



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC APP. NO. 72 OF 2012**

**WILSON OKETCH DACHI .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

1. The petitioner, **WILSON OKETCH DACHI** was on 12th March, 2008 charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code at Kisumu Chief Magistrate's Court. The particulars of the offence were that on 16th September 2007 at Nyahera area in Oyugis town, jointly with another, while armed with offensive weapons robbed George Ochola of a motor cycle chassis number MD 623FB3071C37291 the property of James Ochieng Otieno.

2. He was convicted of the offence and sentenced to suffer death. Being aggrieved by the decision of the trial court, the petitioner appealed to the High Court in Kisumu vide HCCRA No. 28 OF 2009 wherein his appeal was heard and dismissed on 8th December 2009. He filed a second appeal to the Court of appeal vide Kisumu CrA No. 372 of 2009 and the same was dismissed and his conviction upheld.

3. The petitioner has now come to this court seeking a fresh trial founding his petition on the provisions of **Article 50(6)** of the Constitution which provide as follows;

**50(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. The petitioner's case can be summarised from his application and his supporting affidavit. It is his case that he did not have his Identification Card in Court when PW3 testified and as such he was not able to show that he was not the one who sold the said motor cycle to PW3.

5. The Application was opposed. The thrust of Ms Sirtui's submissions on the respondent's behalf is that the petitioner has not met the threshold of **Article 50(6)** 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. He urged the Court to dismiss the petitioner's application.

## **COURT'S DECISION**

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 . In order to invoke this court's jurisdiction under Article 50(6) of the Constitution, the applicant must demonstrate that; that new and compelling evidence has become available and which was not available at the time of his trial.

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 petitioner has not shown that he is in possession of any new and compelling evidence. The only point the petitioner has raised is the fact that he did not have his Identification Card in Court while PW3 was testifying. We do not see how his Identification Card would helped his case, him having been positively identified as the person who sold the stolen motor cycle to PW3. 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. We do not think that the presence of his Identification Card would have influenced the court's decision. It is for that reason that this application must fail.

8. The same is hereby dismissed.

**DATED, SIGNED AND DELIVERED THIS 15TH DAY OF DECEMBER, 2015**

**H. K. CHEMITEI**

**E. MAINA**

**J U D G E**

**J U D G E**