



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CONSTITUTION PETITION NO. 1 A OF 2016

IN THE MATTER OF ARTICLE 21, ARTICLE 25(a) (b) & (c), ARTICLE 27(2),

ARTICLE 28, ARTICLE 29(a), (d), (e) & (f), ARTICLE 48, ARTICLE 50 (4) AND

ARTICLE 50(6) OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF ALLEDGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLE 21, ARTICLE 25(a)(b)&(c),

ARTICLE 27(2), ARTICLE 28, ARTICLE 29(a),(d),(e) & (f), ARTICLE 50(4)

AND ARTICLE 50(6) OF THE CONSTITUTION OF KENYA, 2010.

BETWEEN

DAVID KATHANDE MUTURA.....PETITIONER

AND

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **DAVID KATHANDE MUTURA**, the Petitioner herein has brought this petition against the State/Republic invoking the provisions of **Article 50(6)** of the Constitution alleging contravention of his fundamental rights and freedoms by the respondent who he holds accountable for the alleged infringements which emanated from a criminal trial against him vide **Chuka Principal Magistrate's Court Criminal Case No. 301 of 2006** where he was convicted and sentenced to death. His subsequent appeals both to the High Court vide **Meru Criminal Appeal No. 116 of 2008** and the Court of Appeal vide **Nyeri Criminal Appeal No. 360 of 2009**, were dismissed.

2. This petition was opposed by the respondent but before I frame the issues for determination in this petition, this court will first look at the summary and nature of the Petitioner's case after which I will consider the opposition by the respondent.

3. (a) Petitioners Case:

As I have noted above, the Petitioner was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** Vide **Chuka Principal Magistrate's Court Criminal Case No. 301 of 2006**. Upon trial, the Petitioner was found guilty and sentenced to death. The appeals to both the High Court in Meru and Court of Appeal in Nyeri were dismissed. The Petitioner now avers that having exhausted all legal avenues in the case, the only available recourse is this petition where he is seeking for a retrial on the basis that he was since discovered new and compelling evidence which going by the provision of **Article 50 (6)** of the Constitution should entitle him a retrial as contemplated by the cited provisions.

4. The petitioner has relied heavily on the affidavit of one **SIMON KAMUNDE** sworn on 26th July, 2016. In that affidavit, **SIMON KAMUNDE** has deposed that at the trial of the petitioner he was prosecution witness No. 2 (PW2) and that he testified against the petitioner on 25th February, 2008. He has further deposed that he gave false evidence and that he has been languishing in guilt ever since the

petitioner was convicted. He has further stated that sometime in January 2016 he made peace with the petitioner after visiting him in Meru G.K. Prison and telling him what had transpired during his trial. According to Simon Kamunde, he lied during the trial of the petitioner at the instigation of the complainant and the fact that at the time increased cases of robberies in the area had been reported and hence the need to bring the menace to a stop. It was on the basis of this that he states that he falsely gave evidence that the petitioner had threatened both him and the complainant. He has also stated that he lied that the petitioner was a known robber, when the petitioner had according to him been known to him over 15 years and had never been involved in any criminal activity. As a result of the guilt, the witness has deposed that he now wishes to recant the evidence given by him on 25th February, 2008 because in his view the same were falsehoods solely meant to incriminate the petitioner.

5. The petitioner in both his written and oral submissions made through learned counsel Ms Lucy Kaaria, Matumbi & Co Advocates, has submitted that the affidavit by **SIMON KAMUNDE** who was a witness during his trial reveals new and compelling evidence. It is contended that the recanted evidence was unavailable to the petitioner during trial and it is the petitioner's submission that the recanted evidence formed a nexus between the evidence tendered by PW1 and PW3 which was relied upon by the trial court in finding the petitioner guilty. The petitioner has relied on the decision in the case of **TOM MARTIN KIBISU -VS- REPUBLIC [2014] eKLR** where the Supreme Court inter alia rendered its opinion on what constitutes "*new evidence*" and states that "*new evidence*" as described under **Article 50(6)** of the Constitution 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,*"

6. The petitioner has further contended that the recanted evidence of PW2 amounts to new and compelling evidence which according to him satisfies the threshold set under **Article 50** of the Constitution for a retrial to be ordered. He submits that evidence obtained in a manner that violates any right of fundamental freedom in the Bill of Rights should be excluded citing the provisions of **Article 50(4)** of the Constitution and the decision in **Hassan Muhammed Namwiba -vs- Republic [2014] eKLR**. In his view if the recanted evidence of PW2 was to be excluded, the trial court would have arrived at a different verdict and further that if the evidence was to be availed to the appellate courts, conviction probably would not have been sustained.

