



**Njoroge v Republic (Constitutional Petition E029 of 2022)
[2024] KEHC 1195 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E029 OF 2022
AC MRIMA, J
FEBRUARY 14, 2024**

BETWEEN

SAMSON KAMAU NJOROGE PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Samson Kamau Njoroge, the Petitioner herein, was jointly charged with one Musa Eragae Echau with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
2. The said Musa Eragae Echau was acquitted under Section 210 of the [Criminal Procedure Code](#) after the trial Court found no sufficient evidence had been adduced against him as to establish a *prima facie* case. The Petitioner herein was subsequently found guilty as charged. He was sentenced to 25 years imprisonment. That was in Kitale High Court Criminal Case No 21 of 2012. (hereinafter referred to as 'the criminal case').
3. The Petitioner then lodged an appeal to the Court of Appeal. It was Criminal Appeal No 363 of 2019. From the record, it seems that the appeal was dismissed vide a judgment rendered on 18th November, 2022.
4. Undeterred to seek his freedom, the Petitioner then opted to, and filed the instant Petition in exercising his right under Article 50(6) of the [Constitution](#) in seeking for a retrial of the criminal case.
5. The Petition was supported by the Petitioner's Affidavit. He deposed that he had come across new and compelling evidence which had it been produced at trial, he would not have been convicted.
6. The Petition was opposed by the Respondent. Through the Replying Affidavit of Jackline J. Kiptoo, the Respondent posited that the Petitioner did not present any new evidence or at all, and as such the Petition was unsustainable.



7. The Petition was heard by way of reliance on written submissions. Both parties duly complied.
8. This Court has considered the Petition, the response, the written submissions and the decisions referred to therein.
9. The Petition is anchored on Article 50(6) of the Constitution. The said provision of the Constitution states as follows: -

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- (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.
10. In this Petition, there is no doubt that the Petitioner's appeal to the Court of Appeal was dismissed. The Court of Appeal was the highest Court the Petitioner could legally appeal to. The Petitioner was, therefore, within the confines of the first limb; that is Article 50(6)(a) of the Constitution.
11. On the second limb, the Petitioner had to demonstrate that there was indeed new and compelling evidence that had become available and which evidence, when properly considered, could vitiate the trial, conviction or sentence.
12. What is new and compelling evidence has been considered by many Courts. The Supreme Court of Kenya in Col. Tom Martins Kibisu v Republic Petition No 3 of 2014 [2014] eKLR had the following to say on what new and compelling evidence was: -
 - (42) We are in agreement with the Court of Appeal that under Article 50(6), "new and compelling 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, a 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 the accused person." (emphasis added).
13. From the foregoing, alongside other like decisions, it has been firmly established that for any evidence to qualify to be new and compelling, the following ingredients must be established, that is: -
 - i. The evidence is new in that it was not available to the Petitioner either at the trial or on appeal despite due diligence.
 - ii. The Petitioner must be in possession of the evidence he/she/it intends to rely on and such evidence must be laid before Court for consideration.



- iii. The evidence is compelling in that it is admissible, credible and capable of affecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against the Petitioner.
- iv. The evidence is not merely corroborative, cumulative, collateral or impeaching.
14. Returning to the case at hand, according to the Petitioner, the new and compelling evidence which he intended to rely on is a Government Chemist Report and the deceased's phone records from Safaricom Limited.
15. The Petitioner contended that both the Government Chemist Report and the deceased's phone records from Safaricom Limited were not produced during the trial. To him, such evidence was so crucial as it would have dissociated him from the alleged commission of the offence.
16. From the record, it is apparent that the issue of the Government Chemist Report was dealt with both at trial and on appeal. For instance, the Learned High Court Judge in dealing with the issue in the judgment stated as follows: -
 25. Though the investigating officer was not call (sic) to testify and the results from the Government Chemist not produced it may not be farfetched to conclude that the accused was actually beside washing the blood-stained clothes was also washing the blood which was on the car.
17. In its judgment, the Court of Appeal also dealt with the non-production of the Analyst report. The Appellate Court found no merit on that argument.
18. Drawing from the above, it is the case that the issue of the failure to produce the Government Analyst Report is not new. The issue was canvassed at the trial and on appeal and both Courts found against the Petitioner's position. Further, that evidence is not within the possession of the Petitioner. Therefore, such evidence, by any shred of imagination, cannot be deemed to be new and compelling.
19. Turning to the aspect of the records from Safaricom Limited, again the records are not in the possession of the Petitioner and have not been laid before this Court. How then would this Court find that such evidence as admissible, credible and capable of affecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against the Petitioner? The failure by the Petitioner to produce the records for this Court's scrutiny is fatal to the Petition.
20. The upshot is that the Petitioner has not succeeded in demonstrating that there is any new and compelling evidence in the circumstances of this case that warrants a retrial.
21. Consequently, the following final orders do hereby issue: -
 - a. The Petition is hereby dismissed.
 - b. This file is marked as closed.

DELIVERED, DATED AND SIGNED AT KITALE THIS 14TH DAY OF FEBRUARY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Samson Kamau Njoroge, the Petitioner in Person.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.



Chemosop/Duke – Court Assistants.

