



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 56 OF 2013**

**CHARLES CHEMASWET.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. On 23<sup>rd</sup> November 2001, the petitioner was convicted by the Senior Resident Magistrate, Kitale on one count of robbery with violence. He was sentenced to suffer death. His first appeal to the High Court was dismissed on 17<sup>th</sup> March 2004. The petitioner preferred a further appeal to the Court of Appeal. On 14<sup>th</sup> October 2005, the Court of Appeal upheld the concurrent findings of the courts below.
2. The petitioner has now presented an *amended petition* pursuant to leave of the court granted on 23<sup>rd</sup> July 2015. The petitioner abandoned his original petition filed on 24<sup>th</sup> July 2013. In the amended petition, he claims that his rights to a fair trial were *violated*; and, that the charges were not proved beyond reasonable doubt. The amended petition is anchored on articles 22, 23 and 50 (6) of the Constitution. He craves for a new trial.
3. The petitioner relied on written submissions filed on 23<sup>rd</sup> July 2015. The grounds can be condensed into three. First, that he was incarcerated in police custody for more than twenty four hours against the provisions of the repealed constitution. While in police custody, the police obtained two incriminating statements from him. The petitioner contends that the statements were obtained irregularly or through torture in contravention of section 72 of the repealed Constitution and article 29 of the present Constitution.
4. Secondly, the petitioner avers that he has obtained new and compelling evidence. He submitted that evidence has emerged that the police gathered the family of the complainant who decided to make him the fall guy. He stated that that evidence was not placed before the trial court or dealt with by the two appellate courts.
5. Thirdly, the petitioner's case is that the charge was trumped up. He contends that the charge of robbery with violence was not proved beyond reasonable doubt. In that regard, he submitted that his identification was not positive; that the Police Occurrence Book points to different circumstances; and, that the AK 47 rifle produced in the trial court did not fire the cartridges recovered at the *locus in quo*.
6. The petition is contested by the Republic. It is contended that the matters raised by the petitioner were conclusively settled by the trial court, the High Court and the Court of Appeal. They include the issues of veracity of the evidence in the trial court; criminal procedure; and, the burden and degree of proof. It was submitted that there is no new or compelling evidence to warrant a fresh trial; that the petition is a disguised appeal; and, that the petitioner had a full opportunity in any of the three courts to mount some or all the arguments now presented to this court. In a synopsis, the case for the State is that it did not violate the rights of the petitioners. It was submitted that there is

- no basis to order a fresh trial or to grant any other relief.
7. I have considered the amended petition and rival submissions. The petition is primarily anchored on Article 50(6) of the Constitution of Kenya 2010. To succeed under that head, the petitioner must demonstrate two matters: that his *appeals* against conviction have been dismissed by the *highest court*; and, that *new and compelling evidence* has become available. The reason is self-evident: Article 50(6) is not an avenue for a further or non-existent appeal. See *Mohamed Abdulrahman Said and another v Republic*, Mombasa, High Court Misc. Criminal Appl. 66A & 66B of 2011 [2012] eKLR, *Rodgers Ondiek Nyakundi v State* Kisii, High Court Criminal Appeal 135 of 2006 [2012] eKLR.
  8. In *Mohamed Abdulrahman Said and another v Republic* (supra), Odero and Nzioka JJ dealt at length with the meaning of *new and compelling evidence*. The learned judges stated as follows-

*“In our understanding therefore, 'new' evidence must mean evidence that is recent in origin, has recently been discovered and was not known or available at the time of trial or at the time of hearing of the first two appeals.*

*“Aside from the requirement that the additional evidence be 'new' Article 50(6)(b) also requires that such evidence be 'compelling'. Once again we will turn to the Concise Oxford Dictionary 9<sup>th</sup> Edition where the ordinary English meaning of the term compelling is given as “rousing strong interest, attention, conviction or admiration.*

*“Thus, this evidence must be very strong and convincing evidence – evidence which may possibly persuade a court of law to reach an entirely different decision.....”*

