for correction of “errors” in a trial court’s decision does not lie in a new trial. That right is reserved for convicted persons who may discover new and compelling evidence that would persuade the court to arrive at an entirely different decision from that tried them. Clearly this application does not fit the bill. It is therefore dismissed.

It is so ordered.

Signed, dated and delivered at Nyamira this 25th day of October, 2018.

E. N. MAINA

JUDGE