WILSON THIRIMBA MWANGI .....APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS ……..... RESPONDENT

JUDGMENT

Introduction and background

1. The petitioner's case is for all intents and purposes a petition for a new trial founded on the provisions of **Article 50(6)** of the Constitution which provides;

(6) 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 highest 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.

2. By an information dated 10th May 2000, the petitioner and twelve others were charged with the offence of murder contrary to **section 203** as read with **section 204** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. In that information the High Court was informed that, ***"On the 4th day of February 2000, in Kitengela Reserve in Kajiado District within Rift Valley Province, [the accused] jointly murdered Lawrence Githinji Magondu."***

3. The petitioner and some of the co-accused were tried and convicted of the murder of Lawrence Githinji Magondu on 12th March 2003 in **Nairobi High Court Criminal Case No. 40 of 2000 (Mbogholi Msagha J)**. An appeal was lodged against the conviction to wit; **Nairobi Court of Appeal Criminal Appeal No. 51 of 2004 (O'Kubasu, Waki and Onyango-Otieno JJA)**. The appeal was heard and dismissed by the Court of Appeal on 20th May 2011.

The Murder

4. The prosecution case against the accused in the High Court was that they hatched a scheme whereby Lawrence Githinji Magondu ("the deceased") would be lured to his death by the accused posing as purchasers of a property that the deceased desired to sell.

5. The evidence against Mwangi, the petitioner, was that on 17th January 2000, he visited the deceased in the company of another person. The deceased informed his driver, Harrison Wambugu King'ori ("King'ori") that the two people, Mwangi in the company of another person, had come to see him regarding the plot he was selling in Kitengela. According to King'ori, these buyers were more serious than the previous ones. The next day the deceased informed King'ori that he had shown the plot to the Mwangi and his friend. Mwangi was also accompanied by his sister and mother who supported the purchase of the property.

6. King'ori testified that the deceased informed him that he had made up his mind to sell the plot to Mwangi. On 4th February 2000, King'ori and the deceased arrived at the Kitengela plot at about 10 am. While at the plot, Mwangi arrived in the company of his sister and three persons who Mwangi introduced as his workers. He was taken around the property by the deceased. Mwangi then requested to be shown the general developments in the Kitengela area. The deceased left with Mwangi and his sister in Mwangi's vehicle while King'ori and Mwangi's workers left in the deceased's vehicle and proceeded to tour the area.

7. After conducting the tour, the parties returned to the plot. Mwangi requested the deceased if arrangements for lunch could be made for the whole team before they proceeded to Nairobi. He suggested that they proceed to Kitengela Prison Area while King'ori and two of Mwangi's workers went to Tarino Butchery to arrange for lunch. Mwangi then gave King'ori Kshs. 1,000 to purchase lunch. King'ori left with the deceased's vehicle with two of Mwangi's workers while the deceased, Mwangi, his sister and one of the workers left in Mwangi's vehicle. This was the last time King'ori saw the deceased alive.

8. While at Kitengela Shopping Centre, King'ori got anxious when he saw Mwangi's vehicle without the deceased in it. When Mwangi's vehicle came to the butchery, King'ori inquired from the Mwangi's workers the whereabouts of the deceased. He was informed that the deceased had left for Nairobi to complete the transaction and that they would have lunch later. Despite protesting that he did not have enough fuel, King'ori was ordered to get into the deceased's vehicle and follow Mwangi's vehicle. Mwangi, who was driving his car, drove fast and diverted from the main road towards the Nairobi National Park. King'ori accelerated and when he caught up with Mwangi, the deceased was not in the car. It was then that he was viciously assaulted and left for dead. He was however able to make a report to the Athi River Police Station at about 1.45 pm that the deceased had been kidnapped and that he had been assaulted.

9. The report of the kidnap triggered investigations by the police which revealed that the deceased made and received several calls from his mobile phone and one of the numbers identified belonged to Mwangi. The mobile telephone records produced in evidence showed that the deceased called Mwangi on the material date. The evidence also disclosed that Mwangi had a prior relationship with the deceased in that Mwangi was one of the persons who had come to see the deceased about the plot he was selling in Kitengela.

10. It was on account of the telephone calls he had made to the deceased that Mwangi was arrested. King'ori identified Mwangi as the person who was last seen with the deceased while being driven in Mwangi's car on 4th February 2000. Later that evening the body of the deceased was found.

