REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.2 'A' OF 2014

DANIEL ODHIAMBO KOYO.....APPLICANT

VERSUS

THE ATTORNEY-GENERAL ….....RESPONDENT

J U D G E M E N T

The applicant was convicted and sentenced to death for the offence of robbery with violence. He appealed both to this court and the Court of Appeal in which he lost. He has filed this petition seeking a retrial ostensibly that his constitutional rights as provided under Articles 23(1) 50(2)(6) Section 165 (3) have been violated.

The facts and evidence were clearly analysed by all the courts. The applicant was convicted of robbing the complainant of his motorcycle at around midnight. Several witnesses were called by the prosecution to determine their case. The applicant did give unsworn evidence.

The substance of the petition herein are 2 fold namely, that there was no complaint made by the complainant before the police under the provisions of Section 89 of the Criminal Procedure Code and that the extract of the O.B. showed that no formal complaint was made by the complainant Kennedy Ogot Omollo and infact there was time discrepancy in the proceedings and the O.B.

The court has perused the proceedings and the parties submissions herein. In the recent case of **TOM MARTINS KIBISU VS. REPUBLIC (2014) eKLR**, the Supreme Court while analysing Article 50 of the Constitution stated as follows:

"Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and as part of that right it offers to persons convicted of certain criminal offences opportunity to petition High Court for a fresh trial. Such atrial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to two conditions,

First, a person must have exhausted the course of appeal, to the highest court with jurisdiction to try the matter.

Secondly, there must be "new and compelling evidence."

In this regard there is no evidence that the applicant has attempted to appeal to the Supreme Court. The Court of Appeal judgment was delivered on 3/11/11 after the promulgation of the new constitution. He therefore had the opportunity of appealing to the highest court in the land.

Secondly the O.B. Produced in my opinion may not aid the applicant. The same is a narration and on close reading of the same shows that entry No.64 dealt with "Return of Prisoner in." When was he arrested and why was he being returned. Is it possible to suppose for example that entry No.63 or 62 for that matter dealt with the same prisoner.

Further and at any rate was this an information which could be considered new? I do not think so. This issue was well known to the applicant and ought to have been raised during trial.

Infact this court when deciding on the question of time of the offence stated as follows:

> **"It was notable that the offence occurred in the night but the exact time remained unclear.**
>
> **The complainant talked of midnight while PW2 and PW3 implied that the offence may have occurred prior to 9.30 p.m. Be that as it may, the variance in time of the offence was not fatal to the prosecution case and did not alter the fact that the offence was committed in the hours of darkness."**

This issues ought to have been escalated during the next stage of appeal. It cannot in my finding be termed new.

In the premises I do not think there is any new and compelling evidence to warrant a re-opening of this case. The petition is otherwise dismissed.

Dated and delivered this 25th day of May, 2015

H. K. CHEMITEI

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