**REPBULIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**PETITION NO. 4 OF 2014**

**BONIFACE MUGENDI KINYUA.....PETITIONER**

**VS**

**REPUBLIC.....RESPONDENT**

**RULING**

By a Constitutional Petition brought pursuant to Article 50 (6) (A) (B) of the Constitution of Kenya, the Petitioner has sought the following order:

**1. That this honourable court be pleased to order that Criminal Case No. 1891 of 2004 be heard afresh**.

The Petition is premised on the grounds inter alia, that the Petitioner has new and compelling evidence which he wishes to adduce before this court and that some witnesses were not allowed to testify before court who could have told the truth of the matter.

The brief facts in this case are as follows: the petitioner was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. In the alternative, he faced a charge of handling stolen property contrary to section 322 (2) of the Penal Code. After the hearing of the petitioner's case in the trial court, the court came to the conclusion that the prosecution did not conclusively prove the ingredients of the offence of robbery with violence and reduced the charges to robbery contrary to section 296 (1) of the Penal Code and convicted him of the same whereby he was sentenced to 12 years imprisonment.

Being dissatisfied with the trial court's verdict, the Petitioner appealed to the High Court which dismissed the appeal on both conviction and sentence and instead enhanced the sentence to death. The petitioner subsequently appealed to the Court of Appeal in an attempt to have the High Court's decision reversed which appeal was dismissed by the Court of Appeal and the decision of the High Court upheld.

It is against this backdrop that the Petitioner filed the instant petition pursuant to the provisions of Article 50 (6) (a) and (b) of the Constitution which provides as follows;

> **Article 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 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."***

The petition was opposed. The State filed grounds of opposition on 28th July 2014, inter alia, that the petitioner's case was dispensed and undertaken before the promulgation of the new Constitution and that as such, the petitioner could not invoke the provisions of Article 50 (6) of the Constitution in an attempt to get a retrial; that the petitioner has not demonstrated the existence of any new and compelling evidence to warrant a retrial.

This application turns on two issues:

**1. Whether this court has jurisdiction to invoke Article 50(6) of the Constitution.**

**2. Whether the Petitioner has demonstrated that he has new and compelling evidence under Article 50(6) of the Constitution**.

Article 50(6) of the Constitution under which the petitioner has moved this court came into force with the promulgation of the Constitution on 27/8/2010. Article 263 provides that the Constitution took effect on the date of its promulgation which is 27/8/2010 whereas Article 264 provides that on the said date, the retired Constitution stands repealed subject to the 6th schedule. The effect of the above article was that the Constitution does not have retrospective effect and cannot therefore invalidate what was legal during the currency of the retired Constitution. The petitioner was charged with the offence of Robbery with violence on 26/10/2004 under section 296(2) of the Penal Code. He was convicted for the offence of robbery contrary to section 296(1) of the Penal Code and sentenced to serve 12 years imprisonment. Dissatisfied with both conviction and sentence he appealed to the High Court Meru. The appeal was heard by a 2 judge bench, Lesiit and Kasango JJ. who set aside the conviction under section 296(1) and instead convicted him with robbery contrary to section 296(2) of the Penal Code and sentenced him to suffer death on 29/10/2010. Dissatisfied with that verdict, he appealed to the court of appeal and on 28/11/2013, the Court of Appeal sitting in Meru dismissed the appeal and confirmed the finding of the High Court. In this case, the two appeals were determined after 2010. It therefore follows that the right to a new trial under Article 50(6) of the Constitution accrued after the dismissal of the two appeals. It means that the appellant can avail himself of the provisions of the Constitution, in this case, Article 50(6).

The next issue to consider is whether the petitioner has new and compelling evidence to entitle him to a new trial. Mr. Otieno urged that there is new tangible evidence in that the phone which formed the basis of the conviction of the appellant was still in use 4 days after his arrest yet it was allegedly found in his possession and produced in court as an exhibit in 2004. It was also contended that there was a critical witness i.e. a chief who was not called as a witness, whose evidence would have led the court to arrive at a different finding. Mr. Mulochi strenuously opposed this application urging that the High Court and Court of Appeal having heard and determined the appeals, this court has no jurisdiction to interrogate the issues decided upon. He relied on the decision in **ROGERS ONDIEKI NYAKUNDI V. REPUBLIC (2012) eKLR**. Counsel urged that the only duty of this court is to consider whether there is new evidence to warrant a retrial. His view was that the application is an abuse of the court process because it faults the trial in the lower court which took place before the promulgation in the Constitution. He also relied on the decision of **ROBINSON MWANGI V. REPUBLIC CRA 10/2011** where J. Lesiit held that such an offence that was committed prior to the Promulgation of the Constitution, Article 50(b) does not apply.

Mr. Mulochi also submitted that the appellant contends that the phone was not found with him but there is overwhelming evidence on record that it was found in his house, it was positively identified as the phone that had been recently stolen. As regards the witness who was not called, he submitted that the petitioner was given a chance to defend himself and yet he did not bother to call the chief. For the arresting officer, whom the Petitioner said had a grudge with him, he never raised the issue during the trial.

I have considered the rival Submissions. In the case of ***ROSE KAIZA -VS- ANGELO MPANJU KAIZA MOMBASA CIVIL APPEAL NO. 225 OF 2008 (UNREPORTED)*** the court warned that such applications should be treated with utmost care. The court said:

"***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..."***

The allegation that there existed a grudge between the petitioner and the arresting officer is not new evidence. It should have been raised during the trial before the trial court. As regards the issue of vital witnesses who were not summoned by the trial court that too is not new evidence. The petitioner should have called them as witnesses when called upon to defend himself if he so wished. Otherwise, the prosecution has the discretion to call all material witnesses to enable the court in fairly determining the case and need not call a superfluity of witnesses. I have read the proceedings before the trial court and nowhere did the petitioner indicate that he wished to call the chief of the area to testify in his favour.

As regards the issue of recovery of the phone, the High Court made a finding that the petitioner was found in recent possession of it and the Court of Appeal came to the same finding. That issue has been determined by the two courts and is not a new matter to warrant a retrial. In the case of **ROGERS ONDIEKI NYAKUNDI V. REPUBLIC (2012) eKLR**. The learned Judge held that for one to establish that he has new and compelling evidence in an application under Article 50 (6) of the Constitution, he must demonstrate 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 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 applicant 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.***

The above decision is persuasive but I agree with the finding of the court. As earlier observed, the issue of the recovery of the phone is not new and compelling evidence. What the applicant is trying to do is to have a second bite at the cherry, to have a fresh trial on the same issues hoping the court will arrive at a different finding.

In respect of the question of the petitioner being HIV positive, that is not a ground to warrant a retrial. In his mitigation before the trial court, the petitioner stated that he was HIV positive and that fact was taken into consideration before sentence. Being HIV positive is not an unusual condition because there are many persons in prison with that condition and they receive treatment there.

In light of all that I have considered above, I find that the petitioner has not demonstrated that he has new and compelling evidence envisaged under Article 50(6) (a) and (b) of the Constitution to warrant an order of retrial. The Petition dated 19/3/2014 is therefore unmerited and is hereby dismissed.

**DATED SIGNED AND DELIVERED THIS 20TH DAY OF FEBRUARY, 2015.**

**R. P .V. WENDOH**

**JUDGE**

**Mr. Otieno for Petitioner**

**Mr. Mulochi Respondent**

**Petitioner present in person**

**Jane/Kirimi Court Assistant**