REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 23 OF 2015

IN THE MATTER UNDER ARTICLE 165 (3) OF THE CONSTITUTION OF KENYA

IN THE MATTER UNDER ARTICLE 19, 20, 21, 22, 23, 24 AND 25 OF THE CONSTITUTION OF KENYA

IN THE MATTER UNDER ARTICLE 50 (2) (6) (7) OF THE CONSTITUTION OF KENYA

JOSEPH WAIHORO WAIYORO

JAMES MUGO NJOGU

KEVIN MURERWA..APPLICANTS

V E R S U S

REPUBLIC..RESPONDENT

R U L I N G

This is a petition brought pursuant to the provisions of Article 50 (6) (a) (b) and (7) of the Constitution. The Applicants have sought the following orders:

1. THAT the applicant's petition be admitted for hearing and determination.

2. THAT the applicant's petition annexed hereto be deemed as duly filed upon the payment of the requisite court fees.

The said application is premised on the grounds *inter alia*, that the applicant's are held at Meru G.K Prison whereby they were convicted in Isiolo Criminal Case No. 527 of 2010 for the offence of robbery with violence contrary to section 296 (2) of the penal code on 3rd February 2011; that the applicants' appeals were dismissed by the High Court and the Court of Appeal on 12th July 2011 and 3rd June 2014 respectively; that the applicants have new and compelling evidence.

Article 50(6) of the **Constitution** 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."***

When the matter came up for hearing Mr. Omari Counsel for the applicants urged that the applicants have new and compelling evidence in that a crucial witness who reported the murder to the police, that is Paul Kariuki, was not called as a witness and that he is now willing and ready to shed light on the circumstances of the case. He urged the court to order that the case do start 'de novo'. Counsel submitted that the said Kariuki was not in the list of witnesses. Counsel relied on the decision of ***Zakayo Mwiti Vs Republic CA 66/2012*** where the court considered the application of Article 50 (6) of the Constitution.

Mr. Kariuki Learned State Counsel did not oppose the application and stated that he was leaving it to the court. Out of the submissions by the applicant's, the issues that arise for determination are as follows:

1. *Whether the petitioners have raised any constitutional issue for determination by this court.*

2. *Whether there is new and compelling evidence to justify the court to order a retrial of the applicant's Criminal Cases.*

3. *Whether the applicants are entitled to a retrial.*

It was contended by the applicants that the trial judge and the first appellate judges erred in law by failing to note or find that the applicants were in custody for over 6 days which was against the law; that vital evidence was withheld as the prosecution failed to call essential witnesses such as one Councilor Galma, Paul Kariuki and Simon.

I have carefully considered the submissions by both parties.

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

*a. **Their 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 demonstrated that there was new and compelling evidence had become available;***

*d. **Further, the Petitioner's case or appeal, whichever is applicable must have been concluded after the promulgation of the Constitution 2010.***

The applicants have successfully shown that they ventilated their case up to the highest court in the land, and that the same was concluded after the Constitution 2010 came to force. They have also claimed that they have new and compelling evidence. This court therefore has jurisdiction to entertain this application.

In the case of ***Ramadhani Mohamed and others Vs Republic Nairobi H. C. Petition No. 468 of 2012;*** the Learned Judge relied on the **Black's Law Dictionary, 8th Ed.** 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 Vs. State (2012)EKlr*** 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.***

There are two tests to apply in order to determine whether the applicants meet the qualifications to have an order of retrial made in their favour. The first one is whether there was new evidence and the second test is whether the evidence was compelling within the meaning of Article 50 (6) of the Constitution. Whether there is new evidence: In regard to the new evidence, the question is whether the applicants have shown that the **'new'** evidence was not available to them during the trial, and that such evidence could not have been obtained with reasonable diligence for use at the trial or that the evidence was not available at the time of the hearing of the two appeals. That has not been demonstrated.

As clearly stated by Mr. Omari, one Paul Kariuki was mentioned by PWI in his evidence and it was indicated that he is the person who reported to the police. That issue is not new. If the applicants knew that his evidence was relevant, they would have raised it on the 1st appeal or 2nd appeal to the court of appeal. They would also have during their trial attached to the said evidence which they did not.

The second test was for the applicant's to show that the **'new'** evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching. The evidence must be shown not only to be favourable to the applicants but likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts. As observed earlier, the said 'new' evidence was not placed before this court for its consideration cannot make any finding.

The issue of new evidence should have been raised on the first appeal since the first appellate court has power to call for and admit new evidence even at that stage. That opportunity was squandered by the applicants and they cannot have a second bite at the cherry. In a similar case Hon Majanja J. in the case of ***Misc. Appl. No. 271 Of 2011 Wilson Thirimba Mwangi Vs The Director Of Public Prosecutions*** had this to say:-

"In the case of Chokolingo v Attorney General of Trinidad and Tobago (1981)1 ALL ER 244, the court cited with approval the decision in the case of in Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385 at 399 where the Privy Council stated in part, "In the first place, no human right or fundamental freedom...is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person\'s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say there was an error..."

63. This reasoning was recently adopted by the Court of Appeal in the case of Methodist Church in Kenya Trustees Registered & Another v Rev. Jeremiah Muku and Another CA, Civil Appeal No. 233 of 2008 (Unreported), where the Court of Appeal observed, "As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review…

64. The petitioner in this case had a right of appeal against the decision of the High Court, a right which he duly exercised. The right of appeal or review is protected by Article 50(2) (q). The petition cannot be used as an \'alternative forum\' to lodge collateral attacks against decision of the appellate court nor can it be used as a general substitute for the normal procedures in the

> ***court system which are clearly provided for under Article 50 of the Constitution.***
>
> ***65. A petition under Article 50(6) is not a re-trial or an appeal. As the court stated in Mohamed Adbulrahman Said and Another v Republic (Supra), "We do wish to make it perfectly clear however, that the right to a new trial is not an avenue for further appeal. This court has no jurisdiction to consider and determine matters which have already been decided upon by the Court of Appeal."***

The decision is a persuasive authority but I am persuaded that it is good law on the emerging cases under Article 50(6) of the Constitution 2010. The complaints made by the applicants do not entitle them to a retrial as they urged in this court.

Regarding the propriety of the trial process or otherwise, any complaints that the applicants may have had should have been handled by the first and the second appellate courts. The procedure introduced under Article 50 (6) of the Constitution 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.

As respects the allegation that the accused was held for over 6 days before being arraigned in court; if that is a complaint under Article 49; that they were not arraigned before the court within 24 hours, that should have been raised when the applicants appeared before the trial court because any allegation of breach of rights should be raised at the earliest time possible so that the Police would have responded. Besides, even if the said rights were breached, that would not entitle the applicants to a retrial or acquittal because they can seek redress in the civil courts.

In conclusion, I find that the issues that the applicants are now raising could only be addressed through the Appellate Jurisdiction which the applicants fully enjoyed and exhausted before filing this application.

I find that there is no new and compelling evidence which could not have been available to the applicants with the exercise of reasonable diligence during the trial and appeal process.

The result is that the application has no merit and is accordingly dismissed.

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF MAY 2015

R.P.V. WENDOH

JUDGE

In the presence of;

Mr. Mulochi for State

Mr. Mutama holding brief for Mr. Omari for Accused

C/Assistant – Faith

Accused