REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL (APPLICATION) NO. 95 OF 2014

CONSOLIDATED WITH

CRIMINAL APPEAL (APPLICATION) NO. 96 OF 2014

BETWEEN

DAN OLUOCH OTIENO …………….....……….......................... 1ST APPLICANT

KENNEDY OTIENO DALMAS ……………………..……………..... 2ND APPLICANT

AND

REPUBLIC …………………………………………...….……......... RESPONDENT

JUDGMENT

1. The applicants seeks 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 applications were consolidated as the applicants were tried and convicted together. As a matter of historical record the applicants, **DAN OLUOCH OTIENO** and **KENNEDY OTIENO DALMAS** were charged with the offence of robbery with violence contrary to **section 296 (2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)*** particulars being that on the 10th September 2009 at Ogwedhi Sub Location in Migori District, the applicants while armed with offensive weapons namely panga and rungu robbed Noah Onyango Okoth of Kshs. 30,000/- cash and immediately before and immediately after the time of such robbery they wounded the him.

3. The applicants were tried, convicted and sentenced to death before the Principal Magistrate's Court at Migori in the original ***Criminal Case No. 870 of 2009***. The first appeal to the High Court was heard and dismissed by Asike-Makhandia and Sitati JJ. The applicants were aggrieved by those findings and preferred a second appeal to the Court of Appeal; ***Criminal Appeal No. 298 of 2012***. The appeal was heard and dismissed on 27th September 2013 by Onyango-Otieno, Azangalala and Ole Kantai JJA.

4. The grounds proffered by the 1st applicant are as follows;

a. ***THAT*** *the 1st and second appellate courts grossly erred both in law and fact in finding and holding that the respondent case had been proved beyond reasonable doubts without considered that the charge sheet was patently defective consequently, date of arrest on the charge sheet was not embody with the OB date 1st October, 2009 and O. B dated 6th October 2009, contrary to Article 50 (2) (b) (j) and (6) (a) (b) of the new Constitution of Kenya as well as compared with O.B dated 11th September, 2009*
b. ***THAT*** *the 1st and 2nd appellate court grossly erred both in law and fact in dismissal of the appellant appeal in the charge that was patently unconstitutional, consequently, constitutional right and freedom were abrogated under Article 49 (1) (f) of the new Constitution of Kenya.*
c. ***THAT*** *the 1st and 2nd appellate court grossly erred both in law and fact in upholding and/or extend the appellant appeal without considering the stated witness i.e. the chief whom affect the mode of arrest of the appellant was not availed and/or summoned to came and testify against the respondent case, failure to do so the burden of prove remain against the respondent.*
d. ***THAT*** *the 1st and 2nd appellate courts further grossly erred both in law and facts to misapprehend the tenor and/or extend the nature of the offence thus render same manifestly unsafe; consequently the judgment of both the 1st and 2nd appellate courts are misconceived.*

5. The 2nd applicant, in his grounds for the application, stated as follows;

a. ***THAT*** *the 1st and 2nd appellate courts grossly erred both in law and fact in upholding the findings that the respondent case had been proved beyond reasonable doubts without considered that the charge-sheet was totally defective in date of arrest and the O. B. dated 9th October, 2009 was not incorporate with the O.B. Dated 10th October, 2009, as well as O. B. for the 1st report dated 11th September, 2009, contrary to the provision of Article 50 (2) (b) (j) (6) a & b.*
b. ***THAT*** *the 1st and 2nd appellate courts grossly erred both in law and fact in dismissal of the appellant appeal in the charge that was patently unconstitutional, consequently, constitutional right and freedom were abrogated under article 49 (1) (f) of the new constitution of Kenya.*
c. ***THAT*** *the 1st and 2nd appellate court further grossly erred both in law and fact in upholding and extend the appellant appeal without considering the respondent had not availed the crucial witness, the stated chief whom affect the mode of arrest of the appellant, failure to do so, the burden of proof remained against the respondent side.*
d. ***THAT*** *the 1st and 2nd appellate court further grossly erred both in law and facts to misapprehend tenor and /or extend the nature of the offence, thus render same manifestly unsafe, consequently the judgment of both 1st and 2nd appellate courts are misconceived.*

6. In addition to the grounds outlined, the applicants supported the same with written submissions.

7. In order to determine whether the matters alleged fall within the parameters of **Article 50(6)** of the Constitution, it is necessary to outline the facts as they emerged from the trial.

