REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

MISC. APPLICATION NO. 7 OF 2017

(FORMELY MACHAKOS HC MISC. APPLN NO. 179 OF 2014)

JAMES MWANIKI KAMAU..APPLICANT

-VERSUS-

REPUBLIC...RESPONDENT

RULING

INTRODUCTION

1. The applicant (herein after 'the petitioner') filed a Chamber Summons application under Article 50 (6) of the Constitution of Kenya, 2010 praying for orders;

> *i. **That** this Honorable Court be pleased to consider and determine the applicant's petition herein whether to grant a new trial on available new and compelling evidence.*
>
> *ii. **That** this Honorable Court be pleased to consider whether the new compelling evidence contained in the attached affidavit is capable of granting a new trial under Article 50(6) of the Constitution.*

2. According to the petitioner, the main ground in support of the orders sought was that he had found new and compelling evidence *to wit*; the initial Occurrence Book (OB) extract indicates that the report made to police was in respect of an offence of stealing a motor vehicle but not robbery with violence as charged.

3. A brief background of the case is that the petitioner was originally tried and convicted for the offence of robbery with violence contrary to Section 296 (2) by the Chief Magistrate' Court in Machakos Criminal Case No. 5043 of 2004.

4. He appealed to the High Court in Machakos and subsequently to the Court of Appeal in Nairobi. In both appeals, the sentence and conviction were upheld.

5. Having exhausted his appeals, the petitioner has now come to this Court seeking a new trial.

6. When the petition came up for hearing on 30th October 2017, the applicant relied on his sworn affidavit.

7. The application was opposed by the learned prosecution Counsel, Mr. Orinda who submitted that Article 50(6) of the Constitution of Kenya has a provision which is a window allowing an applicant to petition for a retrial in deserving cases only. According to him, the petitioner cannot raise issues which he would have raised in appeal.

8. He further submitted that the OB extract was in existence at the commencement of trial and could not therefore be referred to as 'new evidence'. Further, that the OB issue was present in the trial Court and appeal process and it would not be proper for this Court to re-open the matter. He urged the Court to dismiss the application.

ANNALYSIS

9. Article **50 (6) (a) & (b)** of the Constitution provides that:-

> ***(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; and

(b) New and compelling evidence has become available.

10. The issue for consideration by this Court is whether the petitioner's application has met the threshold as provided for under A**rticle 50 (6) (a) and (b) of the Constitution of Kenya 2010** to warrant the Court order for a new trial of the applicant who has already been convicted and sentenced to suffer death.

11. In **Tom Martins Kibisu -vs- Republic, Supreme Court Petition No. 3 of 2014 (eKLR),** the learned Judges of appeal expressed themselves as follows;

(a) "Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to <u>two conditions</u>***. (emphasis mine) First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be 'new and compelling evidence'.***

(b) 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." 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 an accused person".

12. The Constitution of Kenya 2010 was promulgated on 27th August 2010 and pursuant to Article 263 thereof, the Constitution took effect on the date of promulgation. On that date too, the old constitution stood repealed, only subject to the Sixth Schedule. The question that arises for determination here is whether, in light of Articles 263 and 264 of the Constitution 2010, the Constitution operates retrospectively.

13. This question has been determined in a number of recently decided cases namely **Joseph Ihugo Mwaura –vs- Attorney General, Nairobi Petition NO. 498 of 2009(unreported), John Githinji Wang'ondu & others –vs- Coffee Board of Kenya & another, Nairobi Petition NO. 255 of 2011(unreported) and Di Plessis & others –vs- Du Klerk & another (CCT8/95 [1996] ZACC 10)** as cited with approval in **Wilson Thirimba Mwangi –vs- DPP, Nairobi JR Misc. Application NO. 271 of 2011**.

