REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CRIMINAL APPLICATION NO. 16 OF 2010

JOSEPH MURIUKI NJOGU…….....……..APPPLICANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The applicant, together with three others were convicted on several counts of the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code** in the Chief Magistrates' Court at Nyeri in **Criminal Case No. 518 of 1998**. They were all sentenced to death, as per the law provided.

Being dissatisfied with the conviction and sentence, they appealed to this court in **High Court Criminal Appeal Nos. 345, 346, 347** and **348 of 1998** respectively. Their appeals were consolidated and heard together and in a judgment delivered by this court (J.V.O Juma and J.K. Mulwa, JJ as they then were), their appeals were allowed on some of the counts but dismissed on the others. The applicant's appeal was dismissed at least on one of the counts and his conviction and sentence sustained.

Still not satisfied, the applicant and his co-accused with whom they were charged and convicted together preferred a second appeal to the Court of Appeal sitting at Nyeri **in Criminal Appeal No. 84 of 1999**. The judgment of the Court of Appeal does not appear to be in in its record but there is an order extracted on 17th day of May, 2001 showing that the appeal was dismissed on the same date.

Almost ten years later, and in particular on the 25th day of November, 2010, the applicant filed an undated application seeking a retrial of his case. The application is said to be based on **article 50(6)** of the Constitution. It ought to have been filed as a petition when one considers **rule 2** as read with **rule 4(1)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** on who a petitioner is and the manner of approaching the court whenever any right or fundamental freedom provided for under the Constitution is allegedly denied, violated or infringed. Nothing much, however, turns on the procedure adopted by the applicant considering that he is, in any event, acting in person.

In the affidavit in support of the application, the applicant has stated that the death penalty meted out against him was commuted to life imprisonment after he petitioned the Head of State for clemency.

More pertinent to his application, the applicant has deposed that he was convicted yet he was not arrested with any of the items alleged to have been robbed from the complainant. He swears that the Occurrence Book of 11th January, 1998 of Nyeri police station where he was apparently booked upon arrest would

show that he was booked in without any of the alleged items. For this reason he applied to have the Occurrence Book produced in court.

Apart from the Occurrence Book, the applicant has also sworn in his affidavit that he wants copies of the witness statements, the investigation diary and the recovery memo form. He has alleged that he is a victim of mistaken identity.

When the application came up for hearing all that the applicant told the court was that his application for the Occurrence Book in the Court of Appeal was still pending and that he wants to be retried.

Counsel for the state, Ms Maundu, opposed the application; while admitting that a retrial can be ordered if there is a discovery of new evidence, counsel submitted the applicant has not proved that such new and compelling evidence has been discovered.

Article 50(6) under which the application has been made states as follows:-

> ***50. (1)…***
>
> ***(2)…***
>
> ***(3)…***
>
> ***(4)…***
>
> ***(5)…***
>
> ***(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.***

The applicant, as noted, went through the entire appeal process both in this court and the Court of Appeal and on both occasions, his appeals were dismissed. It is apparent, therefore, that the applicant's application has satisfied the first limb of the threshold set by **article 50(6)** of the **Constitution**. The only question for this court to determine is whether the applicant has met the second limb of the threshold which is whether *"new and compelling evidence has become available"* after his conviction by the trial court and the subsequent determination of his appeals both in this court and in the Court of Appeal.

Looking at the material placed before me, the answer to this question appears to be in the negative; I say so because, first, the record from the trial court shows that the recovery of the stolen items is a question on which evidence was led and on which the accused persons, including the applicant herein, cross-examined the prosecution witnesses. The question of booking of the stolen items the applicant is alleged to have been arrested with was also dealt with in the same manner. There is no evidence from the entire trial court record that the applicant ever applied for production of any of the documents that he now claims he has persistently sought for in the two appellate courts, during the hearing of the two appeals, and again in this court, at the hearing of his application.

Secondly, the applicant's petition of appeal in the Court of Appeal would also suggest that the whole question of recovery and production of exhibits was deliberated upon and possibly determined by this court and the Court of Appeal. This is what the applicant said in his petition:-

"GROUNDS OF APPEAL

1. …

2. …

3. …

4. That the High Court judges erred in law and facts by failing to consider that the police officer who recovered the exhibits never pointed to where the exhibited items came from-(sic)-Exhibit No. 2, 3 and 6 which is a pointer that I wasn't in possession of any of the item(sic) recently stolen.

5. …

6. …

7. …

8. …

9. That the High Court judges erred in law by failing to order for the production of police O.B. dated 11th January, 1998 to prove that I was not in possession of any of the exhibited item(sic) during my arrest and I pray for its production during my appeal hearing."

Though I did not have the benefit of looking at the judgment of the Court of Appeal, it must be presumed that since the issues of possession, recovery and production of exhibits including the police Occurrence Book were questions for determination before the Court of Appeal, the latter court must have considered these before arriving at the decision it came to. Whether there is any reason, legitimate or otherwise, why the applicant may not have been satisfied with the Court of Appeal's decision, including the question of whether the Court considered the issues raised before it at all, are matters that this court cannot purport to reopen and interrogate under the guise of enforcing **article 50(6)** of the **Constitution**. In the same vein, this court cannot question its own decision subject, of course, to its limited intervention only in those circumstances that have expressly been prescribed in that constitutional provision. **Article 50 (6),** in my humble view**,** is not a carte blanche for this court to regurgitate issues that have been conclusively determined either by itself or by the court above it; if that were the case, litigation in the criminal process would never come to an end.

In my humble view, and with due respect to the applicant, his efforts in this application appear to be a fishing expedition or a speculative venture; he appears to harbour the thought that out of the documents he is seeking, some finding may just spring up that could probably be to his advantage. But that is not what **article 50(6)** of the Constitution is all about; to my understanding this constitutional provision opens a limited window of opportunity for a retrial whereupon conviction or appeal "***new and compelling evidence has become available."***

The availability of the new and compelling evidence is a condition precedent to the application for a retrial; it is a burden which any applicant or a petitioner seeking for retrial under this article must prove to have been discharged to the satisfaction of the court before his application or petition is allowed.

What amounts to ***"new and compelling evidence"*** is a question of fact and would largely depend on the circumstances of each particular case. I would suppose, however, that whatever the case, the evidence must the kind that is likely to have influenced the decision of the trial court or, where an appeal has been lodged, the appellate court, had it been brought to either court's attention in time. In other words, to be compelling, the evidence must be sufficient enough to alter, in a material way, the trial or the appellate courts' opinion if it had been brought to these courts' attention prior to their respective decisions.

Apart from the evidence's sufficiency, I would also add that under **article 50(6)** of the **Constitution,** it is upon the applicant or a petitioner for retrial to demonstrate that he could not access or produce the

evidence in issue despite his reasonable efforts to do so or that he would still fail in his endeavour even after exercise of due diligence. As noted, there is no evidence that any of the documents sought by the applicant were not available and more so there is nothing to suggest that he applied for their production at the trial. His application for production of the same documents in the appellate courts must have been considered and dismissed with the dismissal of his two appeals.

For the reasons I have given, I am satisfied the applicant's application falls far below the threshold set by **article 50(6)** for a retrial. It is not merited and it is hereby dismissed. It is so ordered.

Signed, dated and delivered this 30th October, 2015

Ngaah Jairus

JUDGE