REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC.CRIMINAL APPLICATION NO. 14 OF 2013

LESIIT J.

PATRICK MACHARIA ……………………………….PETITIONER

V E R S U S

REPUBLIC………….........…………..…………RESPONDENT

JUDGMENT.

1. **Introduction and background.**

The Petitioner's case has been brought by way of a Chamber Summons application. It is for all intents and purposes a petition for a new trial founded on the provisions of **Article 50(6)** of the **Constitution** which provides;

> **"(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."**

The Petitioner was arraigned before the Meru Chief Magistrates Court 28th July, 2004 and charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The Petitioner was tried and convicted of the robbery charges by Mr. J. R. Karanja, Chief Magistrate then in Criminal Case No. 1799 of 2004.

An appeal was lodged against the conviction to wit; Meru High Court Criminal Appeal No. 144 of 2005. The appeal was heard by Hon. I. Lenaola and Hon. W. Ouko and dismissed on 25th February, 2008. He filed a second appeal to the Court of Appeal vide CA No. 120 of 2008 and heard by Bosire, Githinji and Nyamu JJ. A. That Court dismissed the appellant's appeal on 19th November, 2010.

2. **DECLARATIONS SOUGHT**

The Petitioner was unrepresented when he filed this Petition. He did not frame any or seek any declarations in his Petition.

3. GROUNDS UPON WHICH APPLICATION IS BASED.

The application is based on an affidavit sworn by the Petitioner which states as follows:

1. **I the applicant was arrested on suspicionof robbery with violence contrary to section 296(2), charged tried and convicted to serve death sentence.**

2. **All my appeals in the two constitutional appellate courts have since been dismissed.**

3. **I strongly believe that I was not awarded a fair trial into the lower court.**

4. **There is compelling evidence that was available on the side of the lower court.**

5. **There are high chances of success if I am granted a chance for retrial in the lower court.**

The application is further based on the following amended grounds:

1. **That the complainant plus witnesses lied by testifying that they did not know me while we have known each other for a long time.**

2. **That the court should have ordered an independence part to re-investigate the matter by way of visiting both my residence and that of the complainant.**

3. **That the court should have summoned my land lady whom I had mentioned in my defence as Kagendo to testify if I was her tenant.**

4. **That the prosecution witnesses were or had a common goal which was not well investigated or examined during the trial.**

5. **That the burden of proof was laid on me the applicant while it should have been vice versa.**

6. **That PW1 and PWIII (both ladies) cast a lot of doubt by saying they were entertaining guest where after PWII escorted PW1 home it was totally dark due to a power blackout at 12.30 am (midnight) without even torches.**

7. **That PW1 case a lot of doubt in fact by testifying that she held onto a suspect who held her by the neck while being robbed.**

8. **That the Investigation Officer on being examined did not know of any connection between me and the complainant and the other witnesses.**

4. SUPPORTING AFFIDAVIT

The application is supported by a statement which for all practical purposes is coined in the form of an affidavit. It is titled additional grounds of application and is signed by the Petitioner but not commissioned. It states as follows:

1. **That I was arrested on suspicion of robbery with violence contrary to section 296(2), charged convicted and sentenced to death.**

2. **That all my appeals have been dismissed by all the appellate court, I am entitled to appeal.**

3. **That I strongly believe that the trial before the lower court was not fair.**

4. **That I stand high chances of success if my application is allowed.**

5. **That what deponed herein is true to the best of my knowledge and belief.**

5. SUBMISSIONS BY PARTIES AND ANALYSIS

The Petitioner was unrepresented. However having noted he was struggling with the application, and upon his request, I gave directions that the Deputy Registrar appoints counsel to represent the Petitioner. That was done and Mr. Ndubi advocate was given the case. He filed written submissions which he relied upon and highlighted in court in support of this petition.

Mr. Ndubi urged that the Petitioner went through the trial and the appellate jurisdiction of the court in which the conviction and sentence by the Chief Magistrate's court was confirmed. Counsel urged that consequently he qualified to bring his Petition under Article 50 (6) (a) and (b). Counsel submitted that new and compelling evidence had since become available through O.B. of 25th July, 2004 which entitles the Petitioner to seek a re-trial of his case.

The application is opposed. Mr. Makori, learned Prosecution Counsel represented the State in this petition. He too filed submissions which he also highlighted in court. Mr. Makori urged that the so called new and compelling evidence was always available and that the same could have been sought at the trial by the counsel who represented the Petitioner at the trial. . Learned Prosecution counsel urged that that evidence was neither new nor compelling. Mr. Makori urged that even if that evidence was availed at the trial it could not have changed the outcome of the case to the Petitioner's favour.

6. ISSUES FOR DETERMINATION

Out of the submissions by both the Petitioner and the State the issues that arise for determination are as follows:

a. What the Petitioner is seeking in the application under Article 50(6) of the Constitution 2010.

b. Whether there is new and compelling evidence to justify the court to order a retrial of the Petitioner's Criminal Cases.

c. Whether the dismissal of the trial magistrate and judge or judges who heard the Petitioner's case and Appeals entitles the Petitioner to have a retrial of his cases.

7. WHAT THE PETITIONER IS SEEKING IN THE APPLICATION UNDER ARTICLE 50(6) OF THE CONSTITUTION 2010.

In the submissions by the counsel for the Petitioner,he urged that the Petitioner was seeking a re-trial of his case.

8. WHETHER THERE IS NEW AND COMPELLING EVIDENCE TO JUSTIFY THE COURT TO ORDER A RETRIAL OF THE PETITIONER'S CRIMINAL CASES.

Mr. Ndubi for the Petitioner urged that there was new evidence in the form of an O.B. of 25th July 2004. Counsel urged the court to find that it was necessary to order a re-trial in order to give the Petitioner the chance to cross-examine witnesses on the OB. Counsel urged that even though the Petitioner was represented by counsel at the trial his client was pleading with this court to allow a re-trial.

Mr. Makori has opposed the application and has urged that the OB was always available to the Petitioner, especially for reason he had a counsel representing him at the trial. Learned

Prosecution counsel urged that the alleged new evidence would not have changed the outcome of the case against the Petitioner and urged the court to dismiss the Petition.

Mr. Makori cited the case of **Ramadhani Mohamed and others Vs Republic Nairobi H. C. Petiton No. 468 of 2012.** In that case the learned judge relies on **Black's Law Dictionary, 8th Ed.** definition of the word "**new"** as 'recently discovered, recently come into being'. The judge also relies on the **Concise Oxford English Dictionary** definition of '**compelling'** as 'powerfully evoking attention or admiration'.

Mr. Makori also relied on the case of **KMM Vs Republic Kisii H Cr. A No. 169 of 2010,** where same definition of the words 'new' and 'compelling' are relied upon.

I have considered submissions by both counsels and the cited cases.

In order to invoke this court's jurisdiction under Article 50(6) of the Constitution 2010, the petitioner must demonstrate that;

a. **His prayers were dismissed by the highest court of appeal in the land.**

b. **That new and compelling evidence has become available and which was not available at the time of his trial.**

c. **Alternatively the petitioner should show that he did not appeal in which case he must in addition demonstrated that there was new and compelling evidence had become available.**

d. **Further the Petitioner case or appeal, whichever is applicable must have been concluded after the promulgation of the Constitution 2010.**

The Petitioner has successfully shown that he ventilated his case up to the highest court in the land, and that the same was concluded after the Constitution 2010 came to force. He has then claimed that he has new and compelling evidence and that he should be allowed to have a second go at his case through an order of re-trial.

In a recent case **ROGERS ONDIEKI NYAKUNDI VS. STATE (2012)e KLR** the learned judge held that in order to successfully establish that one has new and compelling evidence in an application under Article 50(6) of the Constitution, it must be shown that:

a. **There is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of the hearing of the two appeals.**

b. **The evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching. Such evidence must not only be favourable to the Petitioner but it must be such evidence as is likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts.**

The Petitioner's counsel urged that there was new and compelling evidence that would warrant this court to order a retrial of his case. The counsel urged that the basis of the petition was an O.B. of 2004. The Petitioner and his advocate did not apply to this court to have the O.B. produced or availed am unable to tell what the O.B. said and what exactly in that document the Petitioner was relying on.

I have considered the rival arguments of the parties. There are two tests to apply in order to determine whether the Petitioner meets the qualifications to have an order of retrial made in his favour. The first one is whether there was new evidence and the second test is whether the evidence was compelling within the meaning of Article 50 (6) of the Constitution. The order for

retrial is not automatic as Mr. Ndubi for the Petitioner suggested in his arguments. The Petitioner must satisfy the court that he is deserving of the orders sought.

