



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL MISC. APPLICATION NO. 50 OF 2018

IN THE MATTER OF ARTICLE 22(1), 23(1)(3), 165(3), 20(1)(2)(3), 48, 26(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (Protection of Fundamental Rights and Freedoms) PRACTICE AND PROCEDURE RULES 2013 (RULE 4(1))

AND

IN THE MATTER OF SECTION 296(2) OF THE PENAL CODE

AND

IN THE MATTER OF SECTION 216 AND 329 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF 610 OF 2010 JOSEPH KABERIA AND OTHERS

AND

IN THE MATTER OF SUPREME PETITION NO. 15 AND 16 OF 2015 OF FRANCIS KARIOKO MURUATETU AND ANOTHER VS. REPUBLIC

AND

IN THE MATTER OF DOUGLAS MUTHAURA NTOBIRI VS. REP MISC CR APP NO. 4 OF 2015 AT MERU

AND

IN THE MATTER OF CRIMINAL CASE NO. 16 OF 2016 AT KITUI HIGH COURT

BETWEEN

ALFONSE KYALO MUTHOKA.....APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. **Alfonse Kyalo Muthoka**, the Applicant was arraigned in Court for the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. Having been taken through full trial he was found guilty, convicted and sentenced to suffer death.

2. On the **30th** day of **July, 2018** he approached this Court by way of Chamber Summons seeking an order that the decision of **Joseph Kaberia and Others vs. Republic Petition No. 610 of 2010** and **Francis Karioko Muruatetu and Another vs. Republic, Petition No. 15 & 16 of 2015** be found applicable in this matter.

3. That the two (2) decisions are new and compelling evidence within the meaning of **Article 50(6)** of the **Constitution**.
4. The Application is supported by an affidavit deposed by the Applicant where he deposes that he has an Appeal pending in the Court of Appeal but seeks to be re-sentenced for if he is not re-sentenced he will continue serving an illegal sentence which will be prejudicial to him.
5. The application is unopposed.
6. The Applicant's argument is based on **Article 50(6)** 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.”

7. The Applicant has averred and submitted that his case regarding this matter is pending before the Court of Appeal therefore it has not been considered and/or dismissed by the Highest Court.
8. The Supreme Court has considered what comprises a new and compelling evidence. In the case of **Col. Tom Martins Kibisu vs. Republic** the Supreme Court stated as follows:

“... “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, 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. New and compelling evidence means.”

9. Re-sentencing cannot be stated to be new evidence as evidence is available facts or information indicating whether a belief or proposition is true.
10. This is a matter where the Applicant was aggrieved by the decision of this Court and his case is pending before the Court of Appeal which will determine whether or not this Court fell into error in reaching its decision.
11. In the premises, this Application is premature. Accordingly, it is dismissed.
12. It is so ordered.

Dated, Signed and Delivered at Kitui this 4th day of July, 2019.

L. N. MUTENDE

JUDGE