



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**PETITION NO. 07 OF 2015**

**PETER WACHIURI GICHIRA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with and convicted of the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code, cap 63**. He was sentenced to death. His appeals against the conviction and sentence in this Court and in the Court of Appeal were dismissed.

On 13<sup>th</sup> March, 2015, exactly a year after the dismissal of his appeal in the Court of Appeal, the appellant filed a chamber summons in which he sought the following orders:

***“1. That this honourable court be pleased to hear and determine my humble application for re-address (sic) of my case.***

***2. That it is within the cardinal rule of law for the same to be considered and notted (sic)”***

The summons may not have been that clear as to what the petitioner wanted but in the affidavit he swore to support the summons, he clarified that his appeal to the High Court and subsequently in the Court of Appeal against his original conviction and sentence for the offence of robbery with violence had been dismissed and therefore he was invoking **article 50(6)(b)** of the Constitution for what he referred to as “re-address” of his case. The sole ground upon which he sought to have what I understand to be a retrial was that he had new and compelling evidence which, apparently, had neither been considered at the subordinate court nor in the two appellate courts to which he preferred his grievances against the subordinate’s court decision.

**Article 50(6)** under which the application has been made states as follows:-

50. (1)...

(2)...

(3)...

(4)...

(5)...

**(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.**

Thus, before invoking this provision of the Constitution, a petitioner must satisfy the court that his appeal has been dismissed by the highest appellate court to which he can appeal and that he has new evidence relevant to his trial.

Having exhausted the possible appellate avenues available to him, the petitioner has demonstrated that he has surmounted the first hurdle set forth by **article 50(6)** of the **Constitution**. The question left for this honourable court to interrogate is whether the petitioner has managed to overcome the second hurdle which is whether “*new and compelling evidence has become available*” after his conviction and after the dismissal of his appeals against it.

There is no suggestion in the affidavit supporting the summons what the new and compelling evidence which is assumed to have now come to the attention of the petitioner is; being evidence, one would not expect to find it anywhere else apart from an affidavit in support of such an application.

However, when I considered the petitioner’s written submissions I found some remarks that probably give an impression of what the petitioner believes to be the new and compelling evidence; he stated as follows:

***“If granted the opportunity, I would produce before court a witness who can give evidence as to how I wasn’t connected to the commission of the crime alleged”***

***“The complainant herein Joseph Kamau Gaturu is someone whom we are related and at no point did he ever made(sic) any report linking my names to the same and neither did whoever he was with Kimani ever summoned to the court nor my mother through the courtesy of the prosecution side as they were duty bound to.”***

The “witness” that the petitioner has made reference to has not been identified. Besides stating that the evidence of the alleged witness will absolve him, the petitioner has not demonstrated the nature of the evidence the so-called witness is likely to tender. More importantly, no reason has been given why this particular witness could not testify in defence of the petitioner during his trial.

As to the questions of whether the petitioner was positively identified and whether the prosecution should have called a particular witness or witnesses, the judgment of this honourable court and that of the Court of Appeal suggest that these questions were central to the appellant’s conviction and thus they are questions that were interrogated all the way from the trial court to the Court of Appeal. As a matter of fact, the judgment of the latter court is clear that these questions formed the only two grounds upon which the appellant’s appeal to this court was based; they were stated as follows:

***(i) The learned judges erred in law in finding that the identification of the appellant through recognition by PW1 Joseph Kamau Gituru was not free from error.***

***(ii) The learned judges erred in law in not finding that one Kimani ought have been called to testify and the failure to call him as a prosecution witness implied that his evidence was adverse to the prosecution.***

The Court of Appeal proceeded to deal with these issues and concluded that the appellant was properly identified. The court’s answer to the petitioner’s question of calling a particular witness to testify was this:

***On the failure to call a one Francis Kimani to testify, we observe that there is no obligation on the part of the prosecution to call a multitude of witnesses to prove its case. Section 143 of the Evidence Act (Chapter 80 Laws of Kenya) provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.***

It is therefore clear that all the matters that the petitioner has alluded to were disposed of and cannot properly be regarded as “new and compelling evidence.” As I have stated elsewhere, they are the sort of matters that this court cannot purport to reopen and interrogate under the guise of enforcing **article 50(6)** of the **Constitution**. In my previous decisions on what this article entails, I have been of the humble view that it is not a carte blanche for this court to regurgitate issues that have been conclusively determined either by itself or by the court above it for the simple reason that if it were to do so, litigation in the criminal process would never come to an end.

My understanding of **article 50(6)** of the Constitution is that it opens a limited window of opportunity for a retrial whereupon a conviction or disposal of appeal against it “***new and compelling evidence***” becomes available.

The availability of the new and compelling evidence is a condition precedent to the application for a retrial; it is a burden which any applicant or a petitioner seeking for retrial under this article must prove to have been discharged to the satisfaction of the court before his application or petition is allowed.

I have also stated before that what amounts to “***new and compelling evidence***” is a question of fact and would largely depend on the circumstances of each particular case. I would suppose, however, that whatever the case, the evidence must be the kind that is likely to have influenced the decision of the trial court or, where an appeal has been lodged, the appellate court, had it been brought to either court’s attention in time. In other words, to be compelling, the evidence must be sufficient enough to alter, in a material way, the trial or the appellate courts’ opinion if it had been brought to these courts’ attention prior to their respective decisions.

Apart from sufficiency of evidence, I would also add that under **article 50(6)** of the **Constitution**, it is upon the applicant or a petitioner for retrial to demonstrate that he could not access or produce the evidence in issue despite his reasonable efforts to do so or that he would still fail in his endeavour even after exercise of due diligence.

For the reasons I have given, I am satisfied the applicant’s application falls far below the threshold set by **article 50(6)** for a retrial. It is not merited and it is hereby dismissed. It is so ordered.

**Signed, dated and delivered this 31<sup>st</sup> March, 2017**

**Ngaah Jairus**

**JUDGE**