REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 72 OF 2018

HARUN BUNA PHILLIP.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in **Kitui Chief Magistrate's Court Criminal Case No. 1056 of 2016** by **Hon. M. Murage (CM)** on **22/06/18)**

R U L I N G

1. Harun Buna Phillip, the Applicant, was arraigned in Court for the offence of **Causing Grievous Harm** contrary to **Section 234** of the **Penal Code.** Upon being taken trough full trial he was found guilty, convicted and sentenced to **fifteen (15) years imprisonment.**

2. He has now approached this Court pursuant to the provisions of **Article 159(2)** of the **Penal Code** seeking to be reconciled with the Complainant on the grounds that his parents and those of the Complainant had discussed and delayed to approach the Court. That he had no intention of harming the Complainant as the act was committed while he was intoxicated.

3. The State through the Prosecuting Counsel, **Mr. Mamba** filed a Replying Affidavit where he reiterated the offence the Applicant was charged with, what is provided by **Article 50(6)(b)** and **159(2)** of the **Constitution.**

4. At the hearing the Applicant canvassed the Application by way of oral submissions. He urged that the parents of the Complainant and his parents had agreed that he be released.

5. The State filed written submissions. It was urged that the Applicant failed to furnish the Court with proof of any new and compelling reason save for an affidavit sworn by **Musyoki Muasya** an individual who swore an affidavit but did not disclose his relationship with the minor.

6. Regarding what is envisaged by **Article 50(6)(b)** of the **Constitution** the case of **Rodgers Ondiek Nyakundi & 2 Others vs. Republic Criminal Appeal No. 135 of 2006** was cited where it was stated that the Applicant must show that:

> **"a) There is new evidence which must not have been available to him during the trial, and that evidence could not have been obtained with reasonable diligence for use at the trial time of hearing of appeal.**
>
> **b) That the evidence is compelling, is admissible and credible and not merely corroborative, cumulative collateral or impeaching.**
>
> **c) Such evidence must not only be favourable to the applicant but must be such evidence as is likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts."**

7. That there should have been proof of the alleged reconciliation and notification to the Office of the Director of Public Prosecution (ODPP) who mandates discontinuance of criminal proceedings.

8. This is a matter where the Applicant seeks to benefit from the law as espoused by the provisions of **Article 159(2)** of the **Constitution** which provides thus:

> **"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted."

9. In that regard he has approached the Court pursuant to **Article 50(6)(b)** of the **Constitution** that provides as follows:

"(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—

(b) new and compelling evidence has become available."

10. There is no indication as to whether the Applicant appealed the decision of the trial Court or not. He has deposed that there is new and compelling evidence. In the case of **Col. Tom Martins Kibusu vs. Republic Sp. Ct. Petition No. 3 of 2014 (2014) eKLR** the Supreme Court rendered itself thus:

***"[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."**

11. The Complainant in the case, **Raphael Safari Mwanzia** who was described as an adult did not swear an affidavit to insinuate what the Applicant has averred. There is an affidavit sworn by a stranger in the matter, **Musyoki Muasya (Raphael Muasya)** who deposed that soon after the Applicant was arrested he approached his parents for purposes of being compensated. He described himself as the Complainant in the matter but did not state his relationship with the actual Complainant. The State (ODPP) was not aware of allegations.

12. Therefore, the available facts do not amount to new evidence which would move this Court to order a retrial.

13. In the premises, the Application fails and is dismissed in its entirety.

14. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **5th** day of **March, 2019.**

L. N. MUTENDE

JUDGE