



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

MISC. CRIMINAL APPLICATION NO. 22 OF 2014

BETWEEN

DANIEL OWIGO APIYO APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant was charged at the *Homa Bay Senior Resident Magistrate's Court Criminal Case No. 90 of 2006* for the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charges were that on the night of 5th October, 2005, at Rodi Kopany in Homa Bay District of the then Nyanza Province, the applicant jointly with others not before the court and while armed with dangerous weapons, namely, a firearm, pangas and rungun, robbed Maurice Okelo Warada (count 1), Samwel Otieno Nyaliech (count 2), Maurice Omondi Mbai (count 3) and Asenath Atieno Nyalala (count 4) of various items named in each charge and during the robberies, they used or threatened to use violence on the victims of the robberies.
2. Following the convictions and sentence, the applicant appealed to the High Court; **Kisii High Criminal Appeal No. 271 of 2006**. By its judgment delivered on 12th May 2009, the High Court (Musinga and Karanja, JJ) dismissed the appeal and confirmed the death sentence imposed on the applicant. The applicant then appealed to the Court of Appeal being Kisumu **Criminal Appeal No. 129 of 2009** and by the judgment delivered on 22nd March 2012, the Court (Omolo, Waki and Visram, JJA) dismissed the appeal.
3. The applicant now moves this court under the provisions of **Article 50(6)** of the Constitution which provides as follows;

(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.

4. In the application, the applicant seeks an order of retrial to enable him tender new and compelling

evidence on the following grounds;

- a. That the applicant did not have access to the evidence the prosecution intended to rely on to prosecute the prosecution.
- b. That the applicant was harassed, intimidated and threatened by the police.
- c. That the trial court, the 1st and 2nd appellate courts failed to find out the truth and/or warned on the dangers of key witnesses who did not testify.

5. From the procedural history I have set out above, the applicant has satisfied the first condition under **Article 50(6)** of the Constitution in that his appeal to the highest court has been heard and dismissed. This dispute therefore relates to the second limb of the provision. In response to the application, Mr Oluoch, learned counsel for the respondent, submitted that the applicant has not satisfied the requirements of the law by setting out new and compelling evidence. He further contended that the issues raised by the applicant in his grounds and submissions were considered and dismissed by the appellate courts.

6. The applicant also filed an affidavit sworn on 27th October 2014 by **MAURICE OMONDI KAPIS**, who was one of the complainants and a witness PW 1 at the trial, for consideration. Although the filing of the affidavit was unprocedural and that the same ought to have been filed and served on the respondent in time to enable it respond. I will however deal with and consider the same in the interests of justice and for the sake of completeness. The affidavit of **MAURICE OMONDI KAPIS** at the material part states as follows;

1. *THAT I am an adult male of sound mind and disposition and one of the complainants in Criminal Case No. 90 of 2006 at the Senior Residents Magistrate at Homa Bay hence competent to swear this affidavit.*
2. -----.
3. -----
4. *THAT I know of my own knowledge that I booked a report with police against one DANIEL AWIGO APIYO.*
5. *THAT consequently the said DANIEL AWIGO APIYO was charged with Robbery with Violence contrary to section 292(2) of the Penal Code.*
6. *THAT I actually did give incriminating evidence against the said DANIEL AWIGO APIYO to the effect that he was wielding a gun and in the company of a certain gang of robbers and they assaulted and robbed me of various items on the material night of robbery.*
7. *THAT my testimony was not entirely accurate as I was mistaken as to the identity of the said DANIEL AWIGO APIYO.*
8. *THAT my testimony which saw the said DANIEL AWIGO APIYO convicted and subsequently sentenced to life imprisonment continues to prick my conscience as it was made on the basis of a mistaken belief.*
9. *THAT my said items were not actually recovered at the residence of the said DANIEL AWIGO APIYO.*
10. *THAT the said DANIEL AWIGO APIYO is well-known to me being one of my clansmen and I know him to be a person of impeccable and good repute.*
11. *THAT my testimony in the trial court was a product of fabricates lies having been compelled to give incriminating testimony against the said DANIEL AWIGO APIYO.*
12. *THAT I know that the criminal case brought against the said DANIEL AWIGO APIYO was a ploy and a grand scheme beautifully orchestrated to fix and disinherit the petitioner.*

7. In order to succeed in his application, the applicant must demonstrate that he has new and compelling evidence that would entitle him to a new trial. What is new and compelling evidence was considered by the Supreme Court in **Lt Col. Tom Martins Kibisu v Republic Sp. Ct. Petition No. 3 of 2014 [2014]eKLR** where it stated as follows;

[42] *We are in agreement with the Court of Appeal that under Article 50(6), “new and compelling evidence” means “evidence which was not available at the 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 at the trial would probably have led to a different verdict.” A Court considering whether evidence is new and compelling for a given case, 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 the accused person.

8. It is clear from the guidance given by the Apex Court that ‘*new and compelling*’ evidence does not involve rehearing the appeal. Perhaps to appreciate whether the applicant has a case, it is necessary to summarise the case against him. Maurice Okelo Warada (PW1), Maurice Omondi Mbai (PW2), Asenath Otieno Nyalala (PW3) and Samuel Otieno Nyariech (PW5) testified how they were attacked on the material night. They each recognized the applicant during the robberies as they were all from the same neighbourhood at Rodi Kopany. PW 1 knew the applicant as his clansman while PW 3 said that he was a son to one of her in-laws. The four witnesses swore that during the robberies, the applicant was armed with a pistol and PW 1 said the applicant hit him with a metal bar on the head. They all stated that the applicant was the one in charge of the robbers and that he ordered them to call him “*Afande Daniel Owigo*.” The robbers claimed to be police officers and were dressed in police attire. All the complainants were robbed from their respective houses which were in the same neighbourhood and each victim was used to lure the others to open the door for the robbers. Police Constable Richard Limo (PW4), who visited the scene of the robbery, testified that the witnesses gave him the name of “*Daniel Owigo Opiyo*” and it was PW 1 who, after looking for the applicant in vain at Rongo, eventually arrested him in Mbita. In these circumstances, the trial court and both appellate courts were satisfied that the applicant was recognized and that he participated in the robbery. The applicant’s contention supported by the deposition of **MAURICE OMONDI KAPIS** that this was a case of mistaken identity cannot constitute new and compelling evidence.
9. Both appellate courts dealt exhaustively with the issues of identification and the argument that an essential witness was not called by the prosecution. I also understood the applicant to be contending that the prosecution did not prove its case. The issues of proof of the offence were dealt by the trial and both appellate courts which, after evaluating the evidence, concluded that the offence had been proved. Even if the court were to accept the deposition of **MAURICE OMONDI KAPIS** deposition, there remains the evidence of the other complainants implicating the applicant.
10. The issues whether the applicant did not have access to the evidence the prosecution and the allegation that the applicant was harassed, intimidated and threatened by the police were not raised during the trial or in the appellate courts and are not new and compelling evidence contemplated by the *Tom Martins Kibisu Case* (Supra).
11. In light of the clear provisions of **Article 50(6)** of the Constitution, the applicant’s case cannot succeed. It is dismissed.

DATED and DELIVERED at HOMA BAY this 22nd day of December 2015

D.S. MAJANJA

JUDGE

Applicant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.