



**Mwathi v Republic (Criminal Miscellaneous Application E054 of 2024)
[2025] KEHC 13145 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL MISCELLANEOUS APPLICATION E054 OF 2024**

**RL KORIR, J
SEPTEMBER 24, 2025**

BETWEEN

MOSES KITHINJI MWATHI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Moses Kithinji Mwathi (Applicant) was the Accused in Marimanti Magistrate's Court Criminal Case No.E753 of 2021. He was charged with the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on the 12th day of August 2021 at Marimanti Location in Tharaka Nithi County, unlawfully did grievous harm to Martin Mwiti.
2. He pleaded guilty and was convicted on his own guilty plea and sentenced to serve 20 years' imprisonment by Hon. P.N Maina, Chief Magistrate.
3. The Applicant has now approached this court seeking an order for retrial. The Application is based on grounds that he was not informed of the consequences of his guilty plea; that he was tricked by the arresting officer into pleading guilty; that he was not given an opportunity for restorative justice, that his trial violated the right to equality and dignity and; that he had new and compelling evidence on the circumstances which surrounded the offence.
4. In his submissions dated 2nd June 2025, the Applicant stated that his constitutional rights under Article 49 (f) (ii) were violated as he was arrested on 12th August and held in the police cells for 5 days before being presented in court on 16th August, 2021. That after being presented in court, the trial court ordered that he be remanded in police custody as the prosecutor was not ready with the facts of the case until 20th September, 2024 when his plea taking process was completed. He urged that the period between first presentation in court and conviction gave the police time to beat, torture and threaten him to plead guilty.



5. The Applicant further submitted that he did not appeal within time as he was not familiar with the legal procedures.
6. On new and compelling evidence, the Applicant submitted that his ex-girlfriend who had since married the complainant had visited him in prison and informed him that the complainant and herself had discovered who the real offender was and were ready to testify in a re-trial. The Applicant prayed to be re-tried in any court within the jurisdiction of Tharaka- Nithi.
7. The Respondent's submissions were dated 29th July 2025. The Respondent submitted that the Applicant did not meet the threshold for retrial. They submitted that for a retrial to be granted, the Applicant had to show that the trial suffered irregularities, leading to miscarriage of justice, the discovery of new and compelling evidence and that the interests of justice would be served. They relied on the case of *Fatehali Manji Vs- Republic* [1966] E.A 343.

Analysis and Determination

8. The background to the Application is not contested. The trial record shows that the Applicant was charged with the offence of grievous harm and he pleaded guilty. From the facts which were read by the prosecutor, the Applicant, (then Accused), went to pick up one Josephine Kagwiria from her house at 7.30 a.m. He found the complainant there and a fight ensued in which the Accused cut the complainant on the head causing him to bleed profusely. He was rushed to Marimanti Level 4 hospital and referred to Embu Level 6 hospital for head surgery. The P3 produced [Exhibit 1] indicated the degree of injury as maim.
 9. The Accused accepted the facts and was convicted on his own plea of guilt. The court after taking mitigation and considering the pre-sentence Probation Officer's report, sentenced the Accused to serve 20 years' imprisonment.
 10. Article 50 of *the Constitution* provides for fair trial rights which include the right to a re-trial as follows:

“ 50(6) A person who is convicted of a criminal offence may petition the High Court for 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.”
 11. In the case of *Fatehali Manji Vs. Republic* 1966 E.A 343, the predecessor Court of Appeal stated the applicable principles to be considered in an application for a retrial as follows”-

“In general a retrial court will be ordered when the original trial was defective of illegal; it will be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”
 12. Similarly, in the case of
- (copy)



13. In this case the Applicant has stated that he did not appeal his sentence. He said that he was not aware of legal procedures. Be that as it may, I observe that the Applicant pleaded guilty and would only have had the right to appeal sentence only unless the plea was irregular. Further he was convicted and sentenced.
14. I have examined the record to see if there was any irregularity in the plea. As earlier stated, the record shows that the Accused was first presented for plea on 16th August, 2021. The court deferred plea as the prosecutor was not ready with the facts. The charge was subsequently amended from ‘assault causing actual bodily harm’ contrary to 251 causing ‘grievous harm contrary to section 234 of the Penal Code.
15. On 20th September 2021, the substituted charge was read and explained to the Accused in both English and Kiswahili and he answered that “it is true.” Facts were read to him and he stated that the facts are true and correct.” The trial court then entered a plea of guilty and convicted the Accused accordingly.
16. The above shows that the plea was taken in the prescribed manner and there was nothing irregular about it. The steps of taking plea were set out by the Court of Appeal in the famous case of Adan Vs. Republic as follows:-
 - i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
 - ii. the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;
 - iii. the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
 - iv. if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
 - v. if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.
17. Having pleaded guilty, the Applicant could only appeal sentence. The allegation that the investigating officer tricked him into admitting the offence does not hold water because as shown above, he admitted the facts. He did not show what motivated him to admit the charge. It can only be inferred that he admitted because the facts were true.
18. A new trial can be ordered where the Applicant has come across new and compelling evidence. This is provided for under Article 50(6)(b) of *the Constitution* of Kenya 2010. What constitutes new evidence within the meaning of Article 50(6)(b) of *the Constitution* was considered by the Court of Appeal in the case of Robert Tom Martins Kibisu v Republic [2014] KECA 741 (KLR) where the court held as follows:

“In our view, to constitute new evidence within the meaning of that Article, the evidence must be evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial. The word compelling connotes something that is powerful, convincing, weighty, imperative, irresistible or irrefutable. To constitute compelling evidence therefore, the evidence in question must be evidence that could have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to different verdict.”
19. The Applicant urged that he had come into new and compelling evidence. He stated that his ex-girlfriend had visited him in person several time and had informed him that she married the



complainant Martin Mwiti and had two children. That she told him that they were now aware that it was not the Applicant who caused grievous harm to the complainant.

20. The reason given above is not compelling. It suggests that the ex-girlfriend, the complainant and the Applicant were in a love trial which occasioned the fight and assault leading to the charge. It also suggests that the complainant and the ex-girlfriend had forgiven the Applicant. Forgiveness cannot be interpreted to mean new and compelling evidence which would warrant a re-trial. It may in an appropriate case go towards reduction or alteration of sentence.

21. In the end, it is my findings that application has not met the threshold for re-trial. It is dismissed.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 24TH DAY OF SEPTEMBER, 2025.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant acting in person and Ms Rukunga for the State; Muriuki (Court Assistant).

