

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 12 OF 2014

HASSAN MOHHAMED NAMWIBA PETITIONER

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

In his petition dated 12.2.2014 the petitioner is seeking an order of retrial of his case on the reason that there is new and compelling evidence that has become available as contemplated under **Article 50(6)** of the **Constitution**. The application is supported by the petitioner's affidavit. It is indicated that the complainant has now emerged and swore an affidavit indicating that the petitioner was not the one who robbed him.

This court summoned the complainant in Kakamega **Criminal Case No.2056 of 2009** one **CONSTANT SIFUNA KULOBA** who swore an affidavit on the 4.2.2014. The complainant was put on dock and was sworn. The complainant informed the court that he had thought that it was the petitioner who had robbed him of a motorcycle. After the case was concluded and time lapsed the stolen motorcycle was recovered and given to the owner by the name **MARTIN**. It is his evidence that after the recovery of the motorcycle it was found that it was not the petitioner who had robbed him. He stated that he has no complaint against the petitioner and he is the one who went to the petitioner's family and informed them about the recovery of the motorcycle. He informed the court that he has not been forced or paid any money to come and testify but it is the new information that has come to his knowledge that has made him inform the court the truth.

Mr. Kiveu, counsel for the petitioner submitted that the information by the complainant is new and compelling evidence that has come after conviction. The recovery of the motorcycle which has now been returned to the owner does not link the petitioner to the offence. The court can order a retrial or released the petitioner. Mr. Oroni, State Counsel, concurred with the submissions of Mr. Kiveu and stated that it is clear that the petitioner did not commit the offence. This is new and compelling evidence and counsel urged the court to acquit the petitioner.

The record shows that the petitioner was charged with the offence of robbery with violence contrary to **section 296** of the **Penal Code**. He was convicted and sentenced to death. The petitioner filed Kakamega Criminal Appeal No.43 of 2011 and the same disallowed. The petitioner contends that he has always pleaded his innocence until when he got information from his home that the complainant has new information. The complainant was directed to his advocate and has led to the current petition. I have gone through the record of the trial court and it is established that Constant Sifuna Kuloba was the complainant and testified as PW1. He had informed the court that on the 19.10.2009 he was robbed of a motorcycle while operating it as a boda boda. The complainant has now come to court to state that when he testified the boda boda had not been recovered but it was later recovered and given to the owner. I had the opportunity to see the complainant and even raised several questions with him but he was categorical that it is not the petitioner who robbed him.

Article 50(6) of the **Constitution** states, any person who has been convicted of a criminal offence has the right to petition the court for a new trial if there is new and compelling evidence that has become available. From the evidence it is established that the complainant has discovered new and compelling evidence. Although **Article 50** calls for a new trial, it is clear that the court cannot order a new trial as the complainant has no claim against the petitioner. I do agree with the submissions by counsel for the

petitioner and the State Counsel that the petitioner should be acquitted instead of there being a new trial.

In the end I do find that the circumstances that can call upon **Article 50** of the Constitution into play have been satisfied. There is new and compelling evidence and an order of retrial would not meet the ends of justice as the petitioner is not the person who robbed the complainant. The petition is hereby granted as prayed. The petitioner HASSAN MOHAMED NAMWIBA is hereby acquitted and shall be set at liberty unless otherwise lawfully held.

DATED AT KAKAMEGA THIS 29TH DAY OF MAY 2014

SAID J. CHITEMBWE

J U D G E