



**REPUBLIC OF KENYA**

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

**MISC. CRIMINAL APPLC. NO. 31 OF 2012**

**JOSEPH MUSOTSI OPANDA .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

1. This is another petition in series of petitions brought by prisoners serving sentence on Capital Offence. The same is brought pursuant to the window of opportunity provided by Article 50(6) of the Kenya Constitution 2010 in which such parties are permitted to approach the mercy sit of justice if there is a new and compelling evidence which would have altered the findings of the court had it been discovered during the trial.

2. In **TOM MARTINS KIBISU VRS REPUBLIC 20 eKLR**, the Supreme Court in quoting the Court of Appeal defined the “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 the conviction would probably not have been sustained.”**

3. In the instant case the applicant has cited 3 issues which he deemed them as new and compelling evidence namely:

1. **that the charge sheet was defective,**
2. **that the essential witnesses namely the investigating officer was not called.**
3. **That he was not granted adequate facilities to defend himself.**

4. Having perused the judgment of this court and the Court of Appeal, I do not find the three issues to be new at all. The issue of the charge sheet for instance was well within the applicant's knowledge from day one. All the courts had the chance and opportunity to ascertain. In any case nothing stopped the applicant from raising the same.

5. The same goes with the other two issues. The question of whom to call as witnesses rests on the prosecution. Nothing stops them from determining who should and who should not testify in a matter. Needless to say the applicant had the opportunity of calling any of the witnesses.

6. Consequently the application is unmeritorious. I find the applicant and such other related to be a window for opportunity for such petitioners to seek fresh air outside the prison walls.

The same is dismissed.

**Dated, signed and delivered this 22nd day of MARCH, 2016**

**H. K. CHEMITEI**

**J U D G E**

**In the presence of:**

.....for state

.....for applicant