11. The trial court considered all the evidence and concluded that Mwangi and others were guilty of the offence of murder as charged in the information.

12. The Court of Appeal, in its judgment, evaluated the evidence against the appellants and concluded that Mwangi was properly identified by King'ori as he was with the deceased on the date of the murder. Furthermore, the Court concluded that Mwangi was not a stranger to King'ori as he had interacted with him and the deceased previously. In short, the Court of Appeal accepted King'ori's evidence implicating Mwangi in the murder of Lawrence Magondu. The Court of Appeal affirmed Mwangi's conviction.

Petitioner's Case

Telephone Transcripts

13. The petitioner's case is founded on the proceedings of the trial in the High Court. To prove its case and the connection between the deceased and the petitioner, the state, as part of its evidence, produced as documentary evidence, computer print outs from certain mobile exchange magnetic tapes which showed that there was communication between the mobile phone owned by the deceased and the petitioner's mobile phone.

14. The petitioner does not contest the evidence of the phone exchanges produced but argues that its shortfall was that it was only evidence originating from the mobile phone of the deceased, and that therefore it only demonstrated the physical location of the deceased, at the time the deceased made phone calls to the petitioner. The evidence clearly showed that the physical location of the deceased's mobile phone number was in Athi River but did not show the physical location of the petitioner's mobile phone number.

15. The petitioner avers that this was not because the data does not exist but because the prosecution failed to provide it since the investigation only centred on the phone of the deceased. In other words, the prosecution failed to properly discharge its burden to disprove the petitioner's alibi, that he was not in Athi River at the time the deceased met his death.

16. The petitioner submits that it is only fair and just that the category and type of evidence adduced by the prosecution, that originated from mobile exchange magnetic tapes, be made available to the petitioner in order to assist him attempt to prove his innocence.

17. The petitioner maintains that he has reason to believe that Telkom Kenya Limited or Safaricom Kenya Limited have or retain possession of computer evidence that will constitute new and compelling evidence as defined in **Article 50(6)**.

18. The petitioner states that it would not be fair to commit him to a life sentence when evidence which is easily available and can now be produced in order to put to rest the lingering doubt caused by the other evidence which was adduced in the trial.

Reasonable Doubt

19. The petitioner assails the judgment of the High Court on the ground that there was reasonable doubt as to his conviction. In order to point out the lingering doubt, the petitioner relies on the evidence of King'ori during the trial. King'ori testified that the deceased was in the company of "Mwangi" and was driven in "Mwangi's car" and was last seen with the person called "Mwangi." This evidence pointed to the petitioner having been involved in the murder of the deceased.

20. During cross-examination at the trial, King'ori, when asked to identify Mwangi, who was in the dock, stated that, *"I cannot identify him in court. I can identify him if I see him."* The petitioner asserts that he was right there in court and if King'ori could not identify him in court, then doubt was created and should have been recognised by the High Court and Court of Appeal.

21. The petitioner believes that if the orders are granted, new and compelling evidence will show, beyond a shadow of doubt, that the petitioner was in Nairobi at the time and that it was another Mwangi and not him that drove the deceased.

The Witnesses

22. The petitioner has also put forward what he states is fresh evidence which should be considered by the court. This evidence is set out in the affidavit of Ramadhani A. Mukira, an employee of Azania Legal Consultants, filed in support of the petition. Mr Mukira interviewed three witnesses in June 2011 and in his deposition set out a summary of the evidence. The new witnesses are Martin Karue Gakere, Lillian Njoki and one Sylvester. All the proposed witnesses were employees of Josinthe Enterprise, the petitioner's business located at Rehema House, Nairobi.

23. According to Mr Mukira's deposition, Karue reported to work on 4th February 2000 at about 8.00 am. The petitioner arrived at about 8.15 am and at around 8.45 am, Karue saw two persons, a man and a woman, enter the office. He heard that the people were from Bangkok but he could not tell their race. The petitioner and the visitors were in a meeting until about 1.45pm when the petitioner escorted them out of the office.

24. Lilian Njoki, a tea girl at Josinthe Enterprises, confirmed to Mr Mukira that on 4th February 2000, two persons, who were not of African nationality, came into the office at around 10.00 am whereupon she served them tea. Lilian confirmed that the petitioner left with the guests at around 1.45 pm and did not return to the office on that date.

