



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal 176 of 2011

PAUL OUMA OTIENO alias COLLELA APPLICANT

-VERSUS-

REPUBLIC RESPONDENT

RULING

Before me is an application for retrial filed pursuant to Article 165 (3) (a) (b), 25 (c) and 50 (6) (a) and (b) of the Constitution. The applicant, **Paul Ouma Otieno** was charged with robbery with violence contrary to section 296 at the Chief Magistrate's court in Kisii vide Criminal Case No. 923 of 2008. He was convicted and sentenced to suffer death. Judgment was pronounced on 31st August, 2010. He subsequently appealed to the high court vide criminal appeal no. 176 of 2010. The appeal was dismissed. Following the dismissal, the applicant filed a second appeal to the Court of Appeal. The same is pending before that court.

The applicant has now petitioned this court for a retrial. In his supporting affidavit, he states that the trial court wrongly convicted him without taking into account his alibi and that the prosecution did not discharge its burden of proof. He has also averred that his constitutional rights provided under Article 48 and 25 (c) were violated. More relevant, he has averred that he has now come upon new evidence which was not availed at the trial.

The application was urged before me on 28th March, 2012. The applicant relied on his affidavit and further submitted on the issue of new evidence. The state through the learned state counsel, **Mr. Mutuku** opposed the application. In his submissions he stated that the applicant had not met the requirements of Article 50 (6) because he has neither exhausted the appellate channels nor demonstrated the new and compelling evidence.

The issue for my determination is whether the application meets the threshold for retrial set out by the Constitution.

Article 50 (6) gives this court jurisdiction to order a retrial where a petitioner has appealed to the highest court and his appeal has been dismissed or has not appealed within the time allowed for such appeal; and, where new and compelling evidence has become available. In the instant case the applicant submitted before the court that he has filed an appeal which is pending before the Court of Appeal. Secondly, the averments in his supporting affidavit amount not to a demonstration of new and compelling evidence but to grounds of appeal.

During the hearing, the applicant was asked by the court to make a submissions on the new and compelling evidence that he had come upon. He was however unable to do so stating only that there were witnesses who were not called by the prosecution.

Having considered the application in its entirety, i find that the applicant has neither exhausted the appeal process nor has he demonstrated new and compelling evidence to warrant this court to order a retrial.

In the result, I find the application has no merit and accordingly dismiss it.

Ruling dated, signed and delivered at Kisii this 25th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

Paul Ouma Otieno alias Collela: for applicant (present/absent)

..... counsel for respondent (present/absent)

..... court clerk

R. LAGAT-KORIR
JUDGE