9. In the instant case, the petitioner has exhausted his right of appeal to the Court of Appeal. *Prima facie*, the ordinary rights to a criminal appeal under the repealed Constitution have all been exploited.
10. The key question for determination is whether the petitioner has obtained *new and compelling evidence*. The answer is in the *negative*. The petitioner has not demonstrated he has new and compelling evidence as required by article 50 (6) of the Constitution. The petitioner claims that evidence has emerged that the police gathered the family of the complainant who decided to make to implicate him. There is no deposition giving particulars of the meeting. but even assuming that such a gathering took place, it does not rise to the threshold of new and compelling evidence. The submissions before me are *fresh analysis* of the evidence tendered in the trial court or what the petitioner views as errors by the High Court or Court of Appeal respectively. *Ipsa facto* the petition cannot lie under article 50 (6) of the Constitution. See *Tom Martins Kibisu v Republic*, Supreme Court Petition 3 of 2014 [2014] eKLR. The Supreme Court was emphatic that new and compelling evidence *“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 an accused person”*.
11. The arguments framed before me that that the charges were not proved beyond reasonable doubt; or, that the identification was not positive; or, that the ballistic report or evidence did not link the spent cartridges with the weapon produced in court; or, that there was torture *cannot* by any stretch of imagination constitute *new or compelling evidence*. The petitioner could have raised *all* those matters in the three courts that dealt with this case. Furthermore, at pages J5 to J7 of the original judgment, the lower court dealt at great length with the question of *identification* of the accused. At page J7, the learned trial Magistrate dealt with the *spent cartridges*. The trial court also considered the circumstances under which the statements were taken from the accused. At page J7, the court concluded that there was a *confession*.
12. The High Court, as the first appellate court was obligated to re-evaluate all the evidence on record and to draw its own conclusions. See *Pandya v Republic* [1957] E.A 336. It did that. The Court of Appeal at pages 4 to 6 of its judgment found that the identification of the petitioner was positive. The learned judges in fact concluded that it was evidence of recognition. They also found that the charge was not defective; and, that the ballistic reports were properly admitted in evidence under section 77 of the Evidence Act. In particular, the two superior courts found that the charge of robbery with violence was proved beyond reasonable doubt. The Court of Appeal on the other

hand found that the defence proffered by the petitioner was feeble and was considered by both the learned Senior Resident Magistrate and the High Court. Those are the same matters the petitioner is regurgitating before me.

13. The petitioner's plea for a new trial must thus be treated with utmost *caution*. The need for *caution* was well expressed in Rodgers Ondiek Nyakundi v State Kisii, High Court Criminal Appeal 135 of 2006 [2012] eKLR. The Court cited with approval the decision in Rose Kaiza v Angelo Mpanju Kaiza Mombasa, Court of Appeal, Civil Appeal 225 of 2008 (unreported). See also Wilson Thirimba Mwangi v DPP [2012] eKLR. In Mulla on the Code of Civil Procedure volume 4 page 4115, at paragraph 13, the following passage dealing with review in civil actions appears-

*“ Applications on this ground must be treated with great caution.....Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”*

14. In a synopsis, the amended petition does not rise to the threshold of new and compelling evidence which was not available or within the knowledge of the petitioner when his trial at the Magistrates Court was held or his subsequent appeals to the High Court and Court of Appeal were heard. The petition is a disguised appeal. The petitioner is not entitled to a further bite at the cherry. The new Constitution is not an avenue to non-existent appeal. See Tom Martins Kibisu v Republic, Supreme Court Petition 3 of 2014 [2014] eKLR, Mohamed Abdulrahman Said and another v Republic, Mombasa, High Court Misc. Criminal Appl. 66A & 66B of 2011 [2012] eKLR, Rodgers Ondiek Nyakundi v State Kisii, High Court Criminal Appeal 135 of 2006 [2012] eKLR, John Kipkeu Kiprotich v Republic Eldoret, High Court Misc. Criminal App. 97 of 2011 [2015] eKLR.
15. The petitioner is asking this Court to reopen the matter, reconsider the findings of the learned Senior Resident Magistrate and the two superior courts, and grant some reliefs to the petitioner under section 72 of the repealed Constitution and articles 21, 23, and 50 of the current Constitution. I am unable to hold on the materials before me that the trial before the Principal Magistrate violated the former constitution. The guilt of the petitioner was *re-affirmed* by the High Court and the Court of Appeal. I have no *jurisdiction* to reopen the matter. True, this Court has original jurisdiction and power to determine petitions claiming violation of rights or fundamental freedoms. But that is not the real picture in this case: there is no evidence that *any* of the fundamental rights of the petitioner were violated. If the petitioner was held longer in police custody than authorized by the repealed Constitution, the remedy does not lie in an acquittal or a new trial: it may point in the direction of a civil action for recovery of damages.
16. Finally, the law provides for a mandatory death sentence for robbery with violence. Joseph Njuguna Mwaura and others v Republic Court of Appeal Criminal Appeal 5 of 2008 [2013] eKLR. I have thus no reason to acquit the petitioner, order a new trial or grant him any further relief. When I interrogate the entire petition closely, it is simply a *disguised* appeal couched in *constitutional* language. I believe there must be an end to litigation.
17. The upshot is that the amended petition is devoid of merit. It is hereby dismissed. In the interests of justice, I will make no orders on costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 24<sup>th</sup> day of September 2015.

**GEORGE KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of:-***

The applicant (in person).

Ms.....for the respondent instructed by the  
Office of the Director of Public Prosecutions.

Mr. J. Kemboi, Court clerk.