



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**MISC. CRIMINAL APPLICATION NO. 7 OF 2014**

**BETWEEN**

**KENNEDY OCHIENG OLUNGA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The matter before the court is in essence an application 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. The matter before the court has serious procedural deficiencies. The matter was originally commenced by Notice of Motion dated 21<sup>st</sup> February 2014 in which he sought leave to adduce further evidence. The second application was a chamber summons filed on 11<sup>th</sup> February 2014 in the applicant contended that new and compelling evidence had come to light and therefore **Article 50(6)** of the Constitution was applicable. His affidavit did not depone to what evidence had become available. The third application was a Notice of Motion dated 16<sup>th</sup> September 2014 seeking to amend the petition when in fact no petition was filed or amended petition was filed.
3. As pointed out by Mr Oluoch, counsel for the respondent, the applications were all incompetent. Under **Article 22(3)** of the Constitution, the Chief Justice is empowered to make rules for enforcing the Bill of Rights. Under the rules promulgated by the Chief Justice, the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, an application for enforcement of fundamental rights and freedoms is commenced by filing a petition or any other informal documentation. It is not necessary for the petitioner under **Article 50(6)** to file an application for leave to adduce new and compelling. The right to petition the High Court for relief where there is new and compelling evidence is a free standing right which is enforceable by filing a petition directly. The petition should set out the new and compelling evidence that the petitioner proposes to adduce in order to convince the court to grant relief.

4. The procedural lapses were compounded by the fact that counsel for the applicant failed to comply with the court's directions to file the petition to regularise his position in the matter. I therefore fixed the matter for judgment on the basis that there was sufficient material to determine the matter as original court records were before the court and it was clear that the application was made under **Article 50(6)** of the Constitution.
5. Despite the serious procedural lapses I have alluded to I have decided to invoke the provision of **Article 159(2)(d)** of the Constitution which empowers the court to determine matters before it without undue regard to technicalities. I have taken this position for three reasons. First, the applicant is a convict and he may not have been aware of the procedures when he commenced the proceedings. Second, the matter before the Court is one for enforcement of fundamental rights and freedoms under the Constitution. Third, the issue for determination is straightforward and it is whether there is new and compelling evidence entitling the applicant to a new trial.
6. The history of this application is a matter of public record. The applicant was charged in **Homa Bay Senior Resident Magistrate's Court Criminal Case No. 1448 of 2006** for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were that on 13<sup>th</sup> November 2006 at about 11.00pm at Kalanya Konyango Sub-Location in West Kanyada Location of Homa Bay District, jointly with others not before the court he robbed Silas Owuor Oyugi of cash Kshs. 16,000/-, on bag containing assorted clothes, 4 blankets, an identification card, 3 jungle jackets, 3 berets fitted with a crown, 1 coat, Form 4 original certificates, 5 garment materials and 3 bar soaps all valued at Kshs. 50,000.00 and at or immediately after the time of such robbery wounded or beat or struck the said Silas Owuor Oyugi.
7. After a full trial, the applicant was convicted and sentenced to death on 14<sup>th</sup> September 2007. He lodged an appeal to the High Court; **Kisii Criminal Appeal No. 145 of 2007**. It was heard and dismissed on 10<sup>th</sup> December 2009 by Musinga and Muchelule, JJ. He thereafter lodged the final appeal in the Court of Appeal being **Kisumu Criminal Appeal No. 173 of 2010**. On 4<sup>th</sup> October 2013, the appeal was dismissed by Onyango Otieno, Azangalala and Ole Kantai, JJA.
8. From the procedural history I have set out above, the applicant has satisfied the first condition under **Article 50(6)** of the Constitution in that his appeal to the highest court at the time was heard and dismissed. This dispute therefore relates to the second limb of the provision.
9. After judgment had been reserved, the petitioner's advocate filed written submissions and an affidavit of **SILAS OWUORI OYUGI**, who was the complainant at the original trial, sworn on 20<sup>th</sup> September 2014 for consideration. The step taken by the applicant was unprocedural as the affidavit ought to have been filed and served before judgment to give the State an opportunity to respond. However, for the reasons I have stated in paragraph 5 above, I will consider it in deciding whether or not grant the petition in the interests of justice.
10. As the contents of the affidavit form the basis of the applicant's case, I will set out its contents verbatim and they are as follows;

