



REPUBLIC OF KENYA
IN THE HIGH COURT
AT MIGORI
CRIMINAL APPEAL (APPLICATION) NO. 35 OF 2014
BETWEEN
JOMO BOKE MARWA.....APPLICANT
AND
REPUBLIC.....RESPONDENT

JUDGMENT

1. The applicant **JOMO BOKE MARWA** was charged with the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 29th August 2009 at Masaba Sub-location of Kuria District, jointly with others not before the court, while armed with dangerous or offensive weapons, namely pangas, robbed Joseph Boke Sinda of Kshs. 36,000/- and at or immediately before such robbery, wounded the said Joseph Boke Sinda occasioning him actual bodily harm. He pleaded not guilty was tried, convicted and sentenced to death in *Kehancha SRM's Court Criminal Case No. 1300 of 2009 on 10th March 2010*.

2. He appealed to the High Court at Kisii in *Criminal Appeal No. 278 of 2010*. The appeal was heard and dismissed on 29th February 2012 by Sitati and Lagat-Korir JJ. The applicant did not pursue a second appeal to the Court of Appeal.

3. The applicant now 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
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(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.

4. The application filed on 28th June 2012 seeks a new trial on the following grounds;

a. The applicant was not issued with the initial statement of prosecution case to enable him challenge the evidence before the subordinate court and the High Court.

- b. That the trial magistrate and the appellate judges erred by failing to consider the manner of his arrest.
- c. That the Occurrence Book (O.B) which recorded the first report and the warrant of arrest issued were not produced before the trial court and neither were essential witnesses called.
- d. That the applicant did not have an advocate to represent him.

5. Before I consider the gravamen of the application, it is necessary to recite the facts emerging from the trial court in order to determine whether the matters raised by the applicant fall within the purview of new and compelling evidence.

6. On 29th August 2009 at about 7.30pm, the complainant, Joseph Boke Sinda (Joseph) was walking home from the Nyamaharaga where he had sold maize. He had Kshs. 36,000/- in cash. On the way he met four people armed with pangas and rungas. They ordered him to sit down and began assaulting him. One of the assailants removed the money from his trouser back pocket. He was able to recognise the applicant as one of the assailants and the leader of the gang. He noted that the applicant was wearing a pair of green trousers, a white t-shirt with red stripes and a black coat. He screamed for help and told those who came to help that he had been robbed by the applicant and three other people. That night the complainant was taken to hospital and on the following day at about 7.15 am, he reported to the police station that he had been attacked. He reported that the applicant was one of the assailants whose voice he recognised.

7. One of the people who responded to the alarm, Moronge, testified that on that night, the applicant went to his house and informed him that he had been attacked and that in the process he had cut someone and unclothed him. As applicant was speaking to him from outside his fence, he threw the clothes he had taken from the alleged assailant into Moronge's compound. The clothes were a white t-shirt with red stripes, a pair of green trousers with blood stains. The applicant was later arrested after being taken to Isebania Police Station by Moronge as the public were baying for his blood. Moronge testified that he misplaced the clothes the applicant had thrown in his compound as he tried to restrain members of the public from injuring the applicant.

8. In his sworn testimony the applicant stated that on the morning of 29th August 2009, *Sungusungu* went to his home, arrested him and took him to Isebania Police Station where he was charged with a case involving his uncle, Gabriel Mwita Marwa. He stated that his uncle wanted him to sell a plot by force so that he could buy a car but he refused. He was therefore shocked to find that he was being charged with the offence of robbery with violence.

9. From the brief facts I have outlined, the trial and appellate court were satisfied that the applicant was properly recognised as the complainant gave a clear description of what he was wearing, that it was not very dark and that on the next morning he went and made the first report to the police station where he gave the applicant's name and description of clothes he was wearing. The clothes described by the complainant matched those the applicant threw into Moronge's compound on the night of the incident. Based on these facts, the court dismissed his alibi and the allegations of the grudge between him and his uncle.

10. The reason I have outlined the facts is not for the purpose of re-hearing the appeal or to satisfy myself that the trial and appellate courts were correct in their findings. No such jurisdiction exists and I disclaim it. It is to determine whether the grounds relied upon by the applicant fall within the parameters of **Article 50(6)** of the Constitution.

11. The applicant has established the first limb of **Article 50(6)** hence the issue is whether he has proved that he has new and compelling evidence that warrants a retrial. The Supreme Court in *Lt Col. Tom Martins Kibisu v Republic Sp. Ct. Petition No. 3 of 2014* [2014]eKLR discussed the meaning of new and compelling evidence 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.

12. From the facts I have outlined, the issue whether or not the applicant was issued with the initial statement of prosecution to enable him challenge the evidence was an issue known to him and a matter he was entitled to raise as the issue of identification was a key issue in the evidence against him. Likewise, the applicant had an opportunity to call for the Occurrence Book (O.B) as the officer who received the first report testified. As regards the issue of his arrest, Moronge and the investigating officer testified and any issue regarding his arrest could have been raised at that time. The issue of the grudge between him and his uncle was an essential part of his defence and was indeed considered by the trial and appellate court. I therefore find that all the issues raised by the applicant in support of his application do not amount to new and compelling evidence.

13. The issue of whether the applicant was entitled to an advocate to represent him ought to have been raised in the trial and appellate courts. As the trial took place before the promulgation of the Constitution on 27th August 2010, the right to counsel in those circumstances cannot be implied. In any case, it does not constitute new and compelling evidence.

14. When the applicant’s contentions, proceedings and judgments of the subordinate court and the High Court are considered side by side in light of **Article 50(6)** of the Constitution, the inescapable conclusion is that the applicant had not established any 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. I also find and hold that the applicant’s case amounts to an attempt to rehear the appeal.

15. The application is dismissed.

DATED and DELIVERED at MIGORI this 22th day of July 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.