The argument by the Petitioner is that since the O.B. he refers to in his application was never before the trial court, and no one was examined on it, he should get another chance to do so.

The Petitioner in his affidavits and supporting statements challenges the trial process by claiming that the case needed to be re-investigated by an independent person. He also challenges the credibility of certain witnesses and the conclusions made based on their evidence. This is slightly different from the argument of new and compelling evidence. I will consider it alongside the other issues.

The issue of new evidence should have been raised on the first appeal since the first appellate court has power to call for and admit new evidence even at that stage. That opportunity was not seized by the Petitioner. In a similar case Hon Majanja J. in the case of **MISC. APPL. NO. 271 OF 2011 WILSON THIRIMBA MWANGI VS THE DIRECTOR OF PUBLIC PROSECUTIONS** had this to say:-

> **"In the case of Chokolingo v Attorney General of Trinidad and Tobago (1981)1 ALL ER 244, the court cited with approval the decision in the case of in Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385 at 399 where the Privy Council stated in part, "In the first place, no human right or fundamental freedom...is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person\'s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say there was an error..."**
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> **63. This reasoning was recently adopted by the Court of Appeal in the case of Methodist Church in Kenya Trustees Registered & Another v Rev. Jeremiah Muku and Another CA, Civil Appeal No. 233 of 2008 (Unreported), where the Court of Appeal observed, "As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review…**
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> **64. The petitioner in this case had a right of appeal against the decision of the High Court, a right which he duly exercised. The right of appeal or review is protected by Article 50(2)(q). The petition cannot be used as an \'alternative forum\' to lodge collateral attacks against decision of the appellate court nor can it be used as a general substitute for the normal procedures in the court system which are clearly provided for under Article 50 of the Constitution.**
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> **65. A petition under Article 50(6) is not a re-trial or an appeal. As the court stated in Mohamed Adbulrahman Said and Another v Republic (Supra), "We do wish to make it perfectly clear however, that the right to a new trial is not an avenue for further appeal. This court has no jurisdiction to consider and determine matters which have already been decided upon by the Court of Appeal."**

It is a persuasive authority and I am persuaded by it as good law on the emerging cases under Article 50(6) of the Constitution 2010. The complaints made by the Petitioner do not entitle him to a retrial as he urged in this court.

Regarding the propriety of the trial process, any complainants that the Petitioner may have should

have been handled during the first and the second appellate courts. The procedure introduced under Article 50 (6) cannot be used to circumvent the due process of the law, or be used as a means of having a parallel appeal to the one prescribed under the Criminal Procedure Code.

In regard to the new and compelling evidence, the question is whether the Petitioner has shown that the ‘new’ evidence was not available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of the hearing of the two appeals. That has not been proved. The new evidence is contained in an O.B. entry made on the 25th July, 2004. The O.B. number was not given. However considering that the Petitioner was arraigned in court on 28th July, 2004 the OB entry was already in existence and could be available to him or his counsel with exercise of reasonable diligence. The entry on the O.B. the Petitioner seeks to rely on cannot be referred to as ‘new’ as it was always available even at the time of his trial. That test has therefore not been met. It is the most important test, and a prerequisite to the second one. If this first one is not proved, it is not necessary in my view to go to the second test. That notwithstanding, I will consider the second test.

The second test was for the Petitioner to show that the ‘new’ evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching. The evidence must be shown not only to be favourable to the Petitioner but likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts.as observed earlier, the evidence was not placed before the court and so this cannot make any finding either way.

9. WHETHER THIS COURT HAS JURISDICTION TO ISSUE THE ORDERS SOUGHT BY THE PETITIONER.

In conclusion:

1. **I find that any errors or mistakes or defects in the trial process could only be addressed through the Appellate Jurisdiction which the Petitioner fully enjoyed before filing this application.**
2. **I find that there is no new and compelling evidence which could not have been available to the Petitioner with the exercise of reasonable diligence during the trial and appeal process.**

In the result:

1. **The Petitioner’s application has no merit and is accordingly dismissed.**

DATED, SIGNED AND DELIVERED THIS 22nd DAY OF MAY, 2014.

LESIIT, J

JUDGE