25. The third witness was Silvester, a security guard at Josinthe Enterprise. He confirmed to Mr Mukira that he saw the two visitors from Bangkok come in at around 8.30am. They stayed until 1.00 pm before they left.

26. The petitioner's case is that these three new witnesses will demonstrate that on 4th February 2000, the date of the murder, he was in a meeting with the two people from Bangkok in his office in Nairobi and could not be in Athi River at the time the murder took place.

The Prayers

27. The petitioner seeks the following orders in the petition dated 19th August 2011;

(1) That a summons do issue to an official from the office of the Managing Director Telkom Kenya Limited and or an official from the Office of the Technical manager, Safaricom Kenya Limited, to produce before this Court, a computer print out from the mobile exchange magnetic tapes and or similar computer storage devise confirming:-

(a) The call records of mobile telephone 07******** made on 4th February 2000 and

(b) The approximate physical location of mobile telephone 07********* at the time calls were received and sent from the said mobile telephone on 4th February 2000.

The Submissions

28. Mr Bryant, counsel for the petitioner, during his submission stated that the specific order sought was one under the provisions of **Article 35** which protect the right of access to information. He argued that the petitioner seeks computer printouts from telecommunication agencies in respect of telephone No. 07******** which belonged to the petitioner at the time of the deceased's murder. Counsel emphasized that at this stage the petitioner was not seeking a new trial but that the order, if granted, would enable the petitioner use scientific evidence to show where he was on the date of the murder. Mr Bryant submitted that the prosecution and investigators focused their attention on the deceased phone number but did not produce any evidence on the petitioner's phone number yet they were under a duty to do so.

29. Mr Bryant submitted the right of the accused to information is firmly entrenched in our jurisprudence. Counsel referred to the case of ***Thomas Cholmondeley v Republic*** **Nairobi Criminal Appeal No. 11 of 2007 (Unreported)** where the Court of Appeal underscored the prosecution duty at common law to disclose to the defence all relevant material which tended either to weaken the prosecution case or to strengthen the defence case. In line with this principle, the petitioner submitted that the prosecution ought to have submitted evidence in relation to the petitioner's phone record.

30. In response, to the respondent's objection that the Constitution was not applicable to the facts of the case on the ground that the trial, conviction and appeal all occurred prior to the promulgation of the Constitution, Mr Bryant submitted that the right to information in a trial was always available at common law and guaranteed even under **section 77** of the former Constitution. Counsel relied on the case of ***Protus Buliba Shikuku v The Attorney General*** **Kisumu Constitutional Reference No. 3 of 2011 (Unreported)** where the court held that in accordance with the **Sixth Schedule** to the Constitution the rights, duties and obligations of the State survived the transitions therefore the cause of action which accrued in the year 2000 continued to exist and is capable of enforcement.

31. Counsel for the petitioner further contended that regardless of the Constitution, the petitioner was

entitled to receive the information sought as this right was part of the right of a fair trial guaranteed under the provisions of **section 77** of the former Constitution. Counsel urged the court to grant the prayers in the petition which would enable the petitioner obtain the necessary information to which he is entitled under **Article 35**.

32. Mr Bryant adopted the written submissions dated 3rd February 2012 and the further written submissions dated 16th May 2012.

Respondent's Case

33. The respondent opposes the petition through the affidavit of James Njogu sworn on 15th December 2011. The affidavit does not set any issues of fact but makes arguments of law. The respondent also relies on the submissions filed on the 10th February 2012.

34. Ms Kahoro, counsel for the respondent, submitted that **Article 50(6)** entitles the petitioner to a new trial where the two conditions set out therein are met. First, that the person has appealed to the highest court to which the person is entitled or that the time for filing an appeal or review has lapsed and second, new and compelling evidence has become available.

35. According to the respondent, the first condition is not in dispute. It is the second condition that the petitioner has failed to satisfy. Counsel referred to the case of ***Rose Kaiza v Angelo Mpanju Kaiza Mombasa Court of Appeal, Civil Appeal No. 225 of 2008 (Unreported)*** which sets out the principles that a litigant must satisfy the court claiming new and compelling evidence. First, the material placed before the court in accordance with the formalities of the law do prove the existence of the facts alleged. Secondly, the existence of the evidence was not with the petitioner's knowledge and third, the petitioner acted with due diligence. In addition counsel also referred to the case of ***James Mwangi Nganga v Kenyatta University Council & Others*** **Nairobi Civil Appeal (Application) No. 317 of 2000 (Unreported)** which supports these principles.

