



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL MISC. APPLICATION NO. 72 OF 2018

WILSON KYALO MWENDWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. **Wilson Kyalo Mwendwa** was arraigned before the trial Court to answer a charge of **Attempted Murder** contrary to **Section 220(a)** of the **Penal Code**. In the alternative he faced the charge of **Causing Grievous Harm** contrary to **Section 234** of the **Penal Code**. He was found guilty, convicted and sentenced to **life imprisonment** on the alternative Count. Aggrieved he appealed. The High Court considered the Appeal, confirmed the conviction, set aside the sentence meted out and substituted it with **fifteen (15) years imprisonment** on the **20th** day of **September, 2018**. The sentence was to run from the date of conviction and sentence.

2. On the **29th October, 2018** he filed a Chamber Summons seeking revision on the grounds that his right to fair trial was not fully adhered to; his right to acknowledgement on how to Appeal as prescribed by **Section 351** of the **Criminal Procedure Code** was violated and that he has compelling reasons to adduce in event that the Application is allowed.

3. The Application is premised on grounds that the Application was made pursuant to the provisions of **Article 50(6)(a)(b)** of the **Constitution**.

4. The Application was canvassed by way of written submissions. He urged that he was remorseful having reformed both spiritually and mentally while in prison; at the time of the offence he was 20 years old and a student; as the only boy in his family he was expected to develop his home and to care for his family and old parents.

5. The State through learned Counsel, **Mr. Mamba** opposed the Appeal. He argued that the Appellant was not denying having committed the offence and had not exhibited any proof of remorse. In reply the Applicant urged that he had certificates and has learnt how to handle disputes in a calm manner.

6. I have duly considered rival submissions by both the Applicant and the Respondent.

7. It is urged by the Applicant that his right to fair trial was not adhered to. He has asked this Court to act pursuant to **Article 50(6)(a)(b)** of the **Constitution** that provides thus:

“(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.”

8. The alluded to provision of the law guarantees individuals the right to fair trial and another opportunity to petition the High Court for a fresh trial if conditions set in **Article 50(6)** of the **Constitution** are met.

9. In the case of **Tom Martins Kibisu vs. Republic SC Petition No. 3 of 2014** the Court delivered itself thus:

“under Article 50(6) “new evidence” means 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 and “compelling evidence” implies evidence that would have been admissible at the trial, of high probative value and capable of belief which if adduced at the trial could probably have led to a

different verdict.”

10. In the instant matter, the Applicant has not addressed what is provided for by **Article 50(6)** of the **Constitution** but has chosen to mitigate. As correctly pointed out he does not seem to be disputing the conviction.

11. The Applicant lodged his Appeal before this Court which was determined. The sentence passed by the trial Court was addressed and set aside. If he is dissatisfied by the decision of this Court, it is not the Highest Court that can determine the issue.

12. From the foregoing the Application herein lacks merit. Accordingly, it is dismissed.

13. It is so ordered.

Dated, Signed and Delivered at Kitui this 12th day of June, 2019.

L. N. MUTENDE

JUDGE