*I SILAS OWUORI OYUGI of ... Rodi Kopany .... Kalanya Sub Location, Kanyada East Location Asego Division, Homa Bay District within the Republic of Kenya do hereby make oath and states as follows:*

1. **THAT** I am an adult male aged 58 years (fifty eight years) of sound mind and disposition hence competent to make and swear this affidavit.
2. **THAT** I hail from the above mentioned locality save that, I currently reside at Ojunge village within Kalanya Konyango Location.
3. **THAT** I am the **ASSISTANT CHIEF OF KALANYA KANYANGO SUB LOCATION** currently.
4. **THAT** I am aware of a decided case that had been heard and determined at Homa Bay

Senior Resident Magistrate's Court (SRM'S) Criminal Case No.1448/2006 Republic VS. Kennedy Ochieng Olunga.

5. **THAT** in the above case I was the complainant in the thirteenth day of November 2006 (13/11/2006) at around eleven pm in the afore stated locality I was robbed of my personal items by assailants.
6. **THAT** on the material night the said assailants robbed me of Kshs.16,000, a bag containing a sorted clothes, four blankets, ID Card, three jungle jackets, three berets fitted with crown, one Court, three bar soaps, five garment materials, form four original Certificate.
7. **THAT** I did state before the honourable Court by then, that at the time of robbery it was actually dark and the only form of lighting was only by use of a lantern.
8. **THAT** I further stated that the people who committed the offence were over three in number or even they could have been six in number a fact which I could not readily ascertain since at the time of the said robbery I had been sick ling and even at the said robbery the assailants had use force by actually hitting me necessitating me to lose consciousness and making me confused.
9. **THAT** I implicated the said Kennedy Ochieng Olunga to have been one of the said robbers although I actually had not seen him inside my house on that material date but was basing my evidence on what I was presumably told by my family members, even my evidence is a testimony to the same as per the lower Courts records and proceedings.
10. **THAT** I further wish to state that, based on the Court findings and judgment which was delivered on 14/09/2007 by Honourable E.K. Mwaita - **AG. SRM** as then was, nowhere it is indicated that actually the said Kennedy Ochieng Olunga Participated in assaulting me nor carrying out any of my household items which I can readily pin-point to link him to said offence which he was later on sentenced to death by hanging by the said Court.
11. **THAT** I further wish to affirm that the said Kennedy Ochieng Olunga is a victim of implication for an offence that has gotten him due to circumstances.
12. **THAT** I wish to state further that by now I have gotten back most of my stolen items consequently as a result I have no claim against the said Kennedy Ochieng Olunga.
13. **THAT** I wish to put it categorically that I have not been induced, bribed, promised and monetary gain by any of the family members nor the said Kennedy Ochieng Olunga to come up with these new revelation as concerning his case before Honourable Court.
14. **THAT** in the interest of Justice and to clear my consciousness, I wish to bring the Court's attention that I have nothing to the said Kennedy Ochieng Olunga to warrant his continued stay behind bars.
15. **THAT** consequently I make this declaration knowingly and conscientiously and in accordance with oaths and statutory declarations acts.
16. **THAT** all the facts deponed to above herein are true to the best of knowledge, information and belief.

11. In the written submissions, Mr Ongoso, learned counsel for the applicant, argues that the contents of the affidavit constitute new and compelling evidence which was not before the subordinate court. He contended that the complainant admitted that he did not see the applicant or implicate him in the robbery and that most of the stolen things were recovered while the appellatant was in prison.

12. Counsel cited the case of **Hassan Mohammed Namwiba v Republic KKA Petition No. 12 of 2014 [2014]eKLR** where Chitembwe J., allowed an a petition under **Article 50(6)** of the Constitution on the ground that the complainant deposed that the motorbike which had been allegedly stolen by the petitioner was found and returned to the owner. The learned judge went further and directed an acquittal on the ground that the complainant had no claim against the applicant.

13. 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 of law to reach an entirely different decision than that already reached.

