



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Miscellaneous Application 23 of 2012

ELIUD MOSES APWAPOAPPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

The applicant's application dated 8th March 2012 prays for:-

- i) That the applicant be allowed to table and argue new and compelling evidence in regard to Section 50 (6) (b) of the Constitution.

The appellant was convicted and sentence to death at the lower court. He appealed against the said sentence and on 1st December 2009 a two bench decision upheld the said trial's court judgment. The applicant went silent for all those years till he filed this application. This application was no doubt bouyed by the advent of the new constitution.

Article 50 (6) (b) in which he has anchored his application states:-

“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 high 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.**

The applicant therefore is convinced that there is some new compelling evidence which has made him desire to have the case reopened. His main ground is that Safaricom Sim Card number **0723333945** was never produced at the trial. However, I do not think this is a new evidence and in fact the learned judges at page 4 of their judgment said:-

“He also contended that the data print out from Safaricom Limited was not produced by an expert as its mentioned but by PW2. H e said that the photograph were also not produced by a scenes of crime officer and that the alleged sim cards were never produced in court”.

Obviously, this was interrogated during the appeal and it can never be a new and important factor.

Further the allegation that Section 77 of the Evidence Act Chapter 80 laws of Kenya was breached when the exhibits were produced was well argued and a decision made during the appeal.

In regard to non compliance with Section 324 and 329 of the Criminal Procedure Code this is a matter for the appeal court to decide. I note that the applicant lodged an appeal on 15th December 2009 which fate is yet to be determined. I have further perused the applicants submission which in my considered opinion is arguing the appeal afresh. If the applicant was dissatisfied with the judgment then he should not have filed this application but to await the outcome of his appeal.

Consequently I do not find any merit in the applicant's application. The same to say the least is **“reviewing”** through the back door the two bench decision of this court. The same is unmeritorious and I shall proceed to dismiss it.

Dated, signed and delivered at Kisumu this 14th day of January 2013

**H. K. CHEMITEI
JUDGE**

In the presence of:

.....for State Counsel

..... Appellant

HKC/aa0