36. According to Ms Kahoro, the prosecution adduced computer printouts as part of its evidence therefore the petitioner cannot claim new and compelling evidence. Ms Kahoro maintained that the petitioner had the opportunity to interrogate the prosecution evidence and did indeed cross-examine the witnesses who produced the computer print-outs.

37. Counsel submitted that the prosecution proved the case against the petitioners beyond reasonable doubt and the appeal there from dismissed hence there was no basis to re-open the petitioner's conviction as the provisions of **Article 50(6)** have not been satisfied. Furthermore, the prosecution provided all the material and there is no evidence to show that the petitioner was not accorded facilities to prepare his defence and appeal.

38. Ms Kahoro finally submitted that the petition cannot lie as the matters alleged took place before the promulgation of the Constitution. As the application of the Constitution is not retrospective then there is no right to invoke the **Article 50(6).** Counsel relied on the case of ***Charo Karisa Thoya v Republic*** **Mombasa Court of Appeal Criminal Appeal No. 274 of 2002 (Unreported)** where the Court of Appeal held that the provisions of the Constitution will not apply retrospectively as the trial of the accused had taken place under the former Constitution.

Issues for Determination

39. Having heard the parties I think there are two main issues for determination;

(a) Whether Constitution is applicable to determine the petitioner's rights.

(b) And if so, whether the petitioner is entitled to relief under the provisions of **Article 50(6)**.

Applicability of the Constitution

40. The Constitution promulgated on 27th August 2010 brought with it a new legal structure which was effective from that date. **Article 263** provides that the Constitution shall take effect on the date of promulgation while **Article 264** provides that on the date of promulgation the former Constitution subject to the **Sixth Schedule** shall stand repealed.

41. The effect of **Articles 263** and **264** is that the Constitution is not retrospective, it cannot invalidate, except by express provision, what was otherwise legal during the currency of the former Constitution. (See ***Joseph Ihugo Mwaura v Attorney General*** **Nairobi Petition No. 498 of 2009 (Unreported),** ***John Githinji Wang'ondu and Others v Coffee Board of Kenya and Another*** **Nairobi Petition No. 255 of 2011 (Unreported)** and ***Du Plessis and Others v De Klerk and Another*** **(CCT 8/95) [1996] ZACC 10**).

42. In the case of ***Charo Karisa Thoya v Republic (Supra)***, one of the arguments that arose was whether the appellant was entitled to legal representation from the State as provided for under **Article 50(1)**. The Court of Appeal held that the trial took place under the former Constitution and the appellant could not be entitled to free legal representation during his trial as this was not a right existing under the former Constitution.

43. In ***Charo Karisa Thoya*** **(Supra)**, the right sought to be asserted was the right to counsel during the proceedings. That right was exhausted once the trial was completed. The circumstances of this case are different, though the trial was completed during the currency of the former Constitution; the appeal was heard and determined after the Constitution was promulgated. Under **Article 50(6)(a)** the right to petition for a new trial accrues after a person's appeal has been dismissed by the highest court or after the time for appealing has lapsed and no appeal has been filed. As the petitioner's appeal was determined on 20th May 2011, the petitioner is entitled to take advantage of the provisions of the Constitution.

Whether the petitioner is entitled to a new trial

44. Though the petitioner's case is in substance a petition for a new trial, Mr Bryant repeatedly disavowed the fact that the petitioner was not seeking a new trial. He emphasized that the prayers in the petition were firmly grounded on the provisions of **Article 35(1)**. **Article 35(1)** provides;

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

45. **Article 35(1)** has two parts. The first part, entitles every citizen the right of access to information from the State. This right is unconditional and only subject to such limitations that are consistent with **Article 24**. The second part, **Article 35(1)(b)** entitles a citizen to information held by another person and required for the exercise or protection of any right or fundamental freedom. The substance of the petition is that it falls in the second part as the petitioner seeks information from two companies; Safaricom Kenya Limited and Telkom Kenya Limited. This information must relate to the exercise or protection of fundamental rights and freedoms. In other words, the information sought from these two private entities must be rationally connected to the exercise of a fundamental right or freedom.

