REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CRIMINAL APPLICATION NO. 3 OF 2016

CALEB ONCHONGA AMENYA……..APPLICANT

VERSUS

REPUBLIC…….…….RESPONDENT

RULING

1. By an undated Notice of Motion application brought as **Kisii H.C. Misc. Application number 3 of 2016**, the applicant herein **CALEB ONCHONGA AMENYA** sought orders for a retrial after he was tried and convicted of the offence of murder before Kisii High Court in **HCCRC No 58 of 2008** and after his appeal to the Court of Appeal in Kisumu in **Kisumu C.A no. 65 of 2013** was dismissed.

2. The applicant has stated in his undated affidavit in support of the said application that the appellate court was biased and that he had discovered new and compelling evidence that he required this court to consider in order to arrive at a proper determination.

3. When the application came up for hearing before me on 29th March, 2013, the applicant who appeared in person, asked that he be allowed to start his case afresh. Mr. Otieno, for the state, on the other hand opposed the application by stating that it did not satisfy the 2 conditions for a retrial as set under **Article 50 of the Constitution** namely;

a. **That the appeal must have been dismissed by the highest court to which he is entitled to appeal or if he did not appeal within the time allowed for appeal.**
b. **There must be new and compelling evidence which has become available.**

4. Mr. Otieno submitted that the instant application only satisfied the first condition in that the applicants appeal had already been dismissed by the court of Appeal. Mr. Otieno stated that the applicant had not demonstrated that he had any new or compelling evidence so as to warrant this court to order for a retrial.

5. I however note that the Respondent in this case, the Republic, though represented by state counsel Mr. Otieno, did not file any grounds of opposition or replying affidavit to the applicant's application, which brings into the question the aspect of whether or not they had the right of audience in this case in the first place. It is my finding that it was highly irregular for Mr. Otieno to purport to respond to the applicant's application orally from the bar without filing replying affidavit or grounds of opposition. Consequently therefore, I will disregard the response made by Mr. Otieno but still give my ruling on the merits of the application. This application ought to have taken the format of a constitutional petition considering that it has been filed under Article 50 of the Constitution. However, considering that it has been filed by the applicant in person, I will determine its merits all the same the wrong format or want of form

notwithstanding.

6. **Article 50 of the Constitution** provides as follows:

> **"A person who is convicted of a criminal offence may petition the High Court for a retrial if….**
>
> a. **the person's appeal if any has been dismissed by the highest court to which the person is entitled to appeal within the time allowed for appeal, and**
> b. **new and compelling evidence has become available."**

7. Before a person an institute a constitutional petition under the above **Article 50 (6)**, he/she must first identify or establish that his rights under **Article 50 (1) – (5) of the Constitution** have been infringed.

8. Article **50 (1) – (5)** provides as follows:

> **"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**
>
> **(2) Every accused person has the right to a fair trial, which includes the right—**
>
> **(a) to be presumed innocent until the contrary is proved;**
>
> **(b) to be informed of the charge, with sufficient detail to answer it;**
>
> **(c) to have adequate time and facilities to prepare a defence;**
>
> **(d) to a public trial before a court established under this Constitution;**
>
> **(e) to have the trial begin and conclude without unreasonable delay;**
>
> **(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;**
>
> **(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;**
>
> **(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;**
>
> **(i) to remain silent, and not to testify during the proceedings;**
>
> **(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;**
>
> **(k) to adduce and challenge evidence;**
>
> **(l) to refuse to give self-incriminating evidence;**
>
> **(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;**
>
> **(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—**

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law."

9. I have looked at the application and noted that the applicant claims that the appellate court was biased against him and that no inquest was conducted to establish the link between him and the death of the deceased. He further stated that the court relied on mere circumstantial evidence to link him to the offence. It is my finding that the claims of bias, failure to conduct an inquest and allegations of reliance on circumstantial evidence do not connote breach or an infringement of a right to fair trial. The applicant has not specified which one of his rights had been infringed during the trial as envisaged by **Article 50 of the Constitution**.

10. In the case of **Mathews Okwanda vs Minister of Health & Medical Services & 3 others (Nairobi Petition No. 94 of 2012)** the court observed that:

> **"In the absence of a focused dispute for resolution by the court, I am reluctant to express myself on the broad matters raised in the submissions unless there is sufficient material that there had been a violation of the Constitution…"**

11. In **SWN vs FMK (2012) eKLR** the court observed that it is not sufficient to rely on a broad notion of unconstitutionality but, rather point to a specific provision of the constitution that had been abridged.

12. It is my finding that the application before me is not clear about the constitutional violation that the petitioner suffered and for which he is now seeking a constitutional remedy provided for under **Article 50 (6)**.

13. Furthermore, **Article 50 (6**) of the constitution can only be successfully and properly invoked if the petitioner establishes that "new and compelling evidence has become available."

14. In the case of **Tom Martins Kibisu vs Republic (2014) eKLR**, the Supreme court observed that new

and compelling evidence means evidence that was not available at the time of the trial and which could not have been availed at the trial despite exercise of due diligence.

15. In the same **Tom Martins Kibisu** case (supra) the court defined compelling evidence as follows:

> "Evidence that would have been admissible at the trial, of high probative value and capable of belief, and which if adduced at the trial would probably have led to a different verdict. A court considering whether evidence is new and compelling for a given case, must ascertain that it is prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against an accused person."

16. In the instant case, the applicant has not disclosed which new and compelling evidence he has discovered so as to warrant a fresh trial. It is therefore clear to me that the application does not meet the threshold set by **Article 50 (6)** for the grant of the orders of a retrial.

17. In light of the above findings, I note that the application has failed the test of the law. It has failed as it is defective and devoid of merit as illustrated above. The application is therefore dismissed with no orders as to costs.

Delivered, dated and signed in at Kisii on **30th day** of **May**, 2016.

W.A. OKWANY

JUDGE

In the presence of:

- Otieno for the State
- N/A for the Accused
- Omwoyo court clerk