



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CONSTITUTIONAL PETITION NO.1 OF 2016**

**KENNEDY OCHIENG ACHIENG.....PETITIONER**

**VERSUS**

**REPUBLIC OF KENYA.....RESPONDENT**

**JUDGEMENT**

1. In this matter, Kennedy Ochieng Achieng is the Petitioner and the Republic of Kenya is the Respondent. From the pleadings filed on 19<sup>th</sup> January, 2016, the submissions filed on 6<sup>th</sup> February, 2017 and the oral submissions made by the Petitioner at the hearing on 6<sup>th</sup> February, 2017 I glean that this is a petition brought under Article 50(6) of the Constitution.

2. Article 50(6) of the Constitution provides that:

**“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.”**

3. Mr. Owiti for the State in opposition to the petition submitted that this Court lacks jurisdiction to entertain the same. He stated that the Petitioner had based his case on the facts of the trial. Further, that the Petitioner was attacking the decision of the High Court and if this Court entertains this petition it will be acting as an appellate court over the decision of a Court of concurrent jurisdiction.

4. On another point, Mr. Owiti contended that the Petitioner ought to have exhausted the appeal system to the highest court to which he is entitled to appeal before invoking Article 50(6) of the Constitution.

5. The question of jurisdiction having been raised, I need to address it before turning to the petition itself. A reading of the already cited Article 50(6) of the Constitution shows that for a petition to be allowed under the provision the mover must meet two conditions. Firstly, the petitioner should show that he/she has exhausted the appellate system or that the time for appealing has lapsed. Secondly, it must be demonstrated that new and compelling evidence has become available. Another requirement is that the petition can only arise where the petitioner has been convicted of a criminal offence. Above all, the court clothed with jurisdiction to entertain such a petition is the High Court.

6. This being the High Court, the Petitioner has brought his petition before the correct forum. He has also

been convicted of a criminal offence. He has therefore successfully jumped two of the hurdles placed on his path by the Constitution.

7. The State's complaint is that the Petitioner has not exhausted the appellate system. A perusal of the record discloses that the Petitioner did not appeal to the Court of Appeal. However, Article 50(6) provides that a person convicted of a criminal offence may petition this Court for a new trial if his appeal 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. The right can either be exercised when an appeal has been rejected by the highest court to which a petitioner is entitled to appeal to or if no appeal has been filed within the time provided for filing an appeal.

8. I have perused the criminal proceedings that led to the confirmation of the Petitioner's conviction by this Court (Tuiyott and Mabeya, JJ) and find that the Petitioner's appeal against his conviction and sentence by the Magistrate's Court was dismissed on 12<sup>th</sup> November, 2014. This petition was filed on 19<sup>th</sup> January, 2016 meaning the fourteen days within which the Petitioner was entitled to file an appeal as provided by Rule 58 of the Court of Appeal Rules, 2010 had long lapsed. In the language of Article 50(6) (a) of the Constitution, this petition was ripe at the time it was filed. The State's assertion that this Court has no jurisdiction to entertain this petition therefore lacks merit. The Petitioner has met the constitutional threshold for bringing a petition of this kind.

9. Turning to the petition proper, the Petitioner submitted that his trial before the Magistrate's Court violated his constitutional rights. He asserted that during the trial he requested for an extract of an entry in the Occurrence Book on 20<sup>th</sup> February, 2007 but the same was never availed by the prosecution despite the trial Court ordering for its production. His case is that this was a blatant disobedience of a court order by the prosecution and although he raised the issue on appeal, the Court only noted that the order was flouted but failed to make a decision on the issue. His view is that failure to avail the Occurrence Book denied him crucial evidence which would have aided his defence. The Petitioner also faults this Court for dismissing his appeal even though he had pointed to contradictory evidence by the witnesses on the colour of the shirt he was alleged to have been wearing at the time of the alleged robbery. The Petitioner then proceeds to fault the decision of this Court on the arguments that had been placed before it by the Petitioner and the State.

10. The State's response to the petition is that the Petitioner has not demonstrated that there is new and compelling evidence that has become available.

11. Indeed for the Petitioner to succeed he must show that there is new and compelling evidence that has since become available after his appeal was dismissed. In **Tom Martins Kibisu v Republic [2014] eKLR**, the Supreme Court defined new and compelling evidence as follows:

**“[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 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, *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.”**

12. Not only must the evidence be novel but it must only have become available after the trial. It must also be evidence which if it had been availed to the Court was capable of altering the outcome of the case.

13. What the Petitioner has done is to reargue his appeal through this petition. He agrees that whatever arguments he has placed before this Court was placed before the Court which heard and dismissed his appeal. His request for the Occurrence Book was raised before both the trial Court and on appeal. Were this Court to make any comments on the issue of the Occurrence Book, it would be stepping out of the

area demarcated for it by Article 50(6) into that reserved for the Court of Appeal.

14. The petition herein is more of an appeal against the decision of this Court (Tuiyott and Mabeya, JJ) than the discovery of new and compelling evidence. It must fail. The same is dismissed.

**Dated, signed and delivered at Busia this 30<sup>th</sup> day of March, 2017**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**