8. On the night of 10th September 2009 Noah Onyango Okoth and his wife Millicent Akoth were asleep in their house at Ogwedhi. As their 3 month old infant child was afraid of darkness, they left a hurricane lamp on. At 2.00am the couple was woken up by a loud bang at the door which turned out to be a stone used by the assailants to break the door. Before they could react in any way 3 people, who they knew by appearance and by name and who resided in village, entered the room. They were Oluoch, Otieno and Amin. Oluoch held a knife by Noah's breast and demanded money. Amin and Otieno stood on the right and left side of the respectively. Noah was cut up so badly while he put up a spirited fight in defence. Noah and Millicent testified that the attackers decided to kill Noah since they had been recognized. Oluoch used a panga to cut Noahs' neck and left him for dead while one of the other attackers decided to finish off the job by hurling the stone that had been used to break the door but the stone fell on the bed somehow missing Noah who was by now unconscious. During this whole incident that went on for 30

minutes Millicent attempted to scream and had to stop because she was also badly injured by the attackers. The attackers took Kshs. 30,000/= which Noah had in his jacket in his room. Fred Odhiambo Guda, an immediate neighbour was woken up by the commotion. He could not leave his house as the outer door had been locked from outside but when he opened a window and flashed a torch, he recognized Oluoch who he knew before. Oluoch had a panga, bow and arrows which he used to threaten Fred. Noah and Millicent were assisted by neighbours who took them to hospital where the clinical officer examined them and confirmed their injuries. After the matter was investigated, the accused were arrested.

9. In his defence, the 1st applicant gave a sworn statement where he denied the charge. He stated that he was at home on the night of the robbery. He attributed his arrest to an incident where he bumped into his wife making love with the chief of their area in a sugar plantation. Upon such discovery he did not take any action but just went home. The 1st applicant called as witness his wife Rose Adhiambo who stated that her husband did not leave home on the night of the robbery. The 2nd applicant in a sworn statement denied the charge stating that he was arrested because he was found by police carrying sugar for which he had no receipt. His wife, Lencer Achieng, testified that he did not leave home on the night of the robbery. His father, Dalmas Otieno, had no useful information relating to the matter before the court.

10. It is not in dispute that the applicants have established the first limb of **Article 50(6)**, what is in contention here is whether they have satisfied the requirements of the second limb which requires them to prove that there is new and compelling evidence. What is new and compelling was discussed by the Supreme Court in ***Lt Col. Tom Martins Kibisu v Republic*** **Sp. Ct. Petition No. 3 of 2014 [2014]eKLR** 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.

11. All the courts that dealt with the matter considered the evidence and affirmed that the applicants were indeed implicated in the offence. Noah and Millicent knew the applicants before as they resided in the same village and Millicent knew them while growing up. Fred also recognised the second applicant. The courts reviewing the matter appreciated that the incident took place over a period of half an hour in a room illuminated by a hurricane lamp and that both witnesses described their ordeal in graphic detail. The courts were alert to the circumstances of identification and satisfied themselves that the quality of evidence excluded the possibility of mistaken identity. The courts were also satisfied the prosecution proved its case beyond reasonable doubt hence the conviction was affirmed by the two appellate courts.

12. When the applicants' contentions, which I have set out in paragraphs 4 and 5 hereinabove, the facts I have outlined and the decisions of the subordinate court, the High Court and Court of Appeal are considered side by side, there is no new and compelling evidence to warrant the holding of a new trial. Whether certain issues relating to the analysis of evidence were considered or not is not a matter that falls within the purview of **Article 50(6)** of the Constitution. Likewise, any procedural issues, which ought to have been raised before the trial court or on appeal, do not constitute new and compelling evidence.

13. The applicants have raised the issue of their arrest and more particularly the violation of **Article 49(1) (f)** of the Constitution. It provides that a person arrested has to be brought before the court as soon as reasonably possible but not later than 48 hours and if the 24 hours end outside the ordinary court hours on the next court day. In my view such a complaint ought to have been raised at the earliest possible opportunity before the trial court. In this case though, the issue is moot as the applicants' arrest was in 2009 before the promulgation of the Constitution on 27th August 2010. As the Supreme Court has stated in ***Samuel Kamau Macharia v Kenya Commercial Bank Limited and 2 Others*****, SCK Application No. 2**

of 2012 [2012]eKLR, the Constitution is not retrospective in its application hence this claim cannot lie for acts predating the Constitution.

14. In view of what I have set out above the applicants' claims are dismissed.

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

D.S. MAJANJA

JUDGE

Applicants in person.

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