



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**MISC. CRIMINAL APPLICATION NO. 17 OF 2018**

***(CORAM: F.M. GIKONYO J.)***

**DOMINIC LEPOSO SADERA.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. Before me is an undated application filed on 5<sup>th</sup> June 2018 seeking for orders of retrial pursuant Section 358 of the Criminal Procedure Code.
2. The applicant was convicted and sentenced to serve 20 years' imprisonment in respect of the offence of manslaughter contrary to section 202 as read with Section 205 of the Penal Code. He filed **appeal**; Narok **HCCRA 13 of 2016 which appeal was dismissed**. The appellate court upheld the sentence of 20 years **on the ground that** it was supported by evidence produced at the trial.
3. The applicant orally submitted that he is praying that no record was brought to court. The investigating officer did not come to court. The incident occurred when he was not at the area- that was at 2.00p.m. He came in the evening and found the incident had taken place. He found photos had already been taken. He took the deceased to hospital and was admitted. He notified his family thereafter.
4. That PW1, PW2 and PW3 came after 25<sup>th</sup> and reported that they found him beating the victim. They owed him money and he stated that he has an agreement to that effect. Those papers he stated got lost in court.
5. The applicant submitted that he has followed for OB record in vain. That he has never seen OB report that he committed the offence. All medical documents were not provided. He therefore urged this court to order a trial because he was framed and his rights were violated. He further stated that he is also sick and he has attached his medical documents which show that he is diabetic and hypertensive.
6. Mr. Karanja submitted that the application by the applicant is an abuse of the court process. The same is brought under section 358 of the CPC for admission of new evidence. The applicant filed an appeal no 13 of 2016. That was a proper forum to adduce further evidence. The evidence that the applicant wants to produce was available at that time. He was represented by counsel and did not make any application thereto.
7. Mr. Karanja further submitted that new evidence is adduced if it was not available at the time and is relevant to the issue. The agreement was available during trial and were in the applicant's custody. He tendered his defence and did not even talk about those documents let alone seeking to produce them. He did not apply for any OB production. He therefore should have gone to the Court of Appeal.
8. In a rejoinder, the applicant submitted that he talked about the aforementioned documents at page 38 and he has been asking for those papers in the proceedings.

**ANALYSIS AND DETERMINATION**

9. From the outset, I do note that, the application herein is a request for a new trial.

**Of new trial**

10. According to article 50(6) of the Constitution: -

**(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.**

11. Such petition should be made where new and compelling evidence has become available. I take the phrase “new and compelling evidence has become available” to denote evidence which was not available or could not have been adduced at the trial or at appellate level even after due diligence. The evidence must also be relevant, credible and capable of belief, and one capable of creating a doubt as to the guilt of the accused. The test of admitting new evidence under the article should follow after the test stated in the case of Elgood Vs. Regina (1968) E.A. 274, to wit: -

**a. That the evidence that is sought to be called must be evidence which was not available at the trial.**

**b. That it is evidence that is relevant to the issues.**

**c. That it is evidence that is credible in the sense that it is capable of belief.**

**d. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.”**

12. The Court should therefore caution itself in admitting new evidence under the article. Accordingly, the decision to come under this article should be a conscientious one and backed by appropriate and credible evidence thereto. The applicant did not raise the issue of the agreement in his defence or question or request for the copy of the OB record at the trial or appellate stages. No reason was advanced as to why; (a) the request of copy of the OB record was not raised at the trial or at appellate stages, or (b) the agreement was not produced during his defence hearing. It is incumbent upon the person seeking to have a new trial to give cogent and credible reasons showing that the evidence relied upon in the petition was not available or could not have been adduced at the trial even after due diligence, and that the evidence is credible and capable of belief, and is capable of creating doubt as to his guilt. The circumstances of this case are quite ominous- and this was expressed by the prosecution counsel- especially as to how and why these issues are being raised now. Credibility of the evidence is put to question from the onset. I therefore, reject the bid for a new trial.

13. Before I make the penultimate order, I wish to note that the matters raised are camouflaged as a petition for a new trial, yet, they are for, and ought to have been raised in the appeal. They cannot found a petition for a new trial under order 50(6) of the Constitution.

14. The upshot is that the application is hereby dismissed. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

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**F. GIKONYO M.**

**JUDGE**

**In the presence of:**

1. Applicant

2. Karanja for Respondent

3. Kasaso - CA