



**Esiru alias Nairobiian v Republic (Criminal Miscellaneous Application  
3 of 2021) [2024] KEHC 961 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 961 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL MISCELLANEOUS APPLICATION 3 OF 2021  
RN NYAKUNDI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**CHARLES JUMA ESIRU ALIAS NAIROBIAN ..... PLAINTIFF**

**AND**

**REPUBLIC ..... DEFENDANT**

*(Being a Review of on Re-Sentencing in Cr. Case NO HCCR 7 of 2015)*

**RULING**

Mr. Yusuf for the State

1. The petitioner was charged, tried, convicted and sentenced to twenty (20) years imprisonment for the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. The impugned verdict on sentence was imposed on 8.11.2016. In a petition filed before this court under certificate of urgency the petitioner seeks leave of this court to exercise jurisdiction under Art 165 (3) (b) of the *constitution* to reconsider the sentence imposed. In support of the petition is a sworn affidavit of the petitioner. A peruse of the record, shows a petitioner never preferred and appeal to the highest court to canvas any issues on either conviction or sentence. Similarly, the record denotes appending application to be allowed to appeal out of time. Unfortunately, the application to seek extension of time to file an appeal out of time ought to have been lodged before the court of appeal. This court has no jurisdiction to grant such a remedy in view of the facts and circumstances of this case.

**Decision**

2. Essentially the petition can only be entertained within the scope of Art. 50 (6) (a) & (b) of the *constitution* which provides as follows:
- 3.



- 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
- 4.
- b. New and compelling evidence has become available
5. What is new compelling evidence for purpose of this Art.? The basic definitions provide a starting point. First, evidence is something admissible in court which includes witness testimony, documents, and tangible exhibits that tends to prove or disapprove the existence of an alleged fact for a party to secure judgement in a criminal case or a civil trial as provided for Under Section 107 (1), 108 & 109 of the Evidence Act. When it comes for a fact it is something that actually exists as an aspect of reality. For purpose of this petition new compelling evidence is information presented regarding an aspect of reality that was not presented to the trial court but that which Art. 50 (6) (a) & (b) of the constitution allows its admission.
6. The focus of this Article is on evidence that could have been produced and admitted to prove the existence or non-existence of a fact to the trial court in arriving at a particular outcome. This Article therefore excludes any witness testimony, documentary or physical evidence regarding facts that may have changed in the period between the trial court’s judgement and the appellate or review courts consideration. That evidence for purpose of this provision is some new evidence that is truly new in the sense that even with due diligence it could not have been presented to the trial court because it was unavailable for legitimate reasons. Finally, new compelling evidence for purpose of this Article of the constitution does not include evidence that was considered and relied upon by the trial court but was inadvertently left out of the formal record. Such evidence is not at least in the sense of this Article for truly being new compelling evidence because it was revealed in the trial court. The court in Tom Martins vs Republic, Supreme Court Petition no. 3 of 2014 eKLR expressed as follows;
- 7.
- a. Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window or opportunity for such a new trial is subject to two conditions. First, a person must have exhaust the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be new and compelling evidence.
- 8.
- b. We are in agreement with the Court of Appeal that under Article 50(6) “new evidence” means “evidence which was not available at the trial and which, despite exercise of due diligence, could not have been availed at the trial, and “compelling evidence” implies evidence that would 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 a different verdict. A court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject



charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person.”

9. As support for this petition the court is invited to rely on the affidavit by the petitioner. As noted from the record it is not surprising that the petitioner in the language of the affidavit has not met the threshold in the text of the *constitution*, and the guidelines in the above case. Some of the facts being alluded to were inclusively adjudicative within the jurisdiction of the trial court. In sum and in light of the above discussion the petition lacks merit and it is therefore dismissed.

**DATED, SIGNED AND DELIVERED AT LODWAR THIS 1<sup>ST</sup> DAY OF FEBRUARY 2024.**

And in the presence of;

Mr. Yusuf for the state

Applicant in person

.....

**R. NYAKUNDI**

**JUDGE**

