



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**MISC. CRIMINAL APPLICATION NO. 73 OF 2014**

**BETWEEN**

**ROMANUS OTIENO DOK ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The matter before the court is in substance an application brought under the provisions of **Article 50(6)** of the Constitution which provides as follows;

*(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 the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and*

*(b) new and compelling evidence has become available.*

2. In the course of these proceedings the applicant filed an application seeking the production of certain documents namely the police file statements, occurrence book extracts and medical reports. The court issued an order and the applicant was able to access the occurrence book records material to the time the applicant was arrested. The applicant relied on the occurrence book extracts to argue that offence against him was not proved beyond reasonable doubt.

3. The application was opposed through the affidavit of Mary Osoro, the Prosecution Counsel, who pointed out that the applicant's application was devoid of merit in that the applicant did not set out the manner in which his rights were violated. She further deponed that all the issues raised by the applicant were considered by the trial court and the two appellate courts that deal with the issue. Lastly, she was of the view that there was no new and compelling evidence to warrant a new trial.

4. The applicant was charged in **Kisumu Chief Magistrate's Court Criminal Case No. 277 of 2004** for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and three counts of causing grievous harm contrary to **section 234** of the **Penal Code**.

5. The particulars of the offence were that on 8<sup>th</sup> April 2004 at South Kapuonja Sub-location within Winam Divison, Kisumu District of Nyanza Province, with others not before the court and while with offensive weapons to wit simis and pangas they robbed Rose Ochuka Odongo (PW 1) of a wooden stool valued at Kshs. 300/- and at or immediately before or immediately after that time of such robbery, used

personal violence on the said Rose Ochuka Odongo who had been asleep. PW 1 told the trial court that her stool had been stolen but that she did not see the person who assaulted her. When the robbers were fleeing from the scene of robbery after PW 1 raised alarm they met various people including Erick Ouma Wego (PW 2), Michael Ochuka (PW 3), Samson Ayieko Ochuka (PW 4), Everline Olilo (PW 6) and David Otieno Ayieko (PW 8) all who went to the scene in response to the alarm raised by PW 1. The robbers injured them and as result the applicant was also charged with causing grievous harm.

6. The applicant was implicated by two witnesses; PW 3 and PW 8. PW 3 told the court that when he heard screams from the nearby market, he rushed there and as he got out of his gate, he met three people who asked him whether he had seen the escaping thieves. PW 3 did not answer and was cut on his hand and ring finger. He however managed to see the applicant whom he recognised in the moonlight as a matatu tout he knew. When the assistant chief, Patrick Lumumba Omedo (PW 5) was pursuing the robbers, he met PW 3 who informed him that in fact he had seen the applicant. PW 5 immediately went with his group to arrest the applicant after being directed there by the local Assistant Chief within the locality of the robbery. The testimony of PW 8 was that he also responded to the alarm raised and when he went out, he also met some people whom he asked to identify themselves. The people turned on him and cut him with machetes. PW 8 identified the applicant as one of the assailants. He stated that there was sufficient moonlight and that he knew the applicant before.

7. On the basis of evidence of recognition by the two witnesses, the applicant was convicted and sentenced to death on 20<sup>th</sup> September 2004. He lodged an appeal to the High Court; ***Kisumu Criminal Appeal No. 227B of 2004***. It was heard and dismissed on 24<sup>th</sup> June 2008. The final appeal to the Court of Appeal being ***Kisumu Criminal Appeal No. 86 of 2008*** was dismissed on 26<sup>th</sup> June 2009.

8. From the procedural history I have set out above, the applicant has satisfied the first condition under **Article 50(6)** of the Constitution in that his appeal to the highest court at the time was heard and dismissed. The issue at hand relates to the second limb of the provision which requires the applicant to demonstrate that he has “*new and compelling evidence*” that would entitle him to a new trial. What is new and compelling evidence has been settled by the Supreme Court in ***Lt Col. Tom Martins Kibisu v Republic Sp. Ct. Petition No. 3 of 2014 [2014]eKLR*** where it stated as follows;

*[42] We are in agreement with the Court of Appeal that under Article 50(6), “new and compelling evidence” means “evidence which was not available at the 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.” 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 the accused person.*

9. It is clear from the guidance given by the Apex Court in the ***Kibisu’s Case*** is that ‘*new and compelling*’ evidence does not involve rehearing the appeal. The applicant’s case before this court is that the records of the Occurrence Book do not show that he was named at the first opportunity and that the police officers who went to investigate the matter at the scene were never called as witnesses. He also pointed to several inconsistencies in the evidence.

10. The basis of the prosecution was based on evidence of recognition of the applicant by PW 3 and PW 8. The findings of the trial court were affirmed by the two appellate courts. At any rate at the time of the trial the applicant had available to him the Occurrence Book and all other evidence which he could, with due diligence, have called to his aid.

11. Nothing new let alone compelling has been placed before this court. In light of the clear provisions of **Article 50(6)** of the Constitution, the applicant’s case cannot succeed. It is accordingly dismissed.

**DATED and DELIVERED at KISUMU this 22<sup>nd</sup> day of July 2016**

**D.S. MAJANJA**

**JUDGE**

Applicant in person.

Mr Chelangat, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.