



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. 122 OF 2011

SAMUEL KIPROTICH CHESEREK.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner prays for a new trial. The background is as follows. On 27th August 2001, the petitioner was convicted for robbery with violence. That was in the Chief Magistrates Court, Eldoret, in criminal case number 1813 of 1999. He was sentenced to suffer death. His appeal to the High Court was dismissed on 14th November 2002. The petitioner lodged a further appeal to the Court of Appeal. It was also dismissed on 23rd February 2007.

2. In an amended petition dated 11th April 2013, the petitioner now claims that he did not receive a fair trial. The principal grounds are two-pronged: First, he avers that his original conviction was predicated on an illegal confession. He contends that the date and time when the confession was made were not specified; and, that it failed to meet the threshold of the *Judges Rules*. It is also contended that *the trial within a trial* preceding the admission of the confession was irregular. The petitioner states that an expert as defined by section 48 of the Evidence Act should have been called to authenticate the confession. Secondly, the petitioner avers that the doctrine of *recent possession* was inapplicable in this case.

3. The amended petition is contested by the Republic. It is submitted that there is no new or compelling evidence to warrant a fresh trial. The case for the Republic is that this is a disguised appeal. In a synopsis, the case for the State is that it did not violate the rights of the petitioner. Learned State counsel cited the precedents in *Tom Martins Kibisu v Republic*, Supreme Court Petition 3 of 2014 [2014] eKLR and *Michael Mwangi Kamau & others v Republic*, Eldoret High Court, Misc. Criminal Appl. 12,13 & 14 of 2011 [2015] eKLR. The State prays that the amended petition be dismissed.

4. On 1st October 2015, learned counsels for the petitioner and the Republic informed the court that they would rely entirely on their written submissions. The petitioner's submissions are dated 23rd September 2015; those by the State are dated 1st October 2015. I have considered the amended petition and the rival submissions.

5. The amended petition is brought under Articles 22 and 50 of the Constitution. To succeed, the petitioner *must* demonstrate *two* matters: that his *appeal* against conviction has been dismissed by the *highest court*; and, that *new and compelling evidence* has become available. 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.

6. The phrase *new and compelling evidence* was defined by the Court of Appeal in Tom Martins Kibisu v Republic, Nairobi, Court of Appeal, Civil Appeal 259 of 2012. The learned judges (Nambuye, Musinga, & M’Inoti JJA) defined new and compelling evidence as-

“Evidence that was not available at the time of trial or could not have been availed upon exercise of due diligence, and evidence sufficiently weighty that if it was available to the trial or the appellate courts, the conviction would probably not have been sustained”

7. That definition was cited with approval by the Supreme Court in the further appeal in Tom Martins Kibisu v Republic, Supreme Court Petition 3 of 2014 [2014] eKLR. The Supreme Court added that a court *“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”*.

8. I am satisfied that the petitioner has exhausted his right of appeal to the Court of Appeal which was the highest court under the repealed Constitution. The key question for determination is whether the petitioner has obtained *new and compelling evidence*. The answer is in the *negative*. The petitioner is challenging the *admissibility* of his confession in the trial court; and, the application of the *doctrine of recent possession* in his case. It remained open to the petitioner to challenge the admissibility of the confession at the trial court. He had a full opportunity to appeal against the decision at the High Court and the Court of Appeal. The same applies to the findings on the doctrine of recent possession. Those matters were largely considered in the judgments of the three courts.

9. What the petitioner is now saying is that he has brand new *legal points* that he never *argued* in any of the three courts. Those new arguments include the following: that the doctrine of recent possession was inapplicable for want of evidence showing the ammunition or weapon were recovered from the petitioner; and, considering that he was a police officer entitled to such possession. The petitioner now contends that the confession was illegal; that it did not meet the threshold of the *Judges Rules*; that it was vague; or, that an expert as defined by section 48 of the Evidence Act was not called to the stand to authenticate it. There is also a fresh submission by his learned counsel that the charges were consolidated before an unqualified person as defined by section 85 of the Criminal Procedure Code.

10. All those matters do not by any stretch of imagination constitute *evidence that was not available at the time of trial or could not have been availed upon exercise of due diligence*. Fundamentally, they do not persuade me in the least that they are *capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against the accused person*. Tom Martins Kibisu v Republic, Supreme Court Petition 3 of 2014 [2014] eKLR and Michael Mwangi Kamau & others v Republic, Eldoret High Court, Misc. Criminal Appl. 12,13 & 14 of 2011 [2015] eKLR.

11. The plea for a new trial is accordingly on a legal and factual quicksand. The petitioner has failed to *prove* that he has obtained *new and compelling evidence*. I have reached the conclusion that the entire amended petition is a disguised appeal. It follows as a corollary that the Court cannot order a new trial. The upshot is that the amended petition is hereby dismissed. In the interests of justice; and noting the predicament in which the petitioner finds himself in; I make no orders on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 16th day of November 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

The petitioner.

Mr. Mugambi for Mr. Wambua for the petitioner instructed by Wambua Kigamwa & Company Advocates.

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

Mr. J. Kemboi, Court clerk.