REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 37 OF 2016

IN THE MATTER OF ARTICLES 21 (1), (3), (4), 22 (1) (3) (F), 24, 25 (C), 27 (1), (2), 50 (2) B), (C), (F), (J), 50 (6) (A) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 200 OF THE CRIMINAL PROCEDURE CODE CAP 75, LAWS OF KENYA

AND

IN THE MATTER OF CRIMINAL APPEAL NUMBER 416 OF 2006, HIGH COURT, NAIROBI

AND

IN THE MATTER OF CRIMINAL APPEAL NO. 53 OF 2000 AT THE COURT OF APPEAL, NAIROBI

AND

IN THE MATTER OF CRIMINAL CASE NO. 3844 OF 2005 AT KIBERA LAW COURT

BETWEEN

JAMES MACHARIA ANUMBI.....PETITIONER

VERSUS

REPUBLIC…….....RESPONDENT

JUDGEMENT

The petitioner was tried and convicted of the offence of Robbery with violence contrary to section **296 (2)** of the Penal Code[1] in Magistrates criminal case number 3844 of 2005-Kibera, Nairobi. He was sentenced to death.

His appeals to the High court[2] and the court of Appeal[3] were unsuccessful. He has now petitioned to this court seeking an order of retrial under article **50 (6)** of the constitution alleging violation of the law and the constitution, infringement of his rights. He has also filed affidavits from two persons he claims were his witnesses and that he was not informed of his right to call witnesses. He states that the foregoing omissions amounted to violation of his rights, hence seeks a retrial.

The petition is opposed. On record is a Replying affidavit of Spira Laura Laura filed on 15th June 2016. She avers that there is no new and compelling evidence to warrant a retrial as contemplated in article 50 of the constitution.

I have considered submissions by both parties in detail. Article **50 (6) (a) & (b)** of the Constitution postulates that:-

> *(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; and*
> >
> > *(b) new and compelling evidence has become available.*

Fundamentally, the objective of the criminal justice process is that after a fair trial there should be a true verdict. So far as humanly possible, there should be no wrongful convictions, and where they occur, or if new evidence emerges which undermines the safety of a conviction, they will be quashed and re-trials may be ordered.[4] The foregoing position is articulated in Article **50 (6)** which lays down the following conditions, **(a)** the petitioner must have exhausted the laid down appeal mechanism open to him **or** the person did not appeal within the time allowed; and **(b)** there must be new and compelling evidence.

The question, however, is whether the petitioner has met the above conditions which are critical criteria under Article **50(6).** The petitioner did appeal to the High Court and the Court of Appeal but both appeals were dismissed. A three judge bench of the court of appeal unanimously found that the petitioner was convicted on sound evidence and upheld the verdict.

Having exhausted the available appeal mechanism open to him, he has now petitioned to this court. Under article **50(6)** of the Constitution, to warrant the court to allow a fresh trial, it is a requirement that the petitioner must demonstrate that there is new and compelling evidence. This provision has been the subject of several decisions of the High Court.[5]The authorities demonstrate that in order for a petition under Article **50(6)** of the Constitution to succeed, the petitioner must adduce new evidence in the sense that it must not have been available to the petitioner during the trial. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals.

Secondly, the evidence must be compelling meaning that it must be admissible, credible and not merely corroborative, cumulative, collateral or impeaching. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the petitioner to the extent that it may possibly persuade a court of law to reach an entirely different decision than that already reached.[6]

"New" evidence for the purposes of article **50 (6)** is evidence not adduced in the previous proceeding. "Compelling" means evidence which is reliable, substantial and highly probative of the case in the context of the outstanding issues, that is the issues which were in dispute in the first trial.[7]

I have carefully examined the reasons offered by the petitioner and the affidavits filed by the persons he claims are witnesses who were not called. There is no explanation why he never called them at the time of his defence, where they were at the trial, what prohibited him from calling them. Also, it has not been shown that their evidence meets the above tests to the extent that if admitted, the verdict will be different.

The judgment of the court of appeal is fairly detailed and the court described the evidence tendered as

sound. There is nothing to show that the conviction was unsafe or could have been different had the alleged witnesses been called. Article 50 of the constitution limits this court's jurisdiction to the grounds stated sub-article **(a)** and **(b)** above.

Black's Law Dictionary,***[8]***defines "**new**" as: "***recently discovered, recently come into being.*** *Taxmann's Law Dictionary* states that the word **"new"** must be construed as meaning ***"not existing before, newly made, or brought into existence for the first time***," and in contradistinction and antithesis of the word **"used".[9]**The *Concise Oxford English Dictionary*[10] defines **compelling** as "***powerfully evoking attention or admiration."*** This definition was also adopted in the case of *Rodgers Ondiek Nyakundi and 2 Others -vs- Republic****[11]***

In my view, this definition implies that the evidence said to be new and compelling must have been recently discovered or has just come into being and is evidence that will evoke attention and rouse a great deal of interest. The petitioner has not explained when the alleged new and compelling evidence became available or why it was not adduced at the trial and what difference if any it would make if retrial is ordered. The witnesses are not new in the sense that they have just been discovered.

