



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Miscellaneous Criminal Application 141 of 2012**

**JOHN AMARERE SWATI ..... APPLICANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**R U L I N G**

In his application dated 2nd October 2012 the applicant is seeking the court to grant an order of re-trial. The application is made under **Articles 50(6)** and **165** of the Constitution. The applicant states in his supporting affidavit and did reiterate in his submissions during the hearing of the appeal that his case was handled by two magistrates and therefore the trial was not fair. **Section 200** was not complied with. He also contends that the two investigating officers were of the rank of corporals who had no police rank. Lastly, that all the witness were from the same family.

The State opposed the application stated that the applicant has not raised any new and compelling evidence.

The proceedings show that the applicant was charged before the Kakamega CMC Criminal Case number 1161 of 2004. He was sentenced to death. He filed an appeal, vide High Court Criminal Appeal number 19 of 2005 and it was dismissed presumably by a bench of two judges. The applicant state that there is new evidence and cites Kakamega Criminal Case number 834 of 2004. It is not stated what that new evidence is. The fact that the case was heard by two magistrates is not new evidence. The Two Judge High Court bench had the opportunity to find out whether **Section 200** of the Criminal Procedure Code was complied with. The applicant had an opportunity to raise that issue. There is no legal provision that a case cannot be proved if the witnesses are from the same family. Similarly, there is no legal provision barring police corporals from conducting investigations in criminal case even if the cases involve robbery with violence.

In the end, I do find that there is no new and compelling evidence to warrant an order of retrial. The applicant is free to pursue an appeal before the Court of Appeal. The application dated **2.10.2012** is hereby dismissed.

***Delivered, dated and signed at Kakamega this 31<sup>st</sup> day of January, 2013***

**SAID J. CHITEMBWE  
J U D G E**