



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

IN THE MATTER OF PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
ENSHRINED IN THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 50(6)(B) OF THE CONSTITUTION OF KENYA 2010,

CONSTITUTIONAL APPL. NO.82 OF 2014

MICHAEL ASHENE OMIDO PETITIONER

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

1. This is a petition under **Article 50(6)** of the Constitution for re-opening of the petitioner's trial on account of new and compelling evidence. The petitioner, **Michael Ashene Omido**, was charged before the Butere Senior Resident Magistrate's Court with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, in **Criminal Case Number 1197 of 2008**. Particulars of the offence were that on the 18th October, 2008 at Chaka Hotel in Chavakali location in Vihiga District within Western Province, with others not before court, while armed with dangerous weapons namely a pistol, robbed **Geoffrey Mirikau Omuganyi** of one motor vehicle, Registration Number KBC 775, Toyota Hiace Matatu, valued at Kshs.1.7 million, cash Kshs.28,600/-, ignition key, National identification card and wallet all valued at Kshs.1,728,700/- and at the time of such robbery, used actual violence to the said Geoffrey Mirikau Omutanyi. The petitioner pleaded not guilty to the charge and underwent a full trial at the end of which he was found guilty of that offence, convicted and sentenced to suffer death on 2nd February 2010.

2. In his petition dated 16th September, 2014 and filed on 23rd September, 2014, brought under **Article 50(6)(b)** of the Constitution, the petitioner sought the following prayers:-

1) THAT this Honourable court be pleased to order the re-trial of the petitioner on account of emerging and compelling evidence that has since because (sic)

2) THAT without prejudice to (1) above this court do make any further orders to suit the present circumstances and to meet the ends of justice.

3. The petition is based on two grounds which I find necessary to reproduce. They are that:-

a) The complainant in Butere Senior Resident Magistrate Court Criminal Case No.1197 of

2008 against the petition (sic) one Geoffrey Mirikau Omutanyi of P.O. Box 80 BUTERE and ID No.13344916 has traced the petitioner and agreed that he was sure as to the identity of the person who violently robbed him on 18th October, 2008.

b) The emergence of the complainant who wishes to denounce his earlier evidence against the petitioner is new and compelling evidence that needs to be resolved in favour of your petitioner.” (emphasis)

4. The petitioner has deponed an affidavit in support of his petition. He has deponed that after he was convicted, his subsequent appeals came to nought, although he has always pleaded innocence and was a victim of improper identification. The petitioner further deposes that the complainant visited him and expressed a desire to have the petitioner released since he was not sure the petitioner was the one who robbed him, and that he (complainant) was being “disturbed by his conscience.” On the basis of the above, the petitioner believes that this is “new” and “compelling” evidence and therefore seeks a re-trial or acquittal.

5. The petitioner has attached an affidavit by one **Geoffrey Mirikau Omutanyi**, sworn on the same date 16th September, 2014 supporting his petition. Geoffrey has deposed that the court solely relied on his evidence on identification to convict the petitioner, that his conscience has been disturbed since he is not sure that the petitioner is the one who robbed him since at the time, he (complainant), had been drugged and was disoriented; what after soul searching, he visited the petitioner to let him know that he intended to do. The petitioner advised him to see an advocate who would assist him file the petition.

6. During the hearing of the petition, **Miss Akinyi**, appeared for the petitioner while **Mr Oroni** appeared for the respondent. **Miss Akinyi**, learned counsel, moved the petition submitting that they were seeking a re-trial under **Article 50(6)(b)**, of the Constitution on account of the emerging new evidence. According to learned counsel, the petitioner exhausted his right of appeal to the **Court of Appeal in Criminal Appeal No.385 of 2012**, but the appeal was dismissed. Counsel submitted that according to the confirmation from the complainant that he was not sure of the petitioner’s identity as the person who robbed him, it amounts to new and compelling evidence that calls for a re-trial. Counsel prayed that the petition be granted.

7. **Mr Oroni**, learned counsel for the respondent, opposed the petition orally. Learned counsel took issue with the affidavit of the complainant particularly paragraph 5 where the deponent said that he had been drugged at the time of the incident. Mr Oroni submitted that the complainant fully participated in the trial where he mentioned that it was the petitioner who had robbed him. Counsel submitted that the complainant should have done soul searching at that time and not now. “The petitioner’s appeals were dismissed due to the evidence on record,” counsel submitted. In counsel’s view, there is no new and compelling evidence to warrant a re-trial. He asked that the petition be dismissed.

8. I have considered the petition, submissions by counsel and perused the record. **Article 50(6)** of the **Constitution** provides as follows:-

Art. 50(6) “A person who is convicted of a criminal offence may petition the High Court for a new trial if –

- a) the person’s appeal, if any, has been dismissed by the highest court to which this person is allowed to appeal to or the person did not appeal within the time allowed for appeal, and
- b) new and compelling evidence has become available.”

9. The Article sets two conditions which a petitioner seeking to benefit from it must establish. That he was convicted in a criminal case, has appealed to the highest court that could hear his appeal, or that time for lodging such an appeal has lapsed; and that there has emerged new and compelling evidence to require a re-trial.

10. In his petition, the petitioner says he was convicted by the Senior Resident Magistrate at Butere, appealed up to the Court of Appeal, but his appeal was dismissed. I have perused the record but could not trace proceedings and judgments of both the High Court and the Court of Appeal. However, the petitioner's counsel stated from the bar that the petitioner appealed to the Court of Appeal in **Criminal Case No.385 of 2012**, which was dismissed. Even without proceedings from the High Court or the Court of Appeal, the record shows that the petitioner was convicted and sentenced on 5th February, 2010. Even if the petitioner did not lodge an appeal, time for lodging such an appeal lapsed 14 days after his conviction and sentence. The petitioner is therefore within **Article 50(6)(a)** of the **Constitution** to bring this petition.

