

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CRIMINAL APPL. NO.43 OF 2013

MOSES ATELA OTHIRAAPPLICANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The applicant/petitioner was charged and convicted of Robbery with Violence. He was sentenced to suffer death. His appeal to this court and the Court of Appeal were unsuccessful.

2. He like others serving such sentence has tried his luck pursuant to the advent of the new constitution. He premised his petition on Article 50(6) of the same. He argued that certain salient issues were not considered by the three courts namely Section 214 of the Criminal Procedure Code was not complied with by the trial court, that the charge sheet was defective and that the parade officer was not called to testify.

3. The Supreme Court of Kenya in **TOM MARTINS KIBISU VRS REPUBLIC (2014) eKLR** agreed with the Court of Appeal when defining what was “new and compelling evidence” as:

“Evidence that was not available at the time of the trial or could not have been availed upon exercise of due diligence and evidence sufficiently weighty that if it was available to the trial or the appellate courts then conviction would probably not have been sustained.”

4. I have perused the proceedings from the three courts and I do not find the issues raised by the petitioner to be new and compelling. The question of a defective charge sheet all along ought to have been within his mind and he should have raised it earlier on. Further whether or not there are witnesses who should have been called to testify cannot be termed new.

5. In the premises and Like most of myriad other petitions, the same is dismissed.

Dated, signed and delivered this 31st March, 2016.

H. K. CHEMITEI

J U D G E

In the presence of:

.....for state

.....for applicant