7. The petitioner has also cited his fundamental rights and freedoms under **Article 21, 25(a) (b) (c), 27(2), 28, 29(a) (d) (e) and (f), 48 and 50(4)** of the **Constitution** and contended that those rights were infringed by wrongful imprisonment for an offence he claims he did not commit. It is submitted that one of the duties/roles of this court is to uphold those rights and the petitioner has invoked the provisions of **Article 21** of the **Constitution** in urging me to uphold the cited rights. It is contended that the petitioner has been subjected to cruel, inhuman and degrading treatment and punishment because of reliance of fabricated and untrue evidence by the trial court. He also contends that his right to a fair trial was infringed given that one of the prosecution witnesses has since recanted his evidence. As a result, it is argued that the petitioner has suffered for nine years and continue to suffer for an offence he did not commit and has asked this court to invoke the provisions of **Article 50(6)** of the **Constitution** and order for a new trial.

8. The Respondent's case

The Respondent has opposed this petition through a Replying Affidavit sworn on 23rd January, 2017 by James Machirah learned counsel for the Respondent. The opposition is based on the written submissions by the same learned counsel and oral submissions by Ndombi also learned counsel for the Respondent.

9. The respondent contends that this petition does not disclose any real or threatened denial, violation or infringement of petitioner's right by any organ of the respondent in effecting arrest, arraignment in court, the trial and all the appellate processes.

10. According to the Respondent the Petitioner has not provided new and compelling evidence and impugned the Supporting Affidavit as perjury. It is contended that the affidavit is inadmissible because its credibility is doubtful. The Respondent contends that the Petitioner was accorded a fair trial and convicted in accordance with the law after a fair trial. It is further contended that the prosecution at the trial called a total of 8 (eight) witnesses who in their view gave corroborating evidence and denied that the trial court only relied on the evidence of PW2. The Respondent has faulted the Petitioner for not testing the veracity of the evidence tendered by PW2 when he gave evidence during trial yet he had the chance. It is contended that evidence of PW2 cannot be termed as "*new and compelling*" under **Article 50 (6) (b)** because that evidence was available and that a change of heart after all appeal process have been exhausted cannot be a basis to order for a new retrial. The decision in **George Bikari Nyakundi - vs- Republic [2014] eKLR** has been cited to support this proposition.

11. The Respondent has contended that the petition is frivolous and vexatious and an abuse of court process because in their view it is calculated to obtain a second opinion based in similar issues and facts already adjudicated upon.

12. Issues of determination

This petition and the response made has raised two main issues;

- (i) whether the petition herein has disclosed new and compelling evidence contemplated under **Article 50 (6) (b)** to warrant a retrial.
- (ii) whether the petitioner's fundamental rights and freedoms at the trial were infringed and continue to be infringed as he serves his term in prison.

13. (i) Whether new and compelling evidence has become available.

This petition is mainly premised on the provisions of **Article 50 (6) (b)** of the **Constitution** of Kenya 2010 which provides as follows: -

" A person who is convicted of a criminal offence may petition 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."

It is not disputed that the Petitioner was charged with a criminal offence of robbery with violence and convicted. What is not very clear from the pleadings filed is whether the Petitioner was sentenced to death as provided under the law and alluded by the Respondent or he was sentenced to life imprisonment as stated by the Petitioner himself. Perhaps it could have served the Petitioner's cause better had he enclosed the copy of the proceedings in his petition but what is clear is that he has filed this petition after exhausting appeal processes both in the High Court and Court of Appeal. He cannot therefore be faulted for moving this court under the provision of **Article 50 (6) (b)** of the **Constitution**.

14. A party moving the court under **Article 50(6) (b)** of the Constitution is required to establish and demonstrate to court that new and compelling evidence has since become available after his trial and conviction. So what is "**new and compelling**" evidence contemplated in the cited provisions of the constitution?. Both counsels in this petition cited a Supreme Court decision in the case of **Tom Martins Kibisu - vs- Republic (Supra)** where the Supreme Court made the following guiding definition.

"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, capable of belief and which if adduced at the trial would probably have led to a different verdict.**"

15. The Petitioner has sworn an affidavit deposing that he had resigned into accepting to serve life imprisonment in jail after exhausting all avenues of appeals in vain and that this changed after a visit by one **SIMON KAMUNDE** sometime in January 2016 in prison where he informed him that he had given false evidence against him. I have perused through the affidavit of **SIMON KAMUNDE** sworn 26th July, 2016 where he has made incredible and startling revelations. He says that while giving evidence as PW2 at the trial of the Petitioner in the trial court he gave false evidence apparently at the instigation of the complainant, one **SAMUEL MWITI MBUGI (PW1)**. The petitioner has urged me to treat the recanted evidence as new and compelling evidence within the meaning ascribed by the constitution and the Supreme Court decision in the **Kibisu case**.

