REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. NO. 14 OF 2014

DAVID OUMA ONYANGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1). The undated notice of motion filed on 28-8-2012 by the petitioner prays that he be allowed to adduce fresh and new compelling evidence which apparently were not adduced during the hearing and the appeal processes. The petitioner was convicted of robbery with violence on 20-9-2002 by the trial court and sentenced to death. His appeal to the High Court and Court of Appeal were dismissed on 17-7-2007 and 27-3-2009 respectively.

2). The petitioner did file some homegrown submissions as well as oral submission during the hearing. The appellant went further to argue that a crucial witness, the complainant Mr. Andrew Abwa Kenya did not testify.

3). The state opposed the petition through the sworn affidavits of George Mongare and Magoma Kennedy Magoma. They argued that there is no compelling new evidence adduced by the petitioner. Mr. Sirtuy, the learned state counsel argued that there was no other penalty prescribed by the law except death which the petitioner deserved.

4). We have perused the entire proceedings from the lower court all the way to the Court of Appeal. What runs across the decisions is that the petitioner lost all through. Since the promulgation of the new constitution it has now become fashionable for any party to try his luck by heavily relying on various provisions of the Constitution especially Article 50 and its various substances.

Article 50 (6) states as follows:

“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.**

5). The appellant argued that failure to call the complainant prejudiced his case and that had he been called perhaps the courts would have arrived otherwise. But was this a new and a compelling evidence as envisaged by Article 50 (6) (b)?

6). Chesoni Ag. JA (as he then was) in laying down the principles of admitting new evidence: stated as follows in the case of **Mzee Waujie & 93 Others -VS- A.K. Sakwa & 3 Others [1982-88]1KAR at page 465-466**

a. **it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial,**
b. **the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive,**
c. **the evidence must be such as it presumably to be believed or in other words it must be apparently credible, though it need to be incontrovertible.**

7). The word 'new' is defined in the Concise Oxford Dictionary 9th Edition as **"of recent origin, or made invented, discovered, acquired, or experienced recently or now for the first time".**

8). Our appreciation of the facts herein does not in anyway point to the fact that the issues raised were new. They were well within the knowledge of the applicant all through the sittings of trial as well as the appeal processess.

9). The right to retrial is not an avenue for further appeal. The court of appeal has rendered its decision and this court cannot deliberate on this matter again. The issues raised by the applicant are not new in our view and were within his knowledge.

10). In the premises we do not find this petition meritorious. The same does not come under the Purview of Article 50 (6) (b) of the 2010 Constitution. The same is dismissed.

Dated, signed and delivered at Kisumu this 25th day of November, 2014.

H.K. CHEMITEI **E.N. MAINA**
JUDGE **JUDGE**