



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC APP NO 29 OF 2015

DAVID ONGANYI ALELA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. **David Onganyi Alela**, the applicant herein, has brought this application under Article 50(6) of the Constitution seeking a fresh trial. The Applicant was on 11th November 2003, together with others not party to this application, charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code and one count of rape contrary to section 140 of the Penal Code at Maseno Magistrate's Court. On 7th June 2004, they were found guilty of the offence of rape and sentenced to 10 years imprisonment. They were also found guilty of the offence of robbery with violence and sentenced to suffer death as the law prescribes.

2. They being aggrieved by the decision of the trial court appealed separately to the Superior Court and their respective appeals were consolidated in Kisumu HCCRA No. 96 of 2004 which resulted in the convictions on the robbery charges being upheld, and the convictions on rape charge being quashed and the sentences thereof set aside on the ground that the charge was fatally defective. They filed a second and final appeal to the Court of appeal vide Kisumu CA No. 99 of 2007 and the same was dismissed on 16th January 2009 and their convictions upheld.

3. The applicant has now come to this court seeking a fresh trial basing his application on the ground that new and compelling evidence has now become available to him.

4. The petitioner's case can be summarised from his application and his supporting affidavit. It is his case that he was convicted on evidence of identification and recognition but that neither of the initial reports made at Luanda Police Station contained his name and that the OB reports made were never produced. That this information was not available to him during trial.

5. The Application was opposed. The thrust of Ms Sirtui's submissions on the respondent's behalf is that the Applicant has not met the threshold of the **Article 50(6)** of the Constitution to entitle him to a new trial. He submitted that the petitioner has not furnished new and compelling evidence in the matter to warrant a retrial. That the issues of the initial report and identification were canvassed but at trial and on appeal. He urged the Court to dismiss the Applicant's application.

COURT'S RENDITION

6. A person who has been convicted and has exhausted all the appeals has the right, under **Article 50(6)** of the Constitution to seek a fresh trial if he meets the threshold laid out therein . As was held in **PATRICK MACHARIA V REPUBLIC [2014] eKLR**, in order to invoke this court's jurisdiction under Article 50(6) of the Constitution, the applicant must demonstrate that;

- a. **His prayers were dismissed by the highest court of appeal in the land.**
- a. **That new and compelling evidence has become available and which was not available at the time of his trial.**
- a. **Alternatively the petitioner should show that he did not appeal in which case he must in addition demonstrate that new and compelling evidence had become available.**

7. The Supreme Court of Kenya in **TOM MARTINS KIBISU VS.- REPUBLIC [2014]eKLR** has eloquently defined new and compelling evidence in the following terms:

"We are in agreement with the Court of Appeal that under Article 50(6) "new evidence" means " evidence which was not available at the time and which, despite exercise of due diligence, could not have been availed at 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. In the present case, the applicant has stated the evidence that has become available to him is Police Occurrence Book reports. It is his case that his name was not mentioned in the initial reports made at Luanda Police Station and as such the recognition evidence that was relied on by the trial magistrate was faulty. Can this be classified as new and compelling evidence? A perusal of the trial court record divulges that these OB reports were available to the court at the time of trial yet they did not influence the court's decision. The applicants together with his co-appellants also raised the issue on appeal in this Court and the same did not influence this Court's decision. The Supreme Court in **TOM MARTINS KIBISU VS.- REPUBLIC (SUPRA)** has stated that compelling evidence must be of probative value, capable of belief and which if adduced at trial could have led to a different verdict. It must also be remembered as was stated in the case of **WILSON THIRIMBA MWANGI VS. DPP MISC. APPL. NO. 271 OF 2011** that the applicant is not coming before this court with a presumption of innocence but that of guilt, his guilty having been ruled by two superior courts. The onus is thus upon him to convince this Court that the evidence he is introducing is of probative value.

9. The evidence intended to be produced by the applicant in this case does not introduce any new information that is not already in the Court's knowledge and which would persuade it to hold that the two superior courts erred in their decisions.

10. For the foregoing reasons we do dismiss the petition.

Dated, signed and delivered this 15th day of December, 2015.

H. K. CHEMITEI

E. N. MAINA

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