11. Secondly, and most importantly, the petitioner is required to show that there is new and compelling evidence for him to successfully benefit from **Article 50(6)**. The Constitution does not define the meaning of new and compelling evidence, but the Article has been a subject of interpretation by courts. In the case of **Tom Martins Kibisu v Republic** [2014] eKLR **Article 50(6)** of the Constitution was the subject of that litigation. The petitioner petitioned the High Court saying he had new and compelling evidence for purposes of a re-trial. His petition was dismissed. His appeal to the Court of Appeal was equally dismissed by the Court of Appeal, holding that there was no new and compelling evidence. On further appeal to the Supreme Court, the Supreme Court dismissed the appeal. The Supreme Court underlined the objects of **Article 50** of the Constitution when it observed:-

“Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court Forum to admit the charges and conduct a re-hearing based on the new evidence. The window of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the course of appeal to the highest court with jurisdiction to try the matter. Secondly, there must be new and compelling evidence.”

12. The Supreme Court then addressed the meaning of new and compelling evidence and stated;-

“We agree with the Court of Appeal that under Article 50(6) ‘new evidence’ means ‘evidence which was not available at the time of trial and which despite exercise of due diligence, could not have been availed at the trial;’ and ‘compelling evidence’ implies ‘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.”

13. The same issue was again considered in the case of **Evans Sagero v Republic** [2014], eKLR, where the court held:-

“For a petition under Article 50(6) of the Constitution to succeed the petitioner must adduce new evidence in the sense that it must not have been available to the petitioner during the trial. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals.

Secondly, the evidence must be compelling, meaning that, it must be admissible, credible and not merely corroborative, cumulative, collateral or impending. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the petitioner to the extent that it may possibly persuade a court of law to reach an entirely different decision than that already reached.”

14. The petitioner's position is that there is new and compelling evidence and wants the court to order a retrial on the basis of that new evidence. The petitioner has filed his own affidavit in support of the petition and another affidavit from a person who is said to have been the complainant before the trial court, one **Geoffrey Mirikau Omutanyi**. The gist of this affidavit which is said to contain new and compelling evidence is found at paragraphs 5, 6 and 7 and for purposes of this judgment, I reproduce them hereunder.

Para 5 “That I wish to state that **my conscience has been disturbed as I am not sure that the accused is the one who robbed me and at the time I had been drugged and was disoriented.**”

Para 6 That after much soul searching, I visited the accused and let him know what I intended to do.

Para 7 That he advised me to see an advocate in lodging the petition.” (emphasis)

15. The petitioner is now relying on the complainant’s doubts that he is not sure of the petitioner as the one who robbed him because he was drugged on that material day. I have perused the record and according to the complainant’s evidence before the trial court, he had interacted with the petitioner for about 2 days and saw what happened on the day he was robbed. He lost consciousness after the car keys had been taken from him. He was taken to hospital and admitted.

Secondly, after arrest of the petitioner, an identification parade was conducted and the complainant picked out the petitioner from a group of 8 men who formed that parade.

16. The issue being of being drugged, being raised now as new evidence, was an issue that could have been raised before the trial court or the appeal courts. It is clear from the evidence of PW1 before the trial court, that he lost consciousness after keys had been taken from him, and was admitted in hospital for treatment. The trial court and even the courts that heard the appeals, if there were such appeals, were alive to the fact that the complainant lost consciousness after the incident. This fact of being drugged, to my mind, does not amount to “new” let alone “compelling” evidence. If there were doubts in the complainant’s mind, those doubts could have been cleared during the trial or appeals.

17. The petitioner was not arrested because he had been mentioned by the complainant. The complainant was called to attend a parade and he identified the petitioner in that parade. The petitioner was also identified by another person in the parade. The petitioner was also subjected to cross examination by the petitioner’s counsel since he was represented. PW5 gave evidence on how he conducted the parade and the complainant and another witness identified the petitioner. The trial court and Appeal Courts must have reviewed the evidence of identification and were satisfied that the prosecution had proved its case hence sustained the conviction and affirmed the sentence.

18. A petition under **Article 50(6)** is not in the nature of an appeal for rehashing evidence afresh. It is meant to test whether there is new and compelling evidence to warrant re-hearing the case afresh. It should not hinge on doubts. Change of mind or soul searching as the complainant purported to say. It must be on real and independent evidence that was not available after due diligence, evidence that is admissible and capable of belief. And evidence that can lead to a different verdict from that which was arrived at by the trial court or the appeal courts.

19. In the words of the Supreme Court in **Tom Martins Kibisu** case, (supra)

“A court considering whether evidence is new and compelling, in 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, or the sentence passed against the accused person. (emphasis)

20. In this petition, I do not find any new and compelling evidence that could, prima face, affect the petitioner’s trial, outcome or sentence. What is relied on as new evidence was before the trial court and that court must have considered it wholly. And as observed by the Court of Appeal in **Tom Martins Kibisu’s** case (supra), the opportunity offered by Article 50(6) of the **Constitution**, strongly suggests, that a conviction is final and conclusive where the convict has exhausted his right of appeal so long as no new and compelling evidence has come to light.

21. I find and hold, that there is no new and compelling evidence presented by the petitioner, to warrant this court exercising its jurisdiction under **Article 50(6)** of the **Constitution** to re-open the petitioner’s

case for a fresh trial.

For the above reasons, the petition is hereby declined and dismissed.

Dated and delivered at Kakamega this 28th day of July, 2016.

E.C. MWITA

JUDGE