



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL MISCELLANEOUS APPLICATIN NO.44 OF 2014

JOSEPH MUTUMA KONDO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

JOSEPH MUTUMA KONDO, 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 on grounds that he has new and compelling evidence. *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 had gone to the highest court then, where his appeal was dismissed.

The application is premised on the following grounds:

1. That after the harsh and excessive punishment was meted on him, he appealed to the Court of Appeal. His appeal was dismissed.
2. That he was denied fair trial.
3. That he has now available new and compelling evidence.

Other than there being new and compelling evidence, the case giving rise to the application must have been concluded after the promulgation of the Constitution of Kenya, 2010 in addition to some two tests. This was held 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.

At the hearing of the application, he stated orally that he had called two witnesses who did not avail themselves to testify. This does not amount to new and compelling evidence.

If indeed the applicant was denied a fair hearing, there was nothing as simple as raising the issue during his appeal. The issue of fair hearing is basically an issue of law and ought to have been addressed if it existed, by the Court of Appeal. He is estopped from bringing it up now.

It is also worth noting that the judgment in Meru High Court was delivered on 17th August 2007 while his appeal was dismissed on 5th December 2008. The matter he is complaining of and the appeal thereof were decided prior to the promulgation of the Constitution of Kenya 2010. This also disqualifies the application from enjoying orders under Article 50 (6) of the Constitution. The law is not applied retrospectively.

The application is therefore dismissed for want of merits.

DATED at MERU this 26th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE