



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL MISC. PETITION NO. 12 OF 2015**

JOSEPH NJENGA NGETHE.....PETITIONER/APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

**R U L I N G**

The application is brought under Article 50(6) of the Constitution of Kenya. The petitioner/Applicant was convicted of the offence of robbery with violence and was sentenced to suffer death by Siakago Senior Resident Magistrate in Criminal case No. 1039 of 2007 on 19/9/2008. He filed an appeal in Embu High Court Criminal No. 172 of 2008 which was dismissed on 9/2/2010.

The petitioner filed a second appeal in the Court of Appeal Nyeri in Criminal Appeal No. 20 of 2010 which was also dismissed on 18/9/2013.

The petitioner relies on only one ground framed as follows:-

1. *That new and compelling evidence has become available and has come out that key prosecution witness PW2 while the petitioner is still waiting execution of sentence has denied positively identifying the petitioner.*

The application is grounded on the petitioner's affidavit sworn on 10th March 2015 and on that of one Patrick Kamau Muriuki sworn on the same day.

The petitioner stated that after the Court of Appeal upheld his conviction, he accepted his fate. But in January 2015, his former employer Mwangi Wanjau traced him at Nyeri G.K Prison and informed him that one of the witnesses Patrick Kamau had approached him and informed him that he did not believe his evidence was correct. He sought the services of an advocate whom he directed his former employer to ensure he swore an affidavit. He believes there is new evidence to warrant the application to be allowed.

In the supporting affidavit of Patrick Kamau Muriuki, he stated that he was a witness in Siakago SRM Criminal Case No.1039 of 2007 in which the petitioner was the accused. He has since been disturbed by the evidence he gave regarding the identity of the petitioner. The incident occurred at night and the driver never alighted. The filling of petrol at Sagana station (total) took about 5 minutes before the motor vehicle sped off. He was then collected by the police and taken to the place where the thugs were at along Sagana - Nairobi road and was instructed to say that they were the ones who robbed him. After having nightmares and lingering doubts about the identification of the petitioner he sought to find out his whereabouts and traced him somewhere at Kagio. He then found out that the petitioner had been employed as a driver and he disclosed to the former employer of the petitioner about his doubts. The said employer promised to find out the whereabouts of the petitioner and later traced him to Kingongo GK

Prison. He then volunteered to swear an affidavit so say that he could not identify the petitioner. He cannot confirm for sure that the petitioner was among the robbers.

In a replying affidavit by counsel for the State indicated that the petition does not disclose any new evidence to warrant the retrial sought. The conviction was not solely based on the evidence of PW2 but also on the evidence of the 2nd co accused who implicated the co accused. During trial the petitioner was allowed to cross examine the 2nd co accused hence his rights were observed. PW2 denial of the evidence he gave is an afterthought meant to defeat the course of justice. The petitioner is aimed at aiding the petitioner in defeating the course of justice. The trial was conducted in 2007 and a retrial would similarly defeat justice as availability of prosecution witnesses cannot be guaranteed. The petition does not satisfy the legal requirements of a retrial and the same ought to be dismissed.

Both parties filed submissions.

The petitioner in his submissions stated that he has exhausted the avenues of appeal and that there was no opening to pursue an appeal at the Supreme Court as the appeal does not involve interpretation of the constitution and is not a matter of general public importance. The petition satisfies the requirements of Article 50(6)(a).

The petitioner has new and compelling evidence which has become available as PW2 has sworn an affidavit in support of the petitioners application. The evidence of the 2nd co accused which the state alleges strongly linked the petitioner to the offence is weak. It is not the duty of this court to determine what the outcome of the case would have been had PW2 testified as per his affidavit. PW2 has confirmed that it is the police who directed him on what to say. The petitioner relied on the case of **MICHAEL OCHIENG ODONGO VS STATE PETITION NO.11 OF 2011** and **HASSAN MOHAMED NAMWIBA VS REPUBLIC [2014] eKLR** whose relevance he did not explain.

The respondent in her submissions indicated that the issue for determination is whether the the petitioner has fulfilled the conditions of article 50(6) of the Constitution Supreme Court case of **LT COL TOM MARTINS KIBISU V REPUBLIC [2014] eKLR** was cited. In the said case it was held that under Article 50(6) "new evidence" means:-

*evidence which was no available at the time of trial which despite exercise of due diligence could not have been availed at the trial. Compelling evidence means evidence that would have been admissible at trial, of high probative value capable of belief and which did adduced at trial would probably lead to a different verdict."*

The respondent further argued that the affidavit of PW2 is not new evidence and cannot warrant a retrial. The affidavit is in bad faith and an afterthought. The conviction was not based solely on the evidence of PW2 as identification was also by other pieces of evidence. The 2nd and 3rd accused persons who were passengers of the petitioner were able to identify him as the driver to the stolen motor vehicle and that the vehicle stopped at Sagana petrol station where PW2 fueled the vehicle. PW2 failed to pay and this prompted PW2 to report the incident at Sagana police station. The vehicle was intercepted at Makutano and the 1st, 2nd and 3rd accused persons were arrested. The petitioner was issued with the statement of PW2 to enable him prepare for trial and challenge the evidence. There is nothing new or compelling to allow a retrial.

The relevant 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 to be considered before a retrial can be allowed were restated in the following cases:-

a) In the case of **TOM MARTINS KIBISU VS REPUBLIC [2014] eKLR** (cited and attached by the respondent) the Supreme Court cited two conditions that must be fulfilled before a new trial can be ordered. Firstly a person must have exhausted the course of appeal to the highest court with jurisdiction to try the matter and secondly, there must be new and compelling evidence.

b) **LAWRENCE MUTUKU MUSYOKA V REPUBLIC [2010] eKLR**. The court cited the case of **FATEHALI MANJI V. R. [1966] E.A. 343** in which Sir Clement De Lestang the then acting President of the Court of Appeal stated:

*“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.”*

The petition is based on the fact that PW2 has recently claimed that he was told what to say by the police officers at the time he recorded his statement. The petitioner attaches an affidavit of PW2 in which the witness states that he was duped by the police to purport that he identified the appellant and his accomplices and that he is ready to recant his earlier evidence. The petitioner argues that in the absence of PW2's evidence, there would be no positive identification to support conviction. It is therefore important to examine the evidence relied on by the court in convicting the appellant.

The evidence of PW8 a police officer was that on 13/6/2007 at 8.00 p.m. he was on patrol duties accompanied by one PC Mwangi and PC Mbogo along Sagana Makutano road using the station land rover. They were informed through police communication system to look out for motor vehicle registration No. KAU 165 F which was heading to Nairobi from Sagana. The driver of the vehicle was said to have fueled it at a petrol station in Sagana but had refused to pay for the fuel. The police officers were manning the Makutano road block informed them that they had intercepted the vehicle. PW8 instructed them to guard the car awaiting their arrival. The officers proceeded to Makutano road block where they found the petitioner seated at the driver's wheel. On the co-driver's seat was second accused.

The second accused told the court that he was arrested on 13/6/07 at around 8.00pm. He had boarded a small saloon car which was destined to Nairobi. The driver told him to pay KShs.200/= and he sat on the front seat. The vehicle was fueled at a petrol station in Sagana and then driven off towards Nairobi. The vehicle was later flagged down at Makutano road block by police officers. The occupants were ordered to get out of the car. He stated that it was the 1st accused who was driving the motor vehicle.

The third accused testified that, like the second accused he was at a bus stage at Sagana waiting for a vehicle to go to Nairobi. He boarded a vehicle with two occupants and paid KShs.150/= as bus fare while the second accused paid KShs.200/=. The vehicle was driven to a petrol station for fueling. Thereafter it proceeded towards Nairobi but it was stopped by police officers at a road block at Makutano. The occupants were ordered to raise their hands as police interviewed the driver. They were all arrested and taken to Sagana police station.

In his judgment the magistrate relied on the evidence of PW2, PW5, PW7 and PW8 as well as that of the second and the third accused in their defence. The conviction was upheld in the first and second appeal. On the issue of identification, the Court of Appeal on page 13 of the judgment held as follows;

*".....the learned judges considered and evaluated the evidence in totality and did not rely on the testimony of a single identifying witness. The learned judges took into account the evidence of the arresting officers who stated that the appellant was arrested while on the steering wheel of*

the motor vehicle that was stolen and recovered in his possession *are satisfied that the testimony of PW2 was not the only evidence that connected the appellant to the offence.....*"

It is therefore not only the evidence of PW2 that led to the conviction of the petitioner but that of several other witnesses. This included the evidence of recovery and possession of the stolen motor vehicle and that of his two accomplices.

On the issue of the identification of the appellant by his accomplices the Court of Appeal on page 15 of the judgment stated as follows;

*"...we have looked at the totality of evidence on record and are satisfied that the accomplice evidence given by the 2nd and 3rd accused was credible; we are satisfied that there is independent evidence which affects the appellant and connects him with the crime. The testimonies of PW2, PW5, PW7 and PW8 who were at the scene at the time when the appellant was arrested at Makutano road block as well as the appellant recent possession of the stolen motor vehicle connect him to the crime...."*

Article 50(6)(b) of the Constitution states that a retrial may only be ordered where *new and compelling evidence has become available*.

The Supreme Court in the **LT. COL. TOM MARTINS KIBISU** case (supra) was in agreement with the Court of Appeal that under Article 50(6) of the Constitution new evidence means:-

*evidence which was not available at the time of trial and which despite exercise of due diligence could not have been availed at the trial and compelling evidence implies evidence that would have been admissible at the trial, of high probative value and capable of belief and which if adduced would have led to a different verdict.*

PW2 was a witness in this case where he gave implicating evidence against the petitioner. He testified on 17/1/2008 which is about seven years ago. It is suspect for him to attempt to recant his evidence after such a long period. The purported new evidence was within the knowledge of the witness at the time he testified. He was travelling in the same vehicle with the petitioner when he was arrested. One cannot be wrong to think that PW2's motive in this petition is designed to get the petitioner off the hook. The respondent may be justified to state as it has done that the affidavit of PW2 was not made in good faith.

The new purported evidence by PW2 does not fall under the description of new and compelling evidence under Article 50(6). The conviction of the petitioner was based on the evidence of several witnesses. Even if the purported new evidence was to be introduced in the case during a retrial, it would not lead the trial court to reach a different finding bearing in mind that the evidence of PW5, PW7 and PW8 would not change.

I reach a conclusion that the purported new evidence of PW2 as contained in his affidavit sworn on 10/3/2015 does not amount to new and compelling evidence under Article 50(6)(b).

I find no merit in this petition and it is hereby dismissed.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF NOVEMBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Kiminda for Petitioner**

**Ms. Nandwa for the Respondent**

**Petitioner present.**