I appreciate that a difficult balancing exercise is required in determining what amounts to new and compelling evidence. I also strongly feel we must not set the test too low or too high or too wide. What is crucial is to establish a very high test regarding the calibre of the fresh evidence and its likely consequences in a trial. It is the function of this court to determine whether there is enough evidence to justify quashing an acquittal and ordering a fresh trial, in which case the court should focus totally on the quality of the evidence. Perhaps phraseology such as, *"the evidence must be new and compelling, and it must be essential, in the interests of justice, that a new trial should take place"* would be appropriate. Perhaps that would sufficiently express how powerful the new evidence would need to be.

It must be demonstrated that the new and compelling evidence casts doubts on the conviction. The requirements are only met if there is new and compelling evidence against the petitioner in relation to the offence. I should emphasize that evidence is new if it was not adduced in the proceedings in which the person was convicted and was not within the knowledge of the petitioner in spite of exercise of due diligence. Evidence is compelling if **(a)** it is reliable, **(b)** it is substantial, and **(c)** in the context of the outstanding issues, it appears highly probative of the case against the convicted person. The outstanding issues are the issues in dispute in the proceedings in which the person was convicted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

It is now an established fact 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] *A similar position was up held by the court of appeal in Lieutnant Martin Kibisu vs Republic****[13]*** *where the court defined new evidence "as evidence which was not available during trial after exercise of due diligence."*

For a petition under article 50 to succeed, this court must be satisfied that the petition is based on the fresh and compelling evidence exception and it is likely that a new trial would be fair having regard to the circumstances of the case.

In my view, the architect of article 50 of the constitution is that after a criminal trial ends in a conviction, the defendant can file a motion for a new trial only after the conditions stipulated in article **50 (6)** are satisfied. The High courts can grant an order or re-trial —though rarely—to correct significant errors that happened during trial or if substantial new evidence of innocence comes to light. It must be shown that the new and compelling evidence will correct such significant errors, and that such evidence was not

available during the trial and could not have been available even with the exercise of due diligence.

The new evidence generally must have been unknown to the defense during trial, could not have been reasonably possible to discover before or during trial, and can be capable of causing the court to reach a different verdict.

All the authorities cited above are in agreement that courts are extremely clear about what "new evidence" means. At the risk of repeating myself, it can safely be said there are four criteria that must be met for new evidence to considered in a petition for a new trial:-

> *1. The evidence is newly discovered and the petitioner did not know about it prior to, or during the trial;*
>
> *2. The evidence must be material and not merely cumulative;*
>
> *3. The petitioners failure to learn about the evidence before the verdict was not because of lack of diligence; and*
>
> *4. The new evidence is significant enough that it would likely result in a different outcome if a new trial is granted.*

The petitioner is under a duty to establish the above four conditions. From the material before me, I am not persuaded that the petitioner has discharged this duty. In the circumstances, therefore, I am not satisfied that the petitioner has met the criteria set out in Article **50 (6) (a) & (b)** of the constitution. Accordingly, I find that the petitioner's petition has no merits and I hereby dismiss it.

Orders accordingly

Signed, dated and delivered at Nairobi this **28th** day of **June** 2017

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2] High Court Criminal Appeal No. 416 of 2006

[3] Court of Appeal criminal appeal no. 53 of 2000

[4] R -vs- A (2008) EWCA Crim 2908

[5] among them; Ramadhan Juma Abdalla and 3 Others -vs- R Nairobi Petition No. 468 of 2012[2013]eKLR, Wilson Thirimba Mwangi -vs- Director of Public Prosecutions, Nairobi Petition No. 271 of 2011, [2012]eKLR, Mohamed Adbulrahman Said and Another -vs- Republic Mombasa Criminal Misc. Appl. Nos. 66A and 66B of 2011 (Unreported).

[6] Maurice Odhiambo Wesonga -vs- Republic, High Court Petition No. 4 of 2013

[7] R -vs- A (2008) EWCA Crim 2908

[8] 8th Edition

[9] (D.P Mittal, Taxmann’s Law Dictionary (Taxmann Allied Services (P) Ltd, New Delhi).

[10] 9th Edition

[11] Criminal Appeal 135 of 2006.

[12] Supreme Court in *Tom Martins Kibisu vs Republic [2014]*

[13] *supreme court petition no. 3 of 2014*