REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL MISC. APPL. NO.117 OF 2012

NICHOLAS OTIENO ODERA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an application from original Kisumu Chief Magistrate's Court

in Criminal Appeal No.743 of 2005].

****

J U D G M E N T

Under Article 50(6)(a) and (b) of the Constitution of Kenya 2010.

> **"(5) 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 to appeal, and**
>
> **b. new and compelling evidence has become available."**

The applicant has petitioned this court seeking a new trial under the provision on the basis of new and compelling evidence. In the affidavit sworn to support the motion, he stated that the reason he wants a new trial was because

".....the learned trial magistrate erred in law by not complying with the provision of Section 329 CPC before handing me the death sentence."

Mr. Mongare for the DPP opposed the application. In his view, the applicant 's grievance should have formed a ground of appeal to the High Court and Court of Appeal as this was not a new matter or evidence as envisaged under the Article in question.

The brief facts of this case were that the applicant was along with another charged with robbery with violence c/s 296(2) of the Penal Code whose particulars were that on 11/10/04 along Oginga Odinga Street within Kisumu City of Kisumu District, jointly with others not before the court and while armed

with pangas robbed Dorine Maina Roberts of one camera, one green bag, two purses, two pairs of spectacles, one pair of socks, one mobile charger, note book, identity card, driving licence, Kshs.5000/= and at or immediately after or immediately before the time of such robbery threatened to use actual violence on the said Dorine Maina Roberts. They were convicted and each sentenced to death. They appealed to the High Court in Kisumu Criminal Appeals Nos.12 and 13 of 2005. The appeals were consolidated, heard and dismissed. The applicant then filed Criminal Appeal No.405 of 2007 in the Court of Appeal at Kisumu. The appeal was heard and, again, dismissed. This is when he filed the present motion.

Under section 329 of the Criminal Procedure Code the court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself of the proper sentence to be passed. Under section 361(1) of the Criminal Procedure Code, the legality or severity of a sentence are matters that a person convicted can raise on appeal for consideration and determination (**ROTICH .V. REPUBLIC [1983] KLR 541).** I therefore agree with Mr. Mongare that the applicant's complaint ought to have formed the basis of his appeal. Indeed he appealed against the conviction and sentence but did not succeed.

In any case, it is trite that where there is a prescribed mandatory sentence, in this case death as provided for by section 296(2) of the Penal Code, there can be no argument that the sentence was harsh and excessive. (**JOHNSON MUIRURI .V. REPUBLIC [1983] KLR 445).** A mandatory sentence can neither be harsh nor excessive.

It is now accepted that the right to a new trial under Article 50(6) is not an avenue for further appeal. The applicant went through his trial and exhausted his right of appeal. His conviction was, consequently, deemed to be final. Any ordinary errors made in the course of the trial were supposed to be corrected by the process of appeal **(WILSON THRIMBA MWANGI .V. DPP, NBI H.C. Miss. Application No.271 of 2011).** The issue of mitigation was always known to him, and he was required to argue it during the trial. If he asked to mitigate and he was not allowed, or if he did not know that he was supposed to mitigate, or the court forgot to have him mitigate, all these were matters to be raised on appeal. This is notwithstanding the fact that the court was dealing with a charge in respect of which the death penalty was mandatory, mitigation or no mitigation.

In **LT. COL. ROBERT TOM MARTINS KIBIS .V. REPUBLIC, Civil Appeal No.259 of 2012 at Nairobi,** the Court of Appeal considered the meaning to be attached to Article 50(6)(b) of the Constitution when it stated as follows:

“In our view, to constitute new evidence within the meaning of that Article, the evidence must be evidence which was not available at the time of the trial and which, despite exercise of due diligence, could not have been availed at the trial.

The word “compelling” connotes something that is powerful, convincing, weighty, imperative, irresistable or irrefutable. To constitute compelling evidence therefore the 'evidence' in question must be evidence that could 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 different verdict.”

Whichever way one looks at this application, the only conclusion that can be drawn is that there has been no demonstration of “new and compelling” evidence in terms of the Article. The result is that the application lacks merits and is hereby dismissed.

Dated, signed and delivered this 7th April, 2014.

A. O MUCHELULE

J U D G E