



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.196 OF 2014

BETWEEN

SIMON KARIUKI MWANGI..... PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

JUDGMENT

1. The Petitioner, Simon Kariuki Mwangi, was charged in **Criminal Case No.395 of 2007** with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was convicted and sentenced to 15 years' imprisonment. His Petition filed in Court on 23rd April, 2014 is premised on **Article 50(6) (b)** of the **Constitution** and he is seeking a new trial in the Chief Magistrates Court on the grounds that new and compelling evidence has since become available necessitating such a trial.

2. The 1st Respondent in opposing the Petition filed the following grounds of opposition dated 26th March, 2015;

(1) That the Petition is a sham, odious and a mere red herring which fails to satisfy the requirements of Article 50(6) of the Constitution and or any other provision of the Constitution.

(2) That the Petitioner seeks a new trial and yet he does not show that there is new and compelling evidence to warrant the same.

3. Similarly, the 2nd Respondent filed Grounds of Opposition dated 26th March, 2015 and in a nutshell states that the Petitioner has failed to satisfy the requirements of **Article 50(6)** of the **Constitution** as he has also failed to show that there is new and compelling evidence to warrant a new trial.

4. It is also the 2nd Respondent's contention that the Petitioner withdrew his appeal on condition and sentence to the High Court, voluntarily, and then filed the instant Petition. He further relies on the case of **Thirimba Mwangi vs DPP Misc Applic No.271 of 2011** where it was held that a Petitioner who seeks a new trial bears the burden of showing firstly, that new evidence which was not available during the trial

was now available and secondly, that the new evidence must be compelling and credible.

5. In addition, the 2nd Respondent submits that the right to a new trial is not an avenue for a further appeal and that it is not an opportunity for the High Court to consider the evidence and determine whether the conviction was supported by the evidence tendered in the trial Court. Rather, that the inquiry is limited to testing whether the evidence is new and compelling.

6. He therefore submits that the Petition falls below the standards prescribed by the provisions of **Article 50(6)** of the **Constitution** and should be dismissed.

7. On my part, the only issue for determination in this Petition is whether the Petitioner is entitled to the relief of a new trial under the provisions of **Article 50(6)** of the **Constitution**. As a corollary to that issue there is the question whether the Petitioner has demonstrated that he has new and compelling evidence to warrant such a trial.

8. **Article 50(6) (a) and (b)** of the **Constitution** provides 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.

b. And new and compelling evidence has become available.”

9. The Constitution has not defined what is, “new and compelling evidence?” However, in **Mohammed Abdurrahman Said and Another vs Republic Msa Criminal Misc Applic No.66A and 66B of 2011**, the High Court considered the meaning of new and compelling evidence and stated as follows;

“The word “new” is defined in the Concise Oxford Dictionary 9th Edition as “of recent origin” or “made invented, discovered, acquired or experienced recently or now for the first time.” In our understanding therefore “new” evidence that is recent in origin, has recently been discovered and was not known or available at the time of trial or will turn to the Concise Oxford Dictionary 9th Edition where the ordinary English meaning of the term “compelling” is strong and convincing evidence – evidence which may possibly persuade a court of law to reach an entirely different decision than that already reached.”

10. Further, in **Rogers Ondieki Nyakundi vs Republic (2012) e KLR** the Court in considering an application for a new trial under **Article 50(6)** of the **Constitution** stated that for such an application to succeed, an applicant must show that;

“(a) there is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of hearing of the two appeals.

(b) the evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral[or] impeaching; such evidence must not only be favourable to the applicant but it must be such evidence as is likely to persuade this Court to reach an entirely different decision from the decision already reached by the two appellate Courts.”

11. Similarly, in *Thirimba Mwangi vs Director of Public Prosecutions (supra)* the Court stated that in ascertaining whether an applicant had satisfied the ingredients of **Article 50(6) (b)** of the **Constitution**, a Court ought to consider whether;

- a. **“The evidence is new in the sense that it must not have been available to the Petitioner during the trial, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals.**
- b. **The evidence must be compelling. The new evidence must also be admissible and credible and not merely corroborative, cumulative, collateral or impeaching. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the Petitioner to the extent that it may possibly persuade a Court to law to reach an entirely different decision that that already reached.”**

12. I agree entirely with the exposition of the law above and I will now apply those principles in the Petition and opine as follows;

13. Firstly, I do not have the ‘new and compelling evidence’ the Petitioner now claims he has. In his supporting affidavit he states at paragraphs 5 and 6 as follows;

“5. That it is my firm contention that these proceedings were constituted on maneuvered by the police with bad faith which were mere allegation which were malicious vexatious and oppressive which were preferred by the police maliciously.(sic)

6. That if said evidence was availed it could have shaken the evidence of the prosecution resulting in an acquittal.”

What evidence is the Petitioner referring to? The above disposition only amount to an allegation being made by the Petitioner that the police acted in bad faith. How did the police act in bad faith? The Petitioner has mere made general statements without caring to substantiate them at all and the only conclusion one can draw is that the allegation of police acting in bad faith is an afterthought.

14. Secondly, the Petitioner had a right of appeal against the decision of the trial Court, a right which he duly pursued but he later withdrew the appeal, voluntarily. As correctly submitted by the 2nd Respondent, therefore, Petition cannot be used an alternative forum to lodge any complaints against his conviction. That is why the High Court in the *Mohammed Abdulrahman Said Case (supra)* held that a petition under **Article 50(6)** is not a retrial or an appeal. The inquiry at this stage is limited to testing whether the evidence is new and compelling.

15. It is therefore my finding that the Petitioner’s claim on the evidence is that it is neither new nor compelling and he has failed to make a case under the provisions of **Article 50(6)** of the **Constitution** so as to warrant a new trial.

16. For the above reasons, the Petition lacks merit and is dismissed. If any advise is needed, let the Petitioner, who I have interviewed severally and seems to have reformed, pursue other means of reducing his prison sentence.

17. There shall be no order as costs.

18. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Petitioner present

Miss Nyamweya for Respondent present

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE