



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Miscellaneous Criminal Application 3 of 2012**

**EVANS ATUMA ..... APPLICANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**R U L I N G**

This is an application for a re-trial made under Article 50(6) of the Constitution. The applicant contends that page 19 of the proceedings show that there were two youths who allegedly saw the applicant robbing the complainant. The youths gave a date of **13.9.2007** and the applicant was arrested on **13.9.2007**. Further, the applicant conducted the lower court case without witness statements. He was not in good health at the time and did not know how to apply for adjournment.

The State opposed the application and submitted that the issues being raised are not new.

The applicant states that he was sentenced to suffer death by the lower court in Criminal Case number **1325 of 2010** before the High Court and the same was dismissed on 8<sup>th</sup> December 2011. I do find that the issues being raised by the applicant do not amount to new and compelling evidence as required by **Article 50(6) of the Constitution**. The applicant had the opportunity to raise with both courts the date of his arrest as well as the alleged two boys who indicated that the offence was committed on **13.9.2007**. Having been sick during the hearing of the lower court case is not new and compelling evidence. The lower court case was not heard in one day. There was no violation of the applicant's constitutional rights.

In the end, the application dated 23.12.11 lacks merit and the same is disallowed. The applicant should pursue an appeal before the Court of Appeal.

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

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