46. In the petitioner's case, the right and fundamental freedom sought to be enforced is the right to petition the High Court for a new trial under the provisions of **Article 50(6).** The petition is clear that the intended information is to enable the petitioner make a case for a new trial and it is this determination that the court must make.

47. What is ***"new and compelling evidence"*** contemplated under **Article 50(6)**. The Constitution does not give a definition of these terms and in deciding what they mean it must be remembered that a person

who is convicted has gone through the legally established process with the necessary protections contemplated under **Article 50**. The petitioner moves the court without the presumption of innocence and the burden to upset a lawful decision of the trial and appellate court is squarely on the petitioner's shoulders.

48. The Constitution now includes the right to post conviction review as part of the right to a fair hearing. **Article 50(2)(q)** entitles a person convicted to appeal or apply for review by a higher court as prescribed by law. This right entrenches the right of appeal and or review, which is normally a statutory right, a part of the right to a fair trial. There is also the right to petition for a new trial provided in **Article 50(6).** Thisright is new in our jurisprudence. It did not exist in the previous Constitution and it is in recognition of the simple fact that justice must be done where it is necessary to do so. **Article 50(6)** seeks to balance the public interest in having finality in criminal cases on the one hand and ensuring that where there is new and compelling evidence, an innocent person should not suffer the penalty of a conviction.

49. Ms Kahoro submitted that the meaning of ***"new and compelling"*** should be drawn from the test applied in civil matters. **Section 80** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** and **Order 44** of the ***Civil Procedure Rules*** provide instances where the court may review its decision on account of discovery of new and important facts. **Order 44** entitles a party to apply for review upon, *"**……discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed……."***

50. The Court of Appeal expressed the basis for caution considering application for review based on discovery of fresh evidence in the case of ***D.J. Lowe & Company Ltd v Banque Indosuez*** **Civil Appl. Nai. No. 217 of 1998 (Unreported)**. The Court observed that, *"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."*

51. Quoting ***Mulla on the Indian Civil Procedure Code,* (15th Edition)** at page 2726, the Court of Appeal in ***Rose Kaiza v Angelo Mpanju Kaiza*** **(Supra)** stated *"Applications on this ground must be treated with great caution ….. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."*

52. Ms Kahoro referred to another area where the court is required to consider new fresh evidence after a decision has been rendered is in the course of hearing appeals. Under **rule 29** of the ***Court of Appeal Rules***, the Court of Appeal may consider admitting additional evidence in an appeal. The Court of Appeal in the case of ***Mzee Wanjie and 93 Others v A.K. Sakwa and 3 Others*** **[1982 – 88] 1 KAR at page 465**, **466** per Chesoni Ag. JA (as he then was) laid out the following principles for admission of additional evidence on appeal. These principles are as follows;

(a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.

(c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

53. The provision relating to post conviction review articulated in **Article 50(6)** draws its origins from the writs of antiquity. Under the common law, a defendant seeking a writ of error ***coram nobis***was required to file the petition in the appellate court alleging that there are facts that were unknown at the time of the trial and that, if known, those facts would have changed the result of the case. If the appellate court granted the petition, the defendant would be given an opportunity to present the newly discovered facts in the trial court and the trial judge would then determine whether it is necessary to grant a new trial.

54. The writ ***coram nobis*** was available for an error of fact not apparent on the record and not attributable to the applicant's negligence and which if known by the court would have prevented rendition of the judgment. It was not available where advantage could have been taken of the alleged error at the trial, as where the facts complained of were known before or at the trial, or where at the trial the accused or his attorney knew of the existence of such facts but failed to present them. (See generally **Edward N. Robinson, *The Writs of Error Coram Nobis and Coram Vobis,* 2 Duke Bar Journal, 29 -39 (1951)** and ***Dobie v Commonwealth of Virginia* 198 Va. 762, 96 S.E. 2d 747 (1957)**)

55. While the writ was abolished in England by the ***Common Law Procedure Act*** , it is still in use in the US states is some form or other. The use of the writ of ***habeas corpus*** has also been adapted to enable convicted persons file post-conviction motions which may only be used to raise a collateral challenge to the validity of the judgment or sentence. Where this is allowed, it is improper to include in a post-conviction motion a claim that was or could have been raised on direct appeal. The courts have consistently held that post conviction relief is not a substitute for an appeal and the right to file a post-conviction motion was not intended as a second opportunity to argue alleged trial errors. Nor was it intended to provide a forum for re-argument of the issue of guilt or innocence. Post-conviction motion serves the limited purpose of providing the defendant with a remedy in the event there has been a substantive deprivation of federal or state constitutional rights in the proceeding that produced the judgment or sentence under attack.

