



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISC. CRIMINAL APPL. NO. 13 OF 2011**

**JACOB KOSGEI**

**KAYAB.....APPLICANT**

**=VERSUS=**

**REPUBLIC.....RESPOND**

**ENT**

**RULING**

By his application lodged on 11<sup>th</sup> April, 2011, **Jacob Kosgei Kayab**, (hereinafter, (“**the applicant**”), seeks enlargement of time to lodge an appeal. He has invoked the provisions of chapter four (4) Articles 19, 20 (3) & (4), 21 (1), 22 (1) (3) and (4), 23 (1), 50 (1), (4), (6) and 9 of the Constitution of Kenya. Section 19 of the sixth schedule as read together with rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and protection of human rights and freedoms of the individual-High Court Practice & Procedure Rules - 2006), are also invoked.

The application is predicated upon the following grounds:-

- (1) That his fundamental rights were violated because the manner in which the evidence was obtained would render the trial unfair and detrimental to the administration of justice.
- (2) That his fundamental rights were violated as the post-mortem form which was availed before the court was a carbon copy, hence there was no reason given as to why the original could not be produced.
- (3) That his fundamental rights were violated as some of the crucial witnesses were not called.

- (4) That his fundamental rights were violated as the appellate court convicted him on contradictory evidence.
- (5) That his defence was not considered.
- (6) That the assessors were not given a chance to give their verdict.
- (7) That the facts of the case disclosed the offence of manslaughter, yet he was tried for murder.

In the affidavit in support of the application, the applicant has deponed, *inter alia*, that he was tried, convicted and sentenced to death in Criminal case No. 22 of 2004 at Kitale for the offence of murder; that his appeal to the Court of Appeal was allowed and the conviction for manslaughter substituted for that of murder; that he was then sentenced to 15 years imprisonment and that article 22 (1) of the new Constitution allows the re-opening of the case, hence the application.

When the application came up before me for hearing on 5<sup>th</sup> May, 2011, the applicant relied upon the grounds of his application and the supporting affidavit. **Mr. Oluoch**, the learned Senior Deputy Prosecution Counsel, opposed the application on the main ground that the applicant had not demonstrated that new and compelling evidence has become available.

I have considered the application, the supporting affidavit and counsel's submission in opposition thereto. Having done so, I take the following view of the matter. This application is primarily predicated under Article 50 (6) of the Constitution which reads as follows:-

**“(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.”**

The applicant is the kind of person envisaged in sub-section 6 (a) above. For his intended appeal to have any chances of success he had to demonstrate that

**“new and compelling evidence has become available”**

Having gone through the entire application and the supporting affidavit, there is no suggestion that any new and compelling evidence has become available. The applicant has moved the court merely because the Constitution makes provision for a new trial. The threshold set by the Constitution is very high and it is not enough that a person has the right to move the High Court for a new trial. There must not only be fresh evidence but the new evidence must be compelling. The applicant has not demonstrated that such is the case here.

In the premises, I do not find any merit in the application. The same is dismissed.

**DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF JUNE, 2011.**

**F. AZANGALALA**

**JUDGE**

***Read in the presence of:-***

1. **Jacob Kosgei Kayab**, the applicant in person and
2. **Mr. Oluoch**, Senior Deputy Prosecution Counsel for the State.

**F. AZANGALALA**

**JUDGE**

**16/6/2011**