REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 7 OF 2015

DANIEL NJIRU TIRUS..... APPICANT

VERSUS

REPUBLIC…….....RESPONDENT

R U L I N G

This is the application filed on 9/2/2015 seeking for a retrial. The application is supported by the affidavit of the applicant one Daniel Njiru Tirus.

In the affidavit, it is stated that the application is made under Article 165(3) of the Constitution. The applicant claims that he was not accorded a fair trial in contravention of Article 50(2)(a)(c) and 25(c) of the Constitution and that new and compelling evidence has become available. The applicant further stated that he has exhausted all the channels of appeal.

The state counsel Ms. Nandwa in her replying affidavit stated that the alleged new evidence has not been availed to the respondent for consideration. There is no material has been placed before court to warrant the orders being sought. She states that the application is an abuse of court process. That the trial was conducted in five years ago and an order for retrial would defeat justice as availability of prosecution witnesses cannot be guaranteed due to time passage. She further stated that memory also fades with time and the prosecution witnesses will not be able to have a proper account of what happened. There was overwhelming evidence against the applicant during trial and that the conviction which has been upheld in two appeal courts should not be disturbed.

The application was argued by way of submissions.

The applicant in his submissions stated that he was convicted for the offence of robbery with violence and was sentenced to death. His appeals in the High Court and Court of Appeal were dismissed. Further that new and compelling evidence has become available in that PW9 Joseph Njue Njeru has volunteered to swear an affidavit stating that he was forced by the police to give false evidence and hence the applicant did not have fair hearing.

The applicant further stated that the court convicted the applicant without considering that there was violation of Article 49(1)(b)(d). The applicant was forced to proceed without being provided with statements and the court relied on a defective charge sheet. The prosecution failed to avail documentary evidence based on Safaricom data and independent witnesses to support the case. If a retrial is ordered PW9 will shed more light.

The state counsel submitted that the said new and compelling evidence has not been availed to the respondent for consideration. The affidavit of the said PW9 should have been annexed to the application.

Even if there is new evidence, it will not change the verdict of the three courts as the applicant was positively identified by pw1 as one of the people who robbed her while in possession of a pistol. The evidence of pw1 was corroborated by PW2 and PW3. The issues being raised are the ones which have already been determined. The trial was conducted in 2010 and a retrial would defeat justice. The respondent cited the case of ***TOM MARTINS KIBISU VS REPUBLIC [2014] eKLR*** where the court defined new evidence as evidence which was not available during trial despite exercise of due diligence. The court defined compelling evidence as evidence which would have been admissible at trial, of high probative value capable of belief which if adduced at the trial would have probably led to a new verdict.

The applicant relied on Article 50(2)(a) and (d) which deals with the accused's right to remain silent and with the right to be presumed innocent until the contrary is proved and not to give a confession.

However, there was no evidence in the affidavit of the applicant to support or substantiate the relevance of the said provisions.

The applicable law is Article 50(6) of the Constitution provides that;

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 principles that should be considered before a retrial can be allowed were restated in the following cases;

> **1.** In the case of ***TOM MARTINS KIBISU V REPUBLIC [2014]*** (supra) the Supreme Court cited two conditions that must be fulfilled before a new trial can be ordered.

i. *A person must have exhausted the course of appeal to the highest court with jurisdiction to try the matter; and*
ii. *There must be new and compelling evidence. The court defined new evidence as evidence which was not available during trial despite exercise of due diligence. The court defined compelling evidence as evidence which would have been admissible at trial, of high probative value capable of belief which if adduced at the trial would have probably led to a new verdict.*

> **2.** ***LAWRENCE MUTUKU MUSYOKA VS REPUBLIC [2010] eKLR*** the court cited the case of ***Fatehali Manji Vs Republic [1966] EA 343*** in which Sir Clement De Lestang the then acting President of the Court of Appeal stated:
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> *In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.*

In ***M'KANAKE VS REPUBLIC. [1973] E.A. 67*** it was held that a re-trial should not be asked to fill gaps in the evidence or to rectify faults of the prosecution's case. And in ***MWANGI VS REPUBLIC [1983] KLR 522*** this Court said:-

> *We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction*

might result: ***Braganza v. R. (1957) EA 152 (CA) 469 Pyarala Bassan v. R. [1960] EA 854.*** *In our view, there was evidence on record which might support the conviction of the appellant.*

The applicant alleges that PW9 has promised to swear an affidavit stating that he was forced to give false evidence by the police. As pointed out by counsel for the respondent, the said affidavit was not attached to the application to enable the court to determine whether indeed it amounts to new and compelling evidence. The Supreme Court in the case of ***TOM MARTINS KIBISU*** (supra) defined new evidence as evidence which was not available during trial despite exercise of due diligence. The court further defined compelling evidence as evidence which would have been admissible at trial, of high probative value capable of belief which if adduced at the trial would have probably led to a new verdict.

In the Court of Appeal judgment, the court noted that the appellant was convicted on the basis of being in recent possession of the stolen mobile phone. PW13 testified that the complainant reported that she had been robbed of her cell phone make G-Tide, identity card, cash, two NHIF cards, voters card, safaricom, Zain and YU airtime. With the help of Safaricom service provider, the investigating officer learnt that the applicant was the one using the stolen phone. The phone was later traced and recovered at the appellant's house. The phone had the appellant's line and his sim card was still in use. The appellant did not deny that the phone was recovered in his house when a search was conducted.

The complainant positively identified the phone as hers by producing the purchase receipt bearing the phone serial number. The court found that the appellant did not give a reasonable explanation as to the possession of the complainant's phone. The court concluded that the appellant having been found in possession of the stolen phone a few days after the robbery led to the inevitable conclusion that he was involved in the said robbery. The court then proceeded to dismiss the appeal.

The judgment of the Court of Appeal was very candid that the appellant was convicted based on the doctrine of recent possession. The evidence of PW9 is that he knew the applicant in this case who asked to be given cash money and replace with sending cash through mpesa. PW9 gave him case KShs.700/= and the applicant then transferred KShs.1,000/= to the witness. He was later questioned by the police about the transaction. Police later arrested the applicant.

The allegation by the applicant is that PW9 is ready to swear an affidavit to state that police forced him to give false evidence. He has not sworn any affidavit to that effect for this court to consider its contents. However, even if such an affidavit was availed, it would not affect the conviction in that it was not based on the evidence of PW 9 alone. The conviction was primarily based on the fact that the applicant was found in possession of the stolen phone which was positively identified. The recent possession passed the test laid down in law.

The applicant has therefore not demonstrated that there is any new or compelling evidence which was not available on exercise of due diligence. In my considered opinion, this application does not satisfy the threshold of Article 50(6)(b).

This being the status of the application, the court need not dwell on the issue of retrial since the first limb of the test under Article 50(6)(b) has not been satisfied.

I find that this application lacks merit and it is hereby dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF NOVEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

The Applicant

Mr. Macharia for Applicant

Ms. Nandwa for Respondent