

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CRIMINAL APPLICATION NO. 16 OF 2013

PETER SAMSON NANJERO APPLICANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

The applicant was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** (*Nakuru Criminal Case No. 2570 of 2001*). He was convicted and sentenced to death. He appealed to the High Court (*Nakuru Criminal Appeal No. 76 of 2003*) but the appeal was dismissed. The applicant filed *Criminal Appeal No. 137 of 2006* but the appeal was once again unsuccessful.

The applicant has now filed the current application under **Article 50(6)(a)** and **(b)** seeking leave to introduce new and compelling evidence. The application is supported by his affidavit sworn on 27.11.2012. The new and compelling evidence is that he was arrested on the 2nd of December 2001 and arraigned in court on the 18.12.2001. The essence the applicant is contending that he was charged before the court after the expiry of more than 24 hours.

During the hearing of this application, the applicant submitted that he raised the issue in one of his appeal. Miss Opiyo, learned State Counsel, opposed the application and submitted that the issue being raised could have been raised before the trial court.

The applicant was charged before the court on 18.12.2001. The operating Constitution at that time provided under **Articles 72 (3)** that a person suspected to have committed a capital offence could be detained for 14 days. Although the applicant maintains that he was arrested on 2.12.2001, he does not explain the specific time of his arrest. It is clear therefore that under the provisions of the old Constitution the applicant was arraigned before the court within reasonable time as required.

The provisions of **Article 50(6)** require new and compelling evidence. The fact that an accused person has not been arraigned before the court within the stipulated time cannot be new and compelling evidence. The applicant might nurse the thought that even under the old Constitution, he was taken to court after 16 days and not 14 days. Even if that were to be the case, that cannot be new and compelling evidence. The court cannot take that evidence and acquit the applicant. The remedy for the applicant would be a claim for damages as opposed to re-opening of his criminal case.

In the end, the application lacks merit and the same is dismissed.

Dated at Kakamega this 14th day of November 2013

SAID J. CHITEMBWE

J U D G E