16. The petitioner has however failed to persuade me in two aspects .

In the first place, he says that the evidence tendered by PW2 at the trial was significant and played a role in the finding of guilt. But he has at the same time failed to present evidence or the proceedings both at the trial and the appeal to show that if the evidence of PW2 were to be disregarded, the prosecution's case could not be sustained. The Respondent has submitted that they called a total of eight witnesses all of who in their view gave corroborating evidence. Whether that is factual or not is neither here or there. The position in law is that whoever alleges existence of some facts has the burden of proof. The provisions of **Sections 107 and 108** of the

Evidence Act are clear on the burden the Petitioner had in this petition to convince this court that the evidence of PW2 was so crucial that if the evidence was to be excluded he would have been acquitted by the trial court or the appellate court. Failure to annex the proceedings of the trial in my view is fatal to the petitioner's case because in the absence of the proceedings both from the trial and the appellate, it is hard to tell if the prosecution's case or Petitioner's conviction rested on the evidence of PW2 or not.

Secondly and more importantly this court is not persuaded that the evidence of a person like Simon Kamunde (who says he was PW2) can be termed "**compelling**" by any stretch of definition of that term. A person who clearly says he had lied on oath without blinking an eye and without being forced to so testify cannot expect to be believed or taken seriously. He surely testified on oath and no one held a gun over his head to testify. If it is true that he was instigated to lie and commit perjury (which is a punishable crime) then who knows if perhaps he has also been instigated by the Petitioner upon realizing that that was the only window of opportunity to get his freedom.

17. I have looked at the decision of **Hassan Mohamed Namwiba** cited by the Petitioner where the court found that the evidence linking the Petitioner in that case with the offence was incorrect. The circumstances in that case however are quite distinct from the instant case. In the Namwiba's case the complainant had been robbed of his motorbike and mistakenly thought that the Petitioner was the culprit. However after the conviction of the Petitioner, the motorbike was recovered from another person and the complainant came back to state that it was not the petitioner who had robbed him and that he had not been induced or bribed to lie when he testified. In the instant case the Petitioner states that one of the witnesses after testifying against him (assuming that is true as I have no evidence before me) has sort of "**seen the light**" and has therefore recanted his evidence. In my view the recanted evidence of such Johnny come lately who openly admit to lying on oath, is not compelling. The probative value of such evidence is very low and ordinarily such people simply cannot be trusted or believed. It is hard to tell the difference between the two contradictory statements he made on oath and which of the two statements contain falsehood. This court finds that the statement of Simon Kamunde contained in his affidavit sworn on 26th July, 2016 cannot and is not new evidence because no evidence has been laid before me to establish that fact. I also find that certainly the cited affidavit is not '**compelling**' enough to warrant this court to order for a retrial as contemplated under **Article 50(6) (b)** of the **Constitution**.

18. Whether the Petitioner's fundamental rights and freedom were infringed at the trial.

It is true that in this County, fundamental rights and freedoms under the Bill of Rights are well illustrated and enshrined under chapter four of the **Constitution of Kenya 2010**. Those right are protected under **Article 19, 20, 21, 22, 29, 30** and other provisions in the constitution. I also agree that **Article 23** of the Constitution gives this court the authority to uphold and enforce those rights. The Petitioner has cited that his rights under **Article 25**, (that is right to freedom from torture, crime and inhuman treatment among others) and **Article 29** (which guarantees freedom and security) have been infringed. However he has not given the specifics of how those rights were infringed and /or laid evidence before to demonstrate how the Respondent or any organ of the state infringed on any of his rights during or after trial. It is important to note that those rights are not absolute but limited under **Article 24** of the **Constitution** and so where a person has committed a

crime and found guilty through a fair and legal process he cannot claim that his rights have been infringed when the law provides that he has to serve a custodial sentence. That is how law and order is maintained and that is how an orderly society is governed.

In the end this court finds no merit in the petition dated 26th July, 2016 and amended on 17th February, 2017. The same is dismissed.

Dated and delivered at Chuka this 23rd day of November, 2017.

R. K. LIMO

JUDGE

23/11/2017

Judgment dated signed and delivered in open court in the presence of Kaaria for Petitioner and Ndombi for the Respondent/State.

R.K. LIMO

JUDGE

23/11/2017