56. Most state courts in the United States of America considering a motion for a new trial based on newly discovered evidence use the standard articulated by the Georgia Supreme Court in ***Berry v. State* 10 Ga. 511, 527 (1851)**. Under ***Berry***, a new trial based on newly discovered evidence should only be granted if the defendant proves that: (1) the evidence has come to his knowledge since the trial, (2) the failure to discover the evidence was not because of a lack of diligence, (3) the evidence is so material that it would probably produce a different verdict if a new trial were granted, (4) the evidence is not merely cumulative, and (5) the evidence does not simply impeach a witness' credibility.

57. The common thread running through these cases is the fact that the court exercises great caution in re-opening matters which have been heard and determined. Our civil courts will only exercise their plenary power of review where there is new and important evidence which could not have been found with due diligence on the applicant's part. The same degree of caution expressed by the Court of Appeal in ***D.J. Lowe & Company Ltd v Banque Indosuez*** **(Supra)** must always be borne in mind.

58. More recently in ***Mohamed Adbulrahman Said and Another v Republic*** **Mombasa Criminal Misc. Appl. Nos. 66A and 66B of 2011 (Unreported), Odero and Nzioka JJ**, considered the meaning of new and compelling evidence in **Article 50(6)(b)**. The learned judges stated that, *"The word **"new"** is defined in the Concise Oxford Dictionary 9th Edition as,**"of recent origin" or made invented, discovered, acquired or experienced recently or now for the first time."** In our understanding therefore **'new'** evidence mustmean evidence that is recent in origin, has recently been discovered and was not known or available at the time of trial or at the time of hearing of the first two appeals."* As regards compelling evidence they stated that, *"Once again we will turn to the Concise Oxford Dictionary 9th Edition where the ordinary English meaning of the term compelling is given as **"rousing, strong, interest attention, conviction or admiration"**. Thus this evidence must be very strong and convincing evidence – evidence which may possibly persuade a court of law to reach an entirely different decision than that already reached."*

59. Distilling the principles I have adverted to, I would hold that the petitioner bears the burden of satisfying the ingredients of **Article 50(6)** by showing that;

(a) The evidence is new in the sense that it must not have been available to the petitioner during the trial. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals.

(b) The evidence must be compelling. The new evidence must also be admissible and credible and not merely corroborative, cumulative, collateral or impeaching. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the petitioner to the extent that it may possibly persuade a court to law to reach an entirely different decision than that already reached.

Disposition

60. Before I proceed to dispose of the petitioner's case in light of the principles I have set out, I wish to point out that it has become increasingly common for convicted persons to lodge petition's to overturn convictions on the basis of some error in trial or appellate process premised on the breach of some fundamental rights or freedom.

61. In his submissions, petitioner submits that, "*The standard of proof in criminal trials is proof \'beyond reasonable doubt. 'It is the Petitioner\'s submission that the appellate court failed to consider the discrepancy raised by the evidence of PW 1 and instead erroneously used the evidence as a basis for the Petitioner\'s conviction."*

62. In essence, what the petitioner seeks to do is have this court evaluate the judgment of the appellate court. If the petitioner is aggrieved by a judgment of a court of competent jurisdiction, such judgment cannot form the basis of a collateral challenge based on some breach of constitutional provisions. In the case of ***Chokolingo v Attorney General of Trinidad and Tobago* (1981)1 ALL ER 244,** the court cited with approval the decision in the case of in ***Maharaj v Attorney General of Trinidad and Tobago* (No. 2) [1979] AC 385 at 399** where the Privy Council stated in part, ***"In the first place, no human right or fundamental freedom...is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person\'s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say there was an error..."***

63. This reasoning was recently adopted by the Court of Appeal in the case of ***Methodist Church in Kenya Trustees Registered & Another v Rev. Jeremiah Muku and Another* CA, Civil Appeal No. 233 of 2008 (Unreported),** where the Court of Appeal observed, ***"As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review."***

64. The petitioner in this case had a right of appeal against the decision of the High Court, a right which he duly exercised. The right of appeal or review is protected by **Article 50(2)(q)**. The petition cannot be used as an \'alternative forum\' to lodge collateral attacks against decision of the appellate court nor can it be used as a general substitute for the normal procedures in the court system which are clearly provided for under **Article 50** of the Constitution.