14. It was held in the above cited cases that the effect of Articles 263 and 264 is that the Constitution is not to operate retrospectively and that whatever was legal under the old constitution cannot be invalidated, save where it is otherwise expressly provided, by the new Constitution. See also **Charo Karisa Thoya –vs- Republic, Court of Appeal at Mombasa, Criminal Appeal No. 274 of 2002 (unreported).**

15. In the **Thoya case** (above) the issue was whether the appellant was entitled to legal representation from the state as provided for under Article 50(1) of the Constitution of Kenya, 2010. The Court of Appeal held that Article 50 (1) could not apply retrospectively in favour of the appellant who was charged, tried, convicted and sentenced under the old order. That the correct position is that what prevailed under the old Constitutional order remains to be determined under the said order and not under the new order brought about by the promulgation of the Constitution of Kenya, 2010 on the 27th August 2010.

<u>IS THE PETITIONER HEREIN ENTITLED TO A NEW TRIAL?</u>

16. In effect, the petitioner is seeking to enforce a fundamental right that is enshrined in Article 50 (6) which provides:-

"50 (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 the appeal; and

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

17. Thus, for a new trial to be ordered under Article 50 (6) of the Constitution, the applicant herein must prove two things: first that his appeal to the highest court has been dismissed or that he did not appeal within the stipulated time allowed for appeal and secondly, he must prove that new and compelling evidence has become available.

18. In the instant case, the applicant has urged for a new trial on the ground that the Constitution of Kenya 2010 grants him the right to do so and secondly that his appeal to the Court of Appeal was dismissed.

19. The more critical issue for this court to determine is: what constitutes "new and compelling evidence "as envisaged by Article 50 (6) (b) of the Constitution? In the **Wilson Thirimba Mwangi** case(supra) the court observed that there is no definition of the phrase **"new and compelling evidence"** in the constitution, but that **"a person who is convicted has gone through the legally established process with the necessary protections contemplated under Article 50"and that "a Petitioner" seeking a new trial moves the court without the presumption of innocence and the burden to upset a lawful decision of the trial and appellate court is squarely on the Petitioner's shoulders."**

20. There is no doubt that the applicant herein was entitled to appeal or review of his case by a higher court upon his conviction by the trial court. That right was exercised when he appealed to the High Court where his appeal was heard by a 2-Judge Bench. The appeal was dismissed. His second appeal to the Court of Appeal was also dismissed. Having gone through the appeal process to the Court of Appeal, the applicant now wants a new trial ordered as provided by Article 50 (6) of the Constitution.

21. Until the Constitution of Kenya 2010 was promulgated, the right to a new trial for a convict who had gone through the full cycle of appeals was non-existent. I agree with the Court in the Wilson Thirimba Mwangi case (above) when it said that **"Article 50 (6) seeks to balance the public interest in having finality in criminal cases on the one hand and ensuring that where there is new and compelling evidence, an innocent person should not suffer the penalty of a conviction."** That truly is the essence of the provisions of Article 50 (6) of the Constitution.

22. The question that comes up in the mind of this court at this stage is what constitutes new and compelling evidence? Under the CPR, and in particular Order 44 thereof, a party is entitled to apply for review in the event that there is **"--- discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed ---."**

23. Such a situation requiring the court to define what constitutes new and compelling evidence and the need to exercise caution arose in the case of **D.J. Lowe & Company Ltd. –vs- Banque Indosuez – Civil Applic. Nairobi NO.217 of 1998 before the Court of Appeal (unreported)** where the court gave the basis for caution by courts when considering applications for review based on discovery of fresh evidence. The Court expressed itself thus:-

> ***"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."***

24. A similar situation arose before the Court of Appeal in the case of **Rose Kaiza –vs- Angelo Mpanju Kaiza – Mombasa Court of Appeal Civil Appeal No.225 of 2008(unreported).** The court expressed the need for caution in the following words:-

> ***"Applications on this ground must be treated with great caution --***
>
> ***Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."***

25. Also see **Mzