



IN THE HIGH COURT AT HOMA BAY

PETITION NO. 4 OF 2013

BETWEEN

MAURICE ODHIAMBO WESONGA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petition is brought under the provisions of **Article 50(6)** of the Constitution which provides as follows;

(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.

2. In the petition dated 29th March 2012 and the supporting the deposition sworn on the same date, the petitioner states that he was charged with the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* in **Kisii CM's Criminal Case No. 919 of 2002**. After a full trial he was convicted and sentenced to death. Thereafter he lodged an appeal in the High Court; **Kisii HC Criminal Appeal No. 204 of 2004**. The appeal was heard and dismissed. He thereafter filed an appeal to the Court of Appeal; **Kisumu Criminal Appeal No. 171 of 2006**. The appeal was heard and dismissed.

3. The petitioner now seeks a fresh trial under Article 50(6) of the Constitution, having exhausted all the legal avenues for appeal contemplated in law.

4. The petitioner, who acted in person, filed written submissions. The thrust of his submissions was that the charge sheet as framed in the subordinate court was defective in that it did not give proper particulars of the offence and did not accord with the evidence at the trial contrary to **section 214** of the *Criminal Procedure Act (Chapter 75 of the Criminal Procedure Code)*. As a result he contends that the right to a fair trial guaranteed under **Article 50** of the Constitution was violated.

He cited the case of *Yongo v Republic* [1983] KLR 319 to support his case. He also submitted that that the court had a duty to enforce the provisions of the Constitution as was stated in *Albanus Mwasia Mutua v Republic Nairobi Criminal Appeal No. 120 of 2004* [2006]eKLR.

5. Mr Oluoch, learned counsel for the respondent, in a terse response submitted that nowhere has the petitioner stated that there is new and compelling evidence available and which was not available during the trial and the appeals despite the exercise of due diligence. He contended that the mere fact that certain evidence may not have been considered does not amount to new and compelling evidence. He submitted that the new evidence must be demonstrated to enable the court and the respondent address the same and that therefore the petitioner case must be dismissed.

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 by demonstrating that there is new and compelling evidence. This provision has been the subject of several decisions of the High Court among them; *Ramadhan Juma Abdalla and 3 Others v R Nairobi Petition No. 468 of 2012*[2013]eKLR, *Wilson Thirimba Mwangi v Director of Public Prosecutions, Nairobi Petition No. 271 of 2011, [2012]eKLR, Mohamed Abdulrahman Said and Another v Republic Mombasa Criminal Misc. Appl. Nos. 66A and 66B of 2011 (Unreported)*. The authorities demonstrate that in order for a petition under **Article 50(6)** of the Constitution to succeed, the petitioner must adduce new evidence in the sense that it must not have been available to the petitioner during the trial. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals. Secondly, the evidence must be compelling meaning that it must be admissible, credible and not merely corroborative, cumulative, collateral or impeaching. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the petitioner to the extent that it may possibly persuade a court to law to reach an entirely different decision than that already reached.

7. The petition and deposition in support do not disclose any new and compelling evidence and the arguments presented amount to a rehashing of the grounds of appeal. In light of the clear provisions of **Article 50(6)** of the Constitution, the petitioner's case cannot succeed.

8. The petitioner has submitted that his right to life has been violated by imposition of the death penalty, that the commutation of the death penalty by the President was arbitrary and that the upholding of his conviction by Judges who have been affected by the vetting process violated his right to a fair hearing. These issues were not pleaded in the petition and cannot be considered as they fall outside the purview of **Article 50(6)** of the Constitution.

9. The result of my findings is that the petition must be dismissed. It is hereby dismissed with no orders as to costs.

DATED and DELIVERED at HOMA BAY this 17th day of June 2014

D.S. MAJANJA

JUDGE

Petitioner in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.