



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

MISC. CRIMINAL APPLICATION NO. 20 OF 2014

BETWEEN

EVANS SAGERO PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The matter before the court a petition 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. Although the matter was commenced as an application, I granted the petitioner leave to file a petition in order to agitate his case. The petition is supported by the affidavit of **DANIEL MANYARA MOSORORI** who deponed as follows;

I, DANIEL MANYARA MOSORORI, of P.O. Box, Ikonge Nyamira, Nyagokiani Location in the Republic of Kenya do hereby solemnly swear and make oath as follows:-

1. **THAT** I am a male adult of sound mind and disposition and one of the complainants in Criminal Case No.249 of 2009 at the Principal Magistrate at Nyamira hence competent to swear this affidavit.
2. **THAT** I am well-conversant with matters giving rise to this instant Petition hence further competent to swear this affidavit.
3. **THAT** my true place of abode is at Ikonge Sub Location, Nyamira District Central within Kisii County.
4. **THAT** I know of my only knowledge that I booked a report with police against one Evans Sagero.
5. **THAT** consequently the said Evans Sagero was charged with robbery with violence contrary to Section 296(2) of the Penal Code, Cap 63 of the laws of Kenya, with also alternative count of handling stolen goods contrary to Section 322(2) of the Penal Code.
6. **THAT** I actually did give incriminating evidence against the said Evans Sagero to the effect that

he was armed with a knife and a panga and that he had wanted money from me, he was also carrying a spotlight with him, and in the company of a certain gang who were 10 in number and that they assaulted and robbed me of various items on the material night of robbery including my two mobile phones Nokia 1110 and 1600, my DVD machine make Panasonic, my camera make Aucha and cash money valid at 34,000/-

7. **THAT** my said testimony was not entirely accurate as I was mistaken as to the identity of the said Evans Sagero since it was late at night and that the said gang had ambushed me at night, and I was confused since there were so many people who were harassing me at the same time.
8. **THAT** my said testimony which saw the said Evans Sagero convicted and subsequently sentenced to 10 years imprisonment continues to pick my conscience as it was made on the basis of a mistaken belief.
9. **THAT** my said stolen items I have actually recovered some of them and basically I have no issues with said Petitioner.
10. **THAT** the said Evans Sagero is well-known to me being one of my clansmen and I know to be a person of impeccable and good repute.
11. **THAT** my testimony in the Trial Court was a product of fabricated lies having been compelled to give incriminating testimony against the said Evans Sagero.
12. **THAT** I now know that the Criminal Case brought against the said Evans Sagero was as a result mistaken identity and an act of confusion.
13. **THAT** it is only fair and just that the Petitioner be released and freed forthwith.
14. **THAT** it is better to acquit the said accused person in -stead of allowing him to continuing suffering in custody.
15. **THAT** it has now occurred to me that the Petitioner was not among the persons who robbed and accosted me.
16. **THAT** in consequence whereof, I now swear this affidavit in retraction of my statement and testimony against the Petitioner.
17. **THAT** what I have stated herein is true to the best of my knowledge, information and belief.

3. As a matter of historical record, the petitioner with nine accused were arraigned at the **Nyamira Principal Magistrates Court Criminal Case No. 249 of 2009** to face charges of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. They were also charged with three counts of burglary and stealing contrary to **section 304(2)** and **279(h)** of the **Penal Code**, office breaking and committing a felony contrary to **section 306(a)** of the **Penal Code** and kiosk breaking and committing a felony contrary to **section 306(a)** of the **Penal Code**. They also faced alternative charges of handling the various stolen items referred to in the principal charge contrary to **section 322(2)** of the **Penal Code**.
4. After a full trial, the petitioner was convicted of simple robbery contrary to **section 296(1)** of the **Penal Code** and handling stolen goods on 8th December 2009. The petitioner was sentenced to 10 years imprisonment for the offence of robbery and 7 years imprisonment on the two counts of handling stolen property. The sentences were ordered to run concurrently.
5. He lodged an appeal to the High Court; **Kisii Criminal Appeal No. 248, 249 and 250 of 2007**. The appeal was heard and dismissed on 20th May 2011 by Asike-Makhandia and Sitati, JJ. The petitioner did not lodge a second appeal to the Court of Appeal. At the hearing of the appeal in the High Court, the petitioner abandoned his appeal against the conviction and pursued the appeal against the sentence only. The court was not convinced that the subordinate court had erred in any respect, it affirmed the sentence and dismissed the appeal.
6. Mr Ongoso, learned counsel for the petitioner, submitted that the deposition of Daniel Manyara Mosorori, the complainant in the subordinate court, raised new facts which constitute new and compelling evidence and which were not before the subordinate court. He contended that the complainant admitted that he did not see the petitioner or implicate him in the robbery and that most of the stolen things were recovered while the appellant remained in custody.
7. Mr Ongoso 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 in that case went further and directed an acquittal on the ground that the complainant had no claim against the petitioner.

