



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**PETITION NO. 11 OF 2016**

**BETWEEN**

**CLYFORD OTIATO.....1<sup>ST</sup> PETITIONER**

**CHRISTOPHER ALELA.....2<sup>ND</sup> PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The petitioners in this matter **Clyford Otiato** and **Christopher Alela** were charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** in Maseno **Principal Magistrates Court Criminal case No. 961 of 2006**. It was alleged that on 17<sup>th</sup> July 2006 at Esiandumba junction of Esiadumba Location, they jointly with other not before this court, whilst armed with pangas and torches robbed Michael Olupanda of his bicycle worth Kshs. 3000 and immediately before or after such robbery used actual violence to the said Michael Olupanda. The petitioners were convicted and sentenced to death.

2. They lodged an appeal to the High Court at Kisumu, **HCCR No. 142 of 2008** which was dismissed on 17<sup>th</sup> June 2010. Their appeal to the Court of Appeal at Kisumu being **Kisumu Criminal Appeal No. 181 of 2010** was also dismissed on 26<sup>th</sup> April 2012.

3. The petitioners have now moved this court seeking a new trial under **Article 50(6)** of the Constitution. In their petition, deposition and submissions they state that it has now emerged that the complainant wishes to reconcile with them hence their request for a new trial.

4. In summary, the case against the petitioners was that on 17<sup>th</sup> July 2006 at about 8.00pm, the complainant was going home from Maseno University where he worked as a carpenter. When he reached Esiandumba junction, three people emerged from a thicket and blocked his path. He immediately recognised the 1<sup>st</sup> petitioner since he had gone with him to school and the 2<sup>nd</sup> petitioner who lived in the same village. The 1<sup>st</sup> petitioner attacked him with a panga and a struggle ensued while the 2<sup>nd</sup> petitioner removed money from his pocket. The complainant managed to escape and immediately informed his brother of the incident. After getting medical attention, they proceeded to report the incident to area Assistant Chief. They gave him the names of the two assailants. As they were making the report, two boys arrived with two caps, a torch and battery they had recovered from the scene of the incident. One the

boys testified the caps belonged to petitioners whom he had seen earlier in the day wearing them. The police, having been informed, were led to the petitioners' homes. The 1<sup>st</sup> appellant was found nursing an injury on his hand and the 2<sup>nd</sup> petitioner was found nursing an injury on his leg. In their defence, the petitioners merely denied involvement in the incident.

5. The trial court was satisfied with the quality of the evidence and convicted the petitioners. The two appellate courts reviewed and dealt exhaustively with the evidence and were satisfied that there was sufficient evidence to convict the petitioners on the evidence of recognition by a single witness. The Court of Appeal further found that the evidence of the caps fortified the evidence of identification.

6. Ms Osoro, learned counsel for the respondent urged that the petition does not meet the conditions of **Article 50(6)** of the Constitution and particularly the definition of new and compelling evidence advanced by the Supreme Court in the case of **Lt Col. Tom Martins Kibisu v Republic Sp. Ct. Petition No. 3 of 2014 [2014]eKLR**. In that case, the Court 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.*

7. It is clear then that the fact that the complainant wishes to settle the matter or reconcile with the petitioners does not mean that the offence was not committed and proved. That the complainant wishes, after 20 years, to reconcile is not, without more, a ground for re-opening the matter under **Article 50(6)** of the Constitution as it is not new and compelling evidence.

8. The petition is dismissed.

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of November 2016**

**D.S. MAJANJA**

**JUDGE**

Petitioners in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.