REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS APPLICATION NO. 72 OF 2011

ANTHONY KIAMA MUCHIRI……...APPLICANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

On 25th October, 2010, the applicant filed what appears to be a petition under article 50 (6) of the Constitution. I say it appears to be a petition under this particular article of the Constitution because the single-page document the applicant filed is headed *"grounds u/s 50(6) current constitution."* Further, amongst the "grounds" he has enumerated is that he was convicted and sentenced to life imprisonment and all his appeals have been dismissed. Finally, he has asked for a retrial under article 50 (6) (b) of the Constitution on the basis that certain evidence upon which the trial court convicted him was not fully considered.

The petition, if that is what the applicant can be deemed to have filed was not supported by any affidavit; it is simply bare.

As early 16th July 2015, when the applicant's petition was listed for hearing, the applicant himself seems to have appreciated the inadequacies in his application and so on that date he sought for an adjournment to enable file a fresh application and a supporting affidavit to boot for a retrial. The court adjourned the matter and the applicant was duly granted leave to file the application and the affidavit.

Prior to this date, and in particular on 9th July, 2012, the court had directed that the applicant provides details of his appeals both in this court and in the Court of Appeal to enable it make further directions on his petition.

Subsequently, the applicant was granted several adjournments to enable him comply and file an appropriate application or petition with the necessary information that would assist this court arrive at an informed decision. However, none was forthcoming and all the applicant did was to file handwritten submissions instead. In the circumstances, the court had no alternative but to proceed with the applicant's application in its present form.

Article 50(6) of the Constitution which the applicant invoked in his application 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.

Apart from the applicant's averment that his appeals were dismissed, there is no evidence before the court that the entire appeal process open to him both in this court and the Court of Appeal was concluded. The court cannot therefore state with any certainty that the first limb of the threshold set by **article 50(6)** of the **Constitution** has been fulfilled. But even if the applicant was to be taken at his word that he filed appeals in this court and the Court of Appeal and that those appeals were dismissed, the next hurdle which the applicant cannot obviously surmount is threshold of whether *"new and compelling evidence has become available"* after his conviction by the trial court and the subsequent determination of his appeals.

In the first place, there is no evidence that "new and compelling evidence has become available."

Secondly, the application in its present form is wanting in this respect; without at least copies of the judgments delivered in this court and the court above it, there is obviously no material upon which this court can determine whether whatever the applicant alleges to be new evidence is actually new and compelling evidence which was not considered at his trial and at the appellate stages.

As I have said elsewhere whenever I have had to deal with this sort of application, **article 50 (6)** of the Constitution**,** is not a license for this court to regurgitate issues that have been conclusively determined either by itself or by the court above it. To my understanding this constitutional provision opens a limited window for a retrial whereupon conviction or appeal "***new and compelling evidence has become 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.

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 the evidence's sufficiency, 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 endeavor inspite of exercise of reasonable 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.

Dated, signed and delivered in open court this 16th June, 2017

Ngaah Jairus

JUDGE