REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CONSTITUTIONAL PETITON NO. 10 OF 2018

IN THE MATTER OF CONSTITUTIONAL AND HUMAN RIGHTS

BENEDICT NZIOKA KIMEU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. **Benedict Nzioka Kimeu,** the Petitioner was charged, convicted of the offence of **Giving False Information to a Person employed in the Public Service** contrary to **Section 129(a)** of the **Penal Code** and **Defilement** whereafter he was convicted for both Counts and sentenced to serve **one (1) year** and **Fifteen (15) years imprisonment** respectively.

2. His appeal against the decision was dismissed.

3. He now approaches this Court pursuant to the provisions of **Article 50(6)(b)** of the **Constitution** on grounds that there is new and compelling evidence that should move the Court to grant him the opportunity to address the Court as his rights were infringed pursuant to **Article 50(2)(j)** and **(k)** of the **Constitution.**

4. The application is supported by an affidavit where the Applicant/Petitioner argues that he was represented by an advocate throughout the trial but he did not benefit from thorough, exhaustive and independent evaluation of the evidence adduced per his entitlement as enshrined in **Article 35(2)** of the **Constitution.** That a significant issue, namely, that PW2 demanded one hundred thousand shillings from him was not raised, that the case was not proved beyond reasonable doubt which infringed on his rights and the defence put up was no considered.

5. The Respondent urged that the Petitioner could only benefit from the provisions of **Article 50(6)** of the **Constitution** after exhausting the Appeal he is entitled to.

6. I have duly considered submissions by both parties.

7. **Article 50(6)(b)** provides thus:

> ***"(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."***

8. In **Tom Martins Kibisu vs. Republic, SC Pet No. 3 of 2014 eKLR** it was stated that:

> ***"... We are in agreement with the Court of Appeal that 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, and which, if adduced at the trial would probably have led to a different verdict."***

9. The Appellants contention is that he was dissatisfied by the written submissions that were prepared by the counsel who prosecuted the Appeal which to his mind was an infringement of his rights. That this Court failed to appreciate that the Prosecution did not apply the cardinal principle that require Prosecution to prove each and every ingredient of the charges beyond reasonable doubt thus infringing his right to fair trial. What is disclosed by the gravamen is the fact that the Appellant is aggrieved by the decision of this Court. The question to be posed is whether, that, amounts to new and compelling evidence?

10. Conditions that have been set to enable one benefit from the constitutional provision that facilitates re-hearing of the case are clear. The Petitioner herein ought to have exhausted the course of appeal to the highest Court with jurisdiction to try the matter and secondly there must be new and compelling evidence.

11. After the High Court delivered its Judgment, as a sign of being satisfied with the decision, the Appellant did not appeal to the Court of Appeal which was seized of the jurisdiction to determine whether or not the High Court reached the correct decision in its capacity as an Appellate Court. Therefore, he did not exhaust the course of Appeal.

12. On the question whether or not there is new evidence, the question of failure of an advocate to exercise diligence in the course of his duties cannot be new evidence. Secondly, he faults the Court for having not considered what PW2 stated. That in his opinion amounted to exhortation. He urges that it was in evidence that the Investigation Officer stated thus:

> ***"Lilian had passed information to Mulatya to find out if Benedict was married and he concluded that there was no reason for exhortation, not aware of any demands for dowry, not aware that Mulatya had warned Benedict could lose his job."***

13. The argument at this stage is therefore that the angle of exhortation reported was not investigated.

14. All these facts having been captured as presented before the trial Court were considered before reasons for the decision were given. It is important to note that, this, was not one of the grounds of Appeal to the first Appellate Court. But as required the Court re-examined evidence tendered and reached its own conclusion. The alleged "new evidence" was available at the time of trial therefore nothing is new.

15. In the premises, it is not evidence that was discovered by the Petitioner after the decision of the Court. In the result, the Petition fails. Accordingly, it is dismissed.

16. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **20th** day of **November, 2019.**

L. N. MUTENDE

JUDGE