65. A petition under **Article 50(6)** is not a re-trial or an appeal. As the court stated in ***Mohamed Adbulrahman Said and Another v Republic* (Supra)**, ***"We do wish to make it perfectly clear however, that the right to a new trial is not an avenue for further appeal. This court has no jurisdiction to consider and determine matters which have already been decided upon by the Court of Appeal."*** I would also add not only matters decided upon but also matters which could have been the subject of appeal at the material time. It is not an opportunity for the High Court to reconsider all the evidence and see whether there was reasonable doubt or whether the petitioner conviction was supported by the evidence. The inquiry is limited to testing whether the evidence is new and compelling. I must therefore resist the petitioner's entreaty to review the evidence and find that there was reasonable doubt as to his

conviction, a conviction that was affirmed by the appellate court.

66. The petitioner's case falls woefully below the standards prescribed by the provisions of **Article 50(6)**. The computer printouts which are the subject of the petition were available at the trial, the witness producing them was cross-examined and the petitioner had the opportunity to interrogate the issue fully at the trial. In other words, the matters concerning the printouts and telephone exchanges between the petitioner and the deceased were well within the petitioner's knowledge at the time of the trial and had the petitioner exercised due diligence at the trial, such information would have come to light.

67. Even taken alone, the evidence of the computer printouts cannot displace the evidence against the petitioner. Both the High Court and Court of Appeal were satisfied beyond reasonable doubt that Mwangi was involved in the murder of the deceased on 4th April 2012.

68. As regards the proposed witnesses, I must state that the manner of presentation of the evidence was somewhat casual. The proposed witnesses did not swear any affidavit nor was an explanation given why they were not available at the trial. In short, the evidence of the petitioner's employees is not new. The witnesses were known to the petitioner at the time of the trial and were available to testify and could have been called on testify on behalf of the petitioner who was their employer.

69. The evidence is also not compelling in any sense. It does not raise an alibi defence when weighed against the evidence of the petitioner's involvement in the murder of Lawrence Magondu. The only conclusion one can draw is that the evidence of the proposed evidence is a mere afterthought.

70. Finally, the petitioner has raised the issue of the prosecution failing to disclose evidence to it. The petitioner has not placed before the court material to show that the prosecution failed to disclose all the material available to it. The petitioner has cited the correct legal position regarding the disclosure of prosecution evidence to the defence as decided in the case of ***Thomas Cholmondeley v Republic*** **(Supra)** but I think that issue ought to have been raised before the trial court and the appellate court as the right was always available to him. Furthermore and this ground cannot constitute ***"new and compelling evidence"*** within the meaning of **Article 50(6)**.

71. The net result of my finding is that the petitioner's proposed evidence is neither new nor compelling and no case has been made under the provisions of **Article 50(6)** to warrant the ordering of a new trial. Since the right to a new trial is not available to the petitioner, it follows that I cannot make an order for information under the provisions of **Article 35(1)(b)**.

Conclusion

72. The petitioner seeks to summon two parties who were not joined to these proceedings. I think that when **Article 35(1)(b)** is invoked, it is only proper that the party from whom the information is sought be joined to the proceedings as respondent.

73. No case has been made out to demonstrate that information is required for the enforcement of a fundamental right under **Article 35(1)(b)**. The request for summons to issue to Telkom Kenya Limited and Safaricom Kenya Limited is therefore rejected. In substance, the petitioner's claim is a petition for a new trial under **Article 50(6)** and the petition is hereby dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 21st day of September 2012

D.S. MAJANJA

JUDGE

Mr Bryant, Advocate, instructed by Azania Legal Consultants for the petitioner.

Ms T. Kahoro, State Counsel, instructed by the Director of Public Prosecutions for the respondent.