



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO. 3 OF 2011**

**IN THE MATTER OF ARTICLE 50 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)  
HIGH COURT PRACTICE AND PROCEDURE RULES, 2006**

**GEORGE BIKERI NYAKUNDI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. The Petition is brought under **Article 50 (6) (a)** of the **Constitution**. The Petitioner, **George Bikeri Nyakundi** prays that this Court orders for a retrial in a case that has failed in two appeals, that is in the High Court and the Court of Appeal.
2. The Petitioner was charged before Senior Resident Magistrate's Court at Nyamira in Criminal Case No. 109 of 2003 with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the charge were that on 22<sup>nd</sup> day of October, 2002 at Nyambuya village in Nyamira district of the Nyanza province, jointly and armed with dangerous weapons, robbed Rhoda Nyanjama Ongwenyi cash Kshs. 20,000/- and immediately before or immediately after the time of such robbery killed Richard Ongwenyi Omosa.
3. On 7<sup>th</sup> July, 2003, the trial court convicted the Petitioner and sentenced him to death. Being dissatisfied with the judgment of the trial court, he filed an appeal to the High Court vide **Kisii High Court Criminal Appeal No. 206 of 2003**. The court dismissed the appeal and found the Petitioner was properly convicted and sentenced. The judgment of the High Court was delivered on 27<sup>th</sup> November, 2006.
4. The Petitioner was again dissatisfied with the findings of the High Court and he appealed to the Court of Appeal vide **Kisumu Criminal Appeal No. 486 of 2007**. The Court of Appeal was also satisfied that the Petitioner was properly convicted and sentenced and therefore dismissed the appeal.
5. The Petitioner now petitions this Court seeking a new trial under the aforementioned provision of the constitution and on the basis of new and compelling evidence. The Petition is supported by the affidavit of the **George Bikeri Nyakundi** sworn on 12<sup>th</sup> November 2013. He avers that he has obtained a statement recorded by one Alfred Ogalo Nchogu at Keroko Police Station which

- exonerates him from the alleged recovery of the weapon used during the robbery. Further that he has obtained an Occurrence Book extract from Molo Police station which reveals that on Bernard Nyamoko Nyakundi was booked and subsequently charged with possession of the said firearm without a certificate.
6. The Petitioner filed his written submissions dated 12<sup>th</sup> November, 2012, in support of the Petition. He submitted that the Petition meets the criteria set out in the constitution; that the suit was dismissed by the highest court and that there is new and compelling evidence. He relied on the decision in Mohamed Abdulrahman & Another vs Republic (2012) eKLR.
  7. Further he submitted that he was not aware that Alfred Ogalo had recorded a statement with the police and therefore could not have called him as a witness. Secondly, that there was further evidence from **Nakuru Chief Magistrate Court Criminal Case Number 1526 of 2010** touching on the same firearm where the court held that evidence in respect to the recovery of the firearm from the Petitioner amounts to hearsay evidence.
  8. Finally, the Petitioner submitted that the OB extract that was used in criminal case number 1526 of 2010 shall assist in reaching a just finding. According to the Petitioner such evidence shall be available to the court in a fresh trial.
  9. The appeal was heard on 24<sup>th</sup> June, 2014 with the learned counsel **Mr. Maragia**, appearing for the Petitioner and **Ms. Chebii** present for the State. Mr. Maragia enunciated the grounds in the petition and written submissions. He contended that the evidence was obtained after the appeal was dismissed by the court of Appeal. That the evidence if allowed would have an impact on the case since the petitioner was convicted on the premise that he led the police to recover the firearm. It was his submissions that the additional evidence was compelling and relied in the case of **Wilson Thirimba Mwangi V. The Director of Public Prosecutions**, Misc. Application 271 of 2011 in urging the court to order for a retrial.
  10. **Ms. Chebii** opposed a retrial but admitted that there was fresh evidence which required consideration and a determination by the lower court.

### **ISSUES FOR DETERMINATION**

11. After taking into consideration the submissions made by Counsel for the Petitioner and Counsel for the State I find the following issues for consideration;

- (i) Whether there is now new and compelling evidence which was not available to the Petitioner at the trial court or on appeal?
- (ii) Whether an order for a retrial is merited?

### **ANALYSIS**

12. The Petition shows that the Petitioner had two separate charges of robbery with violence contrary to Section 296(2) of the Penal Code. The first charge is set out in SRMCCNo.109/2003 Nyamira and the second charge is set out in CMCCNo.1526/2010 Nakuru.
13. In the first case the robbery incident occurred on the night of and the second robbery incident occurred on the night of the 30<sup>th</sup> December, 2002. The robberies occurred within three months of each other and the Petitioner was involved in both incidences and the same firearm is said to have been used in both incidences.
14. The Petitioner was convicted and sentenced in the first case by the trial court sitting in Nyamira and the conviction and sentence was later affirmed by the High Court sitting in Kisii and the Court of Appeal sitting in Kisumu. In the second case the trial court sitting in Nakuru acquitted the Petitioner.
15. The Petitioner is petitioning this court for a retrial of the SRMCCNo.109/2003 Nyamira and his petition is based on what he states to be new and compelling evidence relating to the recovery of the firearm, which he was supposedly armed with at the time when the robbery took place, which also formed the basis of his conviction and sentence.
16. The Petitioner in his submissions states that he has now obtained an Occurrence Book Extract from Molo Police Station which reveals that the same firearm recovered by the police in the first