14. Counsel for the applicant rightly pointed out that the court should consider the deposition of Silas Owuor Oyugi and consider whether it met the test of new and compelling evidence. In order to do so, it is necessary to recount the substance of the evidence that led to the applicant's conviction.
15. The prosecution marshalled 6 witnesses to prove its case. Silas Owuor Oyugi (PW 1) stated that on the material day in evening he was at home in bed because he was unwell. At about 11.00 p.m he heard voices outside the house of people who asked his wife to open the door. The people outside the house called his wife by a nickname "*Nyakaboko*" by which she was known and they told her that they wanted to see Silas who was the area Chief. When Nyakaboko peered outside, the three people forced the door open and burst into the house. They entered his bedroom where they stated that they were on a mission to kill him, for which they had been paid Kshs.100,000/- but could spare him if he doubled this sum. As PW 1 did not have that kind of money, he therefore told them they were free to accomplish their mission. This did not go down well with the raiders who demanded his official uniform which they took alongside Kshs 16,000/- which were proceeds from sale of cows and the other items particularized in the charge sheet. In the course of the robbery they were beating PW 1 as they demanded the money
16. In the midst of this drama PW 1's daughter PW 2 ran out of the house but was pursued by one of the raiders who caught up with her. He lit a torch and shone it on PW 2 who recognized her pursuer as Omboga son of Jacobo whom she knew. Omboga was the applicant's nickname. She pleaded with him asking, "*why are you killing me and already you have killed my father.*" She stated this believing that her father had been killed. This plea was heard by PW 1 and the other occupants of the house who testified in Court. When Omboga son of Jacobo caught up with PW 2 and as he took her back to the house the other raiders flashed torches and PW 2 was further able to recognize her pursuer. PW 1's wife PW5 cried out for help and stated that she had recognized two attackers including PW 1 when she reported the matter at Homa Bay Police Station where investigations commenced.
17. Four days after the incident PW 1 met the applicant who was called by a nickname Omboga. He had him arrested. PW 2 testified under oath confirmed PW 1's narration of the facts adding that she knew some of the attackers and that it was the applicant who chased after her and took her back to the house. PW 3, another child, narrated the same facts. She stated that she not only knew the applicant who was from the same locality as herself but knew his sister who was her school mate. PW 5 also described the attack in detail and she stated that she knew two of attackers including the appellant who was from the same locality as herself.
18. The applicant contends that Silas Oyugi has now stated that he did not identify him. In my view based upon the three judgments of the courts that heard the matter, the conviction of the appellant was founded on recognition by witnesses PW 2, PW 3 and PW 5. The first appellate court was satisfied that the applicant was properly identified and affirmed the conviction. The Court of Appeal, as the second appellate court, also found sufficient evidence to implicate the applicant in the offence. During the trial, the applicant had the opportunity to interrogate the testimony of Silas Oyugi.

19. The issue of identification was exhaustively dealt with by the three courts and the deposition of Silas Oyugi does not raise any new evidence on the issue of identification particularly given that in the initial trial, Silas Oyugi neither recognised nor identified the applicant as his assailant.
20. The second piece of new and compelling evidence presented by the applicant is the fact that the Silas Oyugi states that he had recovered most of the items stolen from him and as result he has no claim against the applicant. The offence of robbery with violence is defined by the **Penal Code**. The central element is the **proof of theft committed under the circumstances set out in section 296 (2) of the Penal Code**. The ingredients of the offence of robbery with violence that need to be established are as follows; **The offender is armed with any dangerous or offensive weapon or instrument or the offender is in company with one or more other person or persons or at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.**
21. The fact that the items were returned or recovered is irrelevant to the definition of the offence of robbery with violence as is the fact that the complainant had no claim against the applicant. The question for the court is that at the time of the offence were the items stated in the charge stolen in circumstances that amount to robbery? The question is answered by Silas Oyugi himself who clearly states that his things were stolen on the material night. That fact has not changed! The prosecution proved that the intent to steal in the course of using violence and that the applicant was one of the people identified and recognised.
22. Nothing new let alone compelling has been placed before the court. In light of the clear provisions of **Article 50(6)** of the Constitution, the applicant's case cannot succeed.
23. The result of my findings is that the applicant has not made out a case under **Article 50(6)** of the Constitution.

**DATED and DELIVERED at HOMA BAY this 16<sup>th</sup> day of December 2014**

**D.S. MAJANJA**

**JUDGE**

Mr Ongoso instructed by Ongoso and Company Advocates for the applicant.

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