



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISC. CRIMINAL APPLICATION NO. 16 OF 2014

BETWEEN

VITALIS OBONYO ONYANGO APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant, **VITALIS OBONYO ONYANGO** was charged, tried, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** before the **Kisumu Chief Magistrate's Court, Criminal Case No. 756 of 2004**. The charge against his was that on 5th November 2002 at Bandani along Kisumu-Busia Road, with others not before the court, while armed with weapons namely pistols, pangas and knives, they jointly robbed **Geoffrey Ng'ang'a Mbuthia** of a motor vehicle registration No. KAP 853X Toyota Hiace, cash Kshs. 1,700/- plus other valuables all worth Kshs. 1,201,700/-, and during the robbery they threatened to use violence on the said Mbuthia.

2. The brief facts of the case were that **Mbuthia** (PW 1), a matatu driver, was driving along the Kisumu - Bondo road. At about 11.00am, he stopped to pick a passenger along the road when he was surprised by a lone gunman who approached him and shouted a command for him to move away. The gunman settled on the driver's seat and tried to drive the motor vehicle but was unable to do so. As the gunman had difficulties driving the motor vehicle, PW 1, **Patrick Wainaina** (PW2) and other passengers jumped out of the motor vehicle before the gunman drove off. The vehicle later overturned and landed in a ditch after a short distance. PW 1, PW 2 and **Tom Otieno** (PW 3) identified the accused as the gunman. **Otieno Obonyo** (PW6), a police constable with a tracker dog, arrived at the scene to track the robber. The appellant was arrested a short thereafter while trying to hide among a group of people. He was bare chested and had some injuries on him. His T-shirt was also found near the motor vehicle.

3. All the Courts which dealt with the matter including the trial court, the High Court, as the first appellate court in **Kisumu HCCA No. 166 of 2004** and the Court of Appeal at Kisumu, as the second appellate court, in **Criminal Appeal No. 130 of 2008** were convinced that there was sufficient credible evidence of visual identification and were accordingly satisfied that the applicant was properly convicted.

4. The application for consideration is 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

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(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.

5. The first limb of the provision is not in dispute at the applicant exhausted his appeals. The second limb, which is germane to these proceedings, 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.

6. The applicant pressed his case based on Kisumu Central Police Station Occurrence Book entry No. 70/5/11/2002. He submitted that the Occurrence Book would show that he was arrested for a totally different offence and not the offence he was convicted. Despite several orders by the Court for the respondent to produce the Kisumu Central Police Station Occurrence Book for November 2002, it was not produced. The Deputy OCS, Chief Inspector Nancy Otsiengo, testified on oath that all the documents relating to the applicant's case and indeed other cases had been destroyed in a fire that engulfed the station in the year 2002.

7. Even if I accept the applicant's case, would his contention amount to new and compelling evidence. From the dicta in ***Tom Kibisu's Case (Supra)***, the Occurrence Book was a documentary evidence that was always available to the applicant at the time of the trial. At any rate, it would have been produced had the applicant exercised due diligence to call for its production as his identity and involvement in the offence were material issues. The production of the Occurrence Book would not change the fact that the applicant was convicted based on the testimony of eye witnesses. All the Courts that dealt with issue were satisfied with the veracity of the witnesses as the incident took place in broad daylight. They also found that there was further corroborating evidence to support the conviction. The applicant's T-shirt was recovered close to the vicinity of the vehicle, he was arrested a short distance from the vehicle without a shirt and he had sustained injuries to his body consistent with his involvement in the ensuing accident. When called upon to explain these facts in his defence, he failed to do so. The Court of Appeal concluded that, "*The evidence against the appellant was overwhelming and his conviction based on clear ample evidence.*"

8. In summary, the Occurrence Book was always available to the appellant throughout the proceedings. He did not call for its aid. The evidence against him was overwhelming. There is no new and compelling evidence.

9. The application is dismissed.

DATED and DELIVERED at KISUMU this 17th day of November 2016

D.S. MAJANJA

JUDGE

Applicant in person.

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