



**REPUBLIC OF KENYA**

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

**CRIMINAL MISCELLANEOUS APPLICATION NO.41 OF 2014**

**JACOB MUCHOMBA BAIMUNYA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**JACOB MUCHOMBA BAIMUNYA**, the applicant, was convicted for the offence of murder contrary to section 203 as read with section 204 of the Penal code. He was sentenced to suffer death. He lodged an appeal to the Court of Appeal. His conviction and sentence was upheld.

The applicant has now filed this application and raised the following grounds:

1. That his rights were contravened under section 77 (2) (a) and (e) of the former Constitution.
2. That the High Court denied him the right to mitigate.

*There are several authorities on the issue of granting of orders for a new trial under Article 50 (6) of the Constitution. The Article provides as follows:*

***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.***

In the instant application the applicant has gone to the highest court where his appeal was dismissed.

For an application of this nature to succeed, the applicant must demonstrate that there is new and compelling evidence, and that the case giving rise to the application must have been concluded after the promulgation of the Constitution of Kenya, 2010. In the case of **PATRICK MACHARIA vs. REPUBLIC MISC. CRIM. APPLICATION NO. 14 OF 2013** the court stated:

***There are two tests to apply in order to determine whether the Petitioner meets the qualifications to have an order of retrial made in his favour. The first one is whether there was new evidence and the second test is whether the evidence was compelling within the meaning of Article 50 (6) of the Constitution.***

The trial at the High Court was concluded on 28th January 2008. This therefore disqualifies this case

from consideration on whether Article 50 of the constitution applies.

The application is therefore dismissed for want of merits.

The contention that he was denied a right by the High Court to mitigate ought to have been raised and prosecuted in the Court Of Appeal. It is not open to him to do so now.

This application is dismissed for lack of merits.

**DATED at MERU this 28<sup>th</sup> day of April, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**