



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**

**MISC. APP. NO.14 OF 2012**

**BENARD OMONDI NYAWARA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The petitioner herein was charged with the offence of Murder and convicted. His appeal to the Court of Appeal was dismissed., He has then filed this petition based on the provision of Article 50(6) of the Constitution of Kenya 2010. The said Article provides that a losing party in a case can still petition for a reconsideration of his case if there is a new and compelling evidence.

The Supreme Court in **TOM MARTINS KIBISU VRS REPUBLIC (2014) eKLR** defined “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.”**

In this petition the applicant has argued that the case was determined purely on circumstantial evidence and that key witnesses MUSA OMENO and DOREEN AMONDI were not called by the prosecution. Had they been called, the court would have arrived at the proper conclusion, that is, his innocence.

On her part the learned state counsel argued that there is no new and compelling evidence and all that the petitioner was doing was pure speculation.

Having perused the said petition together with the decisions of the two Superior Courts, I respectfully do not find any new evidence as envisaged by Article 50(6) of the 2010 Constitution. The question of failure to call any key witness was within the knowledge of the petitioner all through both trials. He knew the 2 witnesses and in any case he had the opportunity of calling them if he deemed necessary. Needless to say the two courts must have considered this factor before arriving at their conclusion

In the premises I do not find any merit in the petition and the same is dismissed.

**Dated, signed and delivered this 22nd March, 2016.**

**H. K. CHEMITEI**

**J U D G E**