



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 94 OF 2014

BETWEEN

JOHN MWITA KIHINGA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Although this matter was filed as an appeal, it is actually an application for a new trial 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—

(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.

2. The applicant was charged and convicted of the offence of robbery with violence before the Senior Resident Magistrate's Court at Kehancha. He faced three counts of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and one count of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. The particulars of the robbery charges were that on 20th May 2009 at about 8.00pm at Keomakebe Village of Kuria West District, he jointly with others not before the court while armed with dangerous weapons namely a gun and pangas robbed John Mwita of Samsung TV, Sony Radio Cassette player, Sony Raid, DVD player, three suit cases, cash amounting to Kshs. 28,000/- all items and cash valued at Kshs. 74,900 at or immediately after the time of such violence wounded John Mwita on the head. In a similar fashion he robbed Tabitha Ghati, the wife to John Mwita, of Kshs. 500/- cash and Regina Robi, a sister in law of John Mwita of a Nokia 110 mobile phone and Kshs. 600/- cash. In the fourth count it was alleged that he was found, otherwise than in the course of stealing, with the Nokia 1100 phone belonging to Regina Robi knowing or having knowledge that it had been stolen.
3. The case against the applicant was that on the material day, John Mwita was leaving his bathroom which was outside the house at about 8.00 pm when he found three people outside his house, two of whom were in police uniform and the other in civilian dress. One of the people in police uniform was holding a gun. The men introduced themselves as police officers and explained that

they wanted to search his house for a fugitive. He allowed them to enter his house and since the house was well lit with electric lights, he recognised the man in civilian clothes as the applicant whom he had treated at the local dispensary where he worked and to whom he had sold medicine at his chemist. He had also seen him several times in the locality.

4. Upon entering the house, the three men ordered the lights to be switched off. John Mwita was ordered to sit on the floor and when he resisted, the applicant cut him with a panga on the head and forced him to lie on the floor. The applicant searched his pockets and removed cash while the other assailants started removing items from the house. The three men then set upon assaulting Tabitha Ghati and Regina Robi and while they were doing so, John Mwita ran out and raised alarm. The three assailants ran away with the stolen items into the nearby maize plantation. The message about the attack was sent to the local administration and the police. Police on patrol that night caught and arrested the applicant who looked shaken and had a panga, sword, torch and the nokia 1100 which Regina Robi identified as hers.
5. The learned magistrate convicted the applicant on the basis of the he was known to John Mwita, that there was sufficient lightning before the attack hence the applicant was properly recognised. He also relied on the fact that the nokia 1100 stolen from Regina Robi was recovered from him so soon after the incident.
6. The applicant launched his first and only appeal; **Kisii High Court Criminal Appeal No. 80 of 2010**. The appeal was heard by Asike-Makhandia and Sitati JJ., who dismissed it on 15th March 2011. He did not prefer a second appeal. As far as he did not lodge a further appeal, the applicant satisfies the first limb of **Article 50(6)** of the Constitution.
7. The material facts upon which the applicant relies on are set out in supporting deposition sworn on 10th November 2014 as follows;

[4] The complainant MR JOHN MWITA visited me in prison asking for forgiveness after he realised that I had not robbed him and he had recovered his items.

[5] That after negotiations we both agreed on reconciliation because the items was (sic) recovered from someone else and no need to serve the sentence known to me.

[6] That we both agreed to appear before the court on the same for my acquittal under new and compelling evidence under Article 50 of the Constitution of Kenya.

8. What is new and compelling evidence? The Supreme Court in **Lt Col. Tom Martins Kibisu v Republic Sp. Ct. Petition No. 3 of 2014 [2014]eKLR** 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.

9. Are the facts that the applicant and his accuser reconciled or the stolen items recovered new and compelling evidence? The offence of robbery with violence is defined by the **Penal Code**. The prosecution must prove **theft committed under the circumstances set out in section 296 (2) of the Penal Code which are as follows; the offender is armed with any dangerous or offensive weapon or instrument or the offender is in company with one or more other person or persons or at or immediately before or immediately after the time of the robbery, the**

offender wounds, beats, strikes or uses other personal violence to any person.

10.The fact that the stolen items were returned or recovered is irrelevant to the definition of the offence of robbery with violence as is the fact that the victim later reconciled with the applicant. The question for the court is that at the time of the offence were the items stated in the charge stolen in circumstances that amount to robbery? The prosecution proved that the applicant was one of the people who stole several items and in the course of the theft used violence. Apart from the testimony of John Mwita, there were other witnesses whom testified to the circumstances of the robbery. For example, Tabitha Ghata recognised the applicant as a person she knew. The fact that the applicant was found with the Regina Robi's phone sealed his fate. The facts supporting the application could not and cannot affect the outcome of the trial that has taken place.

11.Nothing new let alone compelling has been placed before the court. In light of the clear provisions of **Article 50(6)** of the Constitution, the applicant's case cannot succeed.

12.The application is dismissed.

DATED and DELIVERED at MIGORI this 22nd day of June 2015.

D.S. MAJANJA

JUDGE

Applicant in person.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.