

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CRIMINAL APPL. NO.8 OF 2014

TOM ODHIAMBO OMWAREAPPLICANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. The petitioner was charged with the offence of Robbery with Violence. He was convicted and sentenced to suffer death. The same has been commuted to life imprisonment. His appeals to this court and the Court of Appeal failed. Taking advantage of the provisions of Article 50(6) of the current Constitution, the appellant prays for a retrial as he has new and compelling evidence which was not within the knowledge of the courts.

2. The new evidence according to his submissions are that the initial report made by the complainant to the police did not tally with the evidence adduced during trial. The report to the police states that the complainant was in his pub when 5 thugs attacked him and robbed several assorted items and in the process he was shot on the eye.

3. The other issue he has raised is that there was no proper identification since the complainant whom he had known for a long time targeted him over an allegation of a wheelbarrow which the petitioner had taken in lieu of a debt.

4. The learned state counsel opposed the petition arguing that the same does not meet the threshold set out by Article 50(6) of the Constitution.

5. Its now settled that a “new and compelling” evidence , is:

“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.”

See **TOM MARTINS KIBISU VRS REPUBLIC (2014) eKLR.**

6. I have perused both the High Court and the Court of Appeal judgments. The issue of recognition which the petitioner dwelt heavily was largely discussed by the said courts. Equally the petitioner was well represented by counsel on both appeals. All the issues were within his knowledge. Nothing stopped the petitioner from demanding that the Occurrence Book be produced during the trial and even during the appeals.

7. I do not think that the issues raised by the petitioner meets the Constitutional threshold as provided under Article 50(6) of the Constitution to warrant a retrial.

The same is dismissed.

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

H. K. CHEMITEI

JUDGE