REPUBLIC OF KENYA

High Court at Kakamega

Criminal Miscellaneous Application 88 of 2012

GODFREY SHIMONYO ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

R U L I N G

The applicant, **GODFREY SHIMONYO** was convicted and sentenced to death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The applicant's appeal to the High Court was dismissed on 23.2.2011.

The applicant subsequently applied for a retrial vide his application dated 18.6.12.

The ground of the application is that re-trial has high chances of success.

Mr. Oroni, the State Counsel opposed the application on the ground that it has not been explained what the new evidence is.

Article 50 (6) of the Constitution provides as follows:-

"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."

The applicant's appeal has not been dismissed by the highest court to which he is entitled to appeal. If the applicant did not appeal within the time allowed for appeal, he has not demonstrated that his application to appeal out of time has not been successful. There is also no new and compelling evidence that has become available.

In addition to the Constitution, I have considered the Principles to be applied when considering whether or not to order a retrial as re-stated by the Court of Appeal in the case of BERNARD **LOLIMO EKIMAT VS R. CA NO.151 OF 2004 (ELDORET).**

"There are many decisions on the question of what appropriate case would attract an order of retrial, but on the main the principle that has been acceptable to court is that the case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where

interests of justice required it."

In the instant case, after considering the issues raised by the applicant, I have not seen any procedural irregularities that go to the core of the matter and can be said to have occasioned a miscarriage of justice.

The application has no merits and is dismissed.

Delivered, dated and signed at Kakamega this 19th day of December, 2012

B. THURANIRA JADEN

J U D G E