



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CRIMINAL APPLICATION NO. 15 OF 2014

STANELY KAMARIO ETHANGATHA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Before me is an undated Petition brought pursuant to **Article 50 (6) (a) and (b)** of the new Constitution seeking a new trial on the basis that new and compelling evidence has now become available. The gist of the petition is that there were two vital witnesses who were mentioned in the proceedings by the prosecution witnesses that they were the ones who witnessed the deceased being killed and were not called as witnesses.

Briefly, the petitioner's case is that he was tried, convicted and sentenced to suffer death in Criminal High Court case No. 121 of 2003 by the High Court in Meru for the offence of murder. He appealed to the Court of Appeal which appeal was later dismissed.

The petition was opposed by the State through Prosecution Counsel Anthony Musyoka who filed a Notice of Preliminary Objection in which he contends that the petitioner's trial was undertaken and dispensed with prior to the promulgation of the 2010 Constitution and that therefore the petitioner cannot purport to invoke the provisions of **Article 50 (6) (a) and (b)** of the **2010 Constitution** in seeking a retrial as the law does not apply retrospectively; that the petition was therefore bad in law, frivolous, unfounded, an abuse of the court process and misdirected.

I have carefully considered this Petition and the submissions by the parties. **Article 50 (6) (a) and (b) of the Constitution** in which the instant Petition is premised 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.

In order to invoke this court's jurisdiction under **Article 50(6) of the Constitution 2010**, the Applicant must demonstrate that;

(a) his prayers were dismissed by the highest court of appeal in the land.

(b) That new and compelling evidence has become available and which was not available at the time of his trial.

(c) Alternatively the petitioner should show that he did not appeal in which case he must in addition demonstrate that there was new and compelling evidence that had become available.

It is not in dispute that the Petitioner's appeal was dismissed by the Court of Appeal on 19th November 2010. The first trial had been concluded in 2003. Consequently, I am satisfied that the Petitioner has successfully shown that he ventilated his case up to the highest court in the land after the promulgation of the current Constitution and thus he has met the first requirement under Article 50 (6) (a) of the Constitution of Kenya.

Article 50 (6) (b) of the Constitution of Kenya further provides that for applications of this nature to succeed, the Petitioner must demonstrate that new and compelling evidence has become available.

In the case of ***Ramadhani Mohamed And Others v Rep Nairobi High Court Petition No. 468 of 2012*** the Learned Judge relied on the **Black's Law Dictionary, 8th Edition** on the definition of the word "new" as '**recently discovered, recently come into being**'. The judge also relied on the **Concise Oxford English Dictionary** definition of '**compelling**' as '**powerfully evoking attention or admiration**'.

In a recent case ***Rogers Ondieki Nyakundi v State (2012) e KLR*** the Learned Judge held that in order to successfully establish that one has new and compelling evidence in an application under Article 50(6) of the Constitution, it must be shown that:

(a) There is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of the hearing of the two appeals.

(b) The evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching. Such evidence must not only be favourable to the Petitioner but it must be such evidence as is likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts.

Similarly in the case of ***Wilson Thirimba Mwangi v The DPP Misc Appl NO.271 Of 2011***, the High Court adopted the position of the Court of Appeal in the case of ***Rose Kaiza v Angelo Mpanju Kaiza Mombasacivil Appeal No. 225 Of 2008 (Unreported)*** while referring to the ground of discovery of new and compelling evidence where the court held as follows:

"Applications on this ground must be treated with caution. before a review is allowed on the ground of discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence it is not open to the court to admit evidence on the ground of sufficient cause. it is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made..."

In the instant petition, save for the Petitioner contending that some witnesses were not called to testify, he did not attempt to demonstrate at all that new and compelling evidence which was not available during his trial has now become available. Similarly with regard to his contention that two witnesses who witnessed the murder were not called to testify was not raised at the trial nor did he raise this issue in his subsequent appeal to the Court of Appeal. All these were matters which were within the petitioner's personal knowledge at the trial and appeal. The complaints made by the applicant do not entitle him to a retrial. The procedure introduced under Article 50 (6) cannot be used to circumvent the due process of the law, or

be used as a means of having a parallel appeal to the one prescribed under the Criminal Procedure Code.

In conclusion, I find that the issues that the petitioner is now raising could only be addressed through the Appellate Jurisdiction which the petitioner fully enjoyed and has exhausted. I find that there is no new and compelling evidence which could not have been available to the Petitioner with the exercise of reasonable diligence during the trial and appeal process.

In the end result, the petition has no merit and is accordingly dismissed in its entirety.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JULY, 2016.

R.P.V. WENDOH

JUDGE

20/7/2016

PRESENT

Mr. Mulochi for Respondent

Mr. Kiogora for Petitioner

Ibrahim/Peninah, Court Assistants

Present, Petitioner