- robbery incident in Keroka is said to have been utilized in the second robbery incident in Molo.
17. The Petitioner further states that he has also now obtained a statement by one Alfred Ogero Nchogu and the evidence therein on the recovery of the firearm is new and compelling and can exonerate him on the first charge of robbery with violence.
  18. This court has perused the court record and notes that the first offence was committed in 2002 and it was reported at Keroka Police Station. The trial commenced in the Nyamira court on the 17<sup>th</sup> February, 2003 when the Petitioner took his plea. The Occurrence Book was requested for on the 19<sup>th</sup> May, 2003 and the OB Entry No.4 entered on the 23<sup>rd</sup> October, 2002 at 12.55am was availed and tendered into court as **“OB Exh.1”** by one IP Samuel Arata (Force No.219310).
  19. I reiterate again that the first incident occurred in October, 2002 and the second incident was in December, 2002 and I have gone to great lengths to demonstrate the proximity of the months when the offences were committed. What comes to mind is that the Petitioner was well aware of both cases and was also aware of the connectivity of the first case to the second Nakuru case. This OB Extract from Molo was not new to him and he had requested for it and it had been availed in the Nakuru case and this court is of the view that had the Petitioner exercised due diligence he would have been able to obtain this OB Extract for his use in the first trial.
  20. This court opines that the issue of the OB extract from Molo Police Station is hindsight and an afterthought by the Petitioner due to the fact that he was acquitted in the Nakuru case and is now seeking to use this evidence for purposes of a retrial but what the Petitioner must demonstrate to this court is that this evidence is new to him so as to warrant the orders sought.
  21. Going to the issue of one Alfred Ogalo Ngochu and his statement and having perused the Nyamira court record and the Petition, at page 23 the Petition shows that the Petitioner therein described as the 3<sup>rd</sup> Accused, when called upon to defend himself, this court notes that the Petitioner chose to make an unsworn statement of defence in which he mentioned Alfred's name severally.
  22. The evidence of the Petitioner is as follows and this court quotes;

**“On the 20.12.2002.....Alfred Ogero and others came to my house . He had been handcuffed. He was with Police Officer. Ogero told me that he had been arrested on allegations of having a gun. He told police officers that he had given it to me for custody. I denied the same. I was arrested and put in a motor vehicle. They took me to Molo where I stay. We arrived there at 3am. They searched my house and recovered nothing. We then proceeded to the house of Alfred Ogero. They left me in the m/vehicle. They returned with a rifle from the home of Alfred Ogero. We were taken to Molo Police Station. On the way Ogero was released after gave Police officers some money. He was told to come the following day and record a statement....”**

23. From the above it is obvious that this Alfred Ogera was a person well known to the Petitioner and that the issue of his Statement is not a new issue to the Petitioner, at all, as it was within his knowledge from as far back as the year 2002 and the contents of this statement together with the said Alfred Ogero could have been obtained by the Petitioner to enable him to defend himself in the Nyamira trial.
24. The issue of this witness and his statement was also brought up by the Petitioner at the appellate stage and the High Court made a determination on this issue and held that the prosecution had the right to choose the witnesses it so desired so as to prove its case. Both the High Court and the Court of Appeal affirmed the findings of the trial court that the prosecution proved its case beyond reasonable doubt.
25. This court associates itself with above findings and makes these additional observations. Two crucial ingredients for the offence of robbery with violence were proved at the trial which were;
  - a) The act of stealing
  1. b) The use of actual violence against any person before or immediately after to further the act of stealing
26. As for the other ingredients for robbery with violence as are listed hereunder any one of them may be proved.

- a) That the robber was armed with a dangerous or offensive weapon
- b) The robber was in the company of one or more persons
- c) Immediately before or immediately after the time of the robbery the robber wounded, beat, struck or used any other form of violence to any person.

27. This court makes reference to the case of **Johanna Ndungu V. Republic**, CA.116 of 1995 (Unreported) and concurs that the prosecution proved its case to the desired threshold in the trial at the Nyamira Court.

28. This court further observes that the crafters of Article 50 (6) did not envisage the issue of hindsight or “*to have the second bite at the cherry.*” and from the evidence on record this court is of the view that the OB Extract from Molo Police Station and the Statement were within the Petitioner’s knowledge and were available. So if these documents had beneficial evidence to enable the Petitioner better his defence he should have endeavoured to secure and obtain either using due diligence during the tenure of the first trial and or at the appellate stage as both were within his knowledge and were available during that time.

29. The Petitioner has not demonstrated to the satisfaction of this court that either the OB Extract from Molo Police Station and the statement of Alfred Ogero Ngochu is new and compelling evidence that has now become available so as to warrant the orders sought.

30. This court states that the Petitioner has not demonstrated that the orders sought are merited.

## **FINDINGS**

31. This court finds that neither the OB Extract from Molo Police Station and or the Statement of Alfred Ogalo Ngochu is new and compelling evidence that has now become available to the Petitioner so as to warrant the orders sought.

32. The court finds that there is no sufficient cause to order for a retrial.

33. For the reasons stated above the Petition and orders sought are not merited.

34. The Petition is hereby dismissed with no order as to costs.

It is so Ordered.

**Dated, Signed and Delivered at Nakuru this 23rd day of October, 2014.**

**A. MSHILA**

**JUDGE**