8. Mr Oluoch, learned counsel for the respondent, in his written submissions contended that that since the petitioner abandoned his appeal against the conviction, he cannot rely on the provisions of **Article 50(6)** of the Constitution which states that that appeal must have been dismissed by the highest court to which the person is entitled to appeal.
9. On the substance, Mr Oluoch submitted that the petitioner's conviction was not based solely on the testimony of Daniel Manyara Mosorori but also on other witnesses who had not recanted their testimony as such his deposition could not constitute new and compelling evidence. He pointed out that the evidence of identification was considered by the trial court and could only have been canvassed on the appeal which was abandoned.
10. The first issue raised by Mr Oluoch is whether the petitioner has satisfied the first condition of **Article 50(6)(a)** of the Constitution. The provision has two limbs which are disjunctive. The petitioner must either be a person whose appeal has been dismissed by the highest court to which the person is entitled to appeal or that the person did not appeal within the time allowed for appeal.
11. In interpreting and applying a provision of the Bill of Rights, I am required to apply the provisions of **Article 20(2), (3)** and **(4)** of the Constitution which state as follows;

20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

12. The essence of the right under **Article 50(6)** of the Constitution is to permit a person who has exhausted his appeals or failed to appeal to seek a review of his conviction on the basis of new and compelling evidence. It would therefore be inconsistent with the provisions of **Article 20(2)** of the Constitution to hold that a person who has abandoned an appeal is not entitled to seek a new trial where there is new and compelling evidence as this would limit the right contrary to the intent of expressed in the Bill of Rights. A person who has abandoned an appeal is akin to a person who has not lodged an appeal due to the expiry of time as provided in the second limb of **Article 50(6)(a)** of the Constitution. A person may abandon an appeal for a multiplicity of reasons but where the person finds new and compelling evidence that may upset the conviction, the right to seek relief should not be lightly denied.

13. I therefore find and hold that even though the petitioner abandoned his appeal on the conviction, he is not debarred from petitioning the High Court for a new trial under **Article 50(6)** of the Constitution. His appeal was ultimately dismissed and he did not appeal to the highest court within the time allowed for appeal. What is important is that the person has been convicted and has exhausted all the appeals and that there is no appeal pending.
14. The second issue is what amounts to new and compelling evidence under **Article 50(6)** of the Constitution 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.
15. Counsel for the petitioner rightly pointed out that the court should consider the deposition of Daniel Manyara Mosorori and determine whether it meets the test of new and compelling evidence. In order to do so it is important to recount the substance of the evidence that led to the petitioner's conviction before the subordinate court.
16. The petitioner and his co-accused were accused of being part of a gang that had gone on an orgy of robberies and violence at Ikonge Market on the night of 18th and 19th April 2009. Daniel Manyara Mosisiro (PW 1) testified that on that night while asleep in his house at Ikonge, he was woken up by a loud bang which sounded like a gun shot. It was a huge stone that was used to break his door. A gang of ten men armed with weapons entered the house and started demanding money from him with threats and menaces. He testified that he clearly recognised the petitioner as one of the people who was part of the gang and who assaulted him with a panga. PW 1's wife, PW 2, who was present, narrated how they were attacked and she too clearly stated that she identified the petitioner whom she knew. The very next morning they reported the matter to the Assistant Chief, PW 7, who also confirmed that PW 1 and PW 2 named the petitioner and other assailants they knew.
17. The petitioner was later arrested on 19th April 2009 when he was followed by up by PW 5, a charcoal dealer, whose store had been broken into and his charcoal stolen. He was arrested with assorted items belonging to other complainants and when the public threatened to lynch him. PW 11, a police officer, confirmed the fact of arrest and the fact that he was found with items which the other complainants had identified as theirs.
18. It is on the basis of the evidence of recognition, that the appellant was convicted as having been involved in the robbery at the complainant's home. In this instance, the evidence of recognition from the court record was clear and was confirmed and corroborated by PW 2, his wife and PW 5, the assistant chief, who was informed of the petitioner's identity. Apart from the complainant who recanted his testimony, the testimonies of PW 2 and PW 5 remain supportive of the conviction. The fact that a witness recants his testimony does not, of itself, constitute new and compelling evidence.
19. The complainant depones that some of his stolen items were recovered and that he has no issues with the petitioner. This fact does not in any way exonerate the petitioner. First, the complainant does not state which of his items were recovered and under what circumstances they were recovered. Second, the fact that the stolen items were recovered does not negate the conviction.

The conviction is based on the intent and action at the time the offence was committed and the prosecution proved that the petitioner was part of a gang that robbed the petitioner. Nothing new or compelling negates that evidence.

20. The fact that the complainant states that he knew the petitioner as his clansman and that he was a person of impeccable and good repute is neither new nor compelling. Both PW 1 and PW 2 clearly testified that they knew the appellant. The petitioner had the opportunity to put his character in issue at the trial if he wanted but he did not put any questions to him in cross-examination to suggest that he was a person good mien.

21. The material before the court and the deposition of Daniel Manyara Mosorori does not disclose any new and compelling evidence. The result of my findings is that the petitioner has not made out a case for a new trial under **Article 50(6)** of the Constitution.

22. The petition is dismissed with no order as to costs.

DATED and DELIVERED at HOMA BAY this 15th day of December 2014

D.S. MAJANJA

JUDGE

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

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