



**REPUBLIC OF KENYA**

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

**MISC. CRIMINAL APPEAL NO.52 OF 2014**

**JAMES KIRIAGO OSIEMO .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

1. The petition is brought pursuant to the provisions of Article 50(6) of the Kenya Constitution 2010. The applicant avers that there is a new and compelling evidence, namely that his name was not **JAMES KIRIAGO OSIEMO** but Richard Nyaagah Charana as evidenced by his National Identity Card No.11036853 issued on 11.3.1997.

2. In the case of **TOM MARTIN KIBISU VRS REPUBLIC** the Supreme Court agreed with the Court of Appeal's findings on the definition of new and compelling evidence when it stated that:

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

3. I have listened to the oral submissions by the petitioner as well as perused the written submissions. I have also heard the opposing views of the respondent. I have perused the decision by the Court of Appeal No.606/2010 in which the three honourable learned judges dismissed the petitioners appeal. In the said appeal the applicant was represented by counsel and he raised three grounds of appeal. None of those grounds relates to the fact that the names used in the charge sheet and thereafter in all the proceedings were not his.

4. I note from the photocopy of the national identity card, as well as the original, which he presented to me in court that the same was issued in 1997. The offences which he was charged with were committed on 24/3/2004. Clearly as at the time of the trial the petitioner had the identity card. Can this be termed as a new evidence? I do not think so. Nowhere does the petitioner suggest that he is not granted the opportunity to present this line of argument.

5. Even if as he states that he was molested by the police officers after his arrest, a fact which he never proved, he had several opportunities of presenting the issue before the three courts which he has been through.

6. For that reason I do not find the application meritorious, and I shall proceed to dismiss the same.

**Dated, signed and delivered this 22<sup>nd</sup> day of March 2016**

**H. K. CHEMITEI**

**J U D G E**