



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Miscellaneous Criminal Application 41 of 2012**

**ELIUD IROKA MACHARIA ..... APPLICANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**R U L I N G**

In his application dated 28<sup>th</sup> February 2012, the applicant is seeking a re-trial. The grounds upon which the application is made is that the applicant has discovered new and compelling evidence that was not available during the trial. In his supporting affidavit, the applicant avers that the Occurrence Book (O.B.) did indicate that it was a case of causing grievous harm yet he was a charged with robbery with violence. The applicant further submitted that the evidence of PW9 is contradicting his statement made to the police.

The state opposed the application and submitted that the issues being raised are not new. The applicant ought to appeal to the Court of Appeal.

With regard to the evidence of PW9, I have seen the proceedings before the two judges. The applicant submitted before the two judges that the evidence of PW9 differed with his evidence in court. Thus, that issue is not new evidence neither is it compelling. As for the Occurrence Book, the same has not been exhibited. Further, a complainant can report a case of grievous harm but the police can charge the accused with a different offence such as robbery with violence if they note that the evidence from the witnesses can sustain the charge.

In the end, I do find that there is no new and compelling evidence to warrant a re-trial. The applicant should pursue his appeal before the Court of Appeal. The application herein is hereby dismissed.

***Delivered, dated and signed at Kakamega this 7<sup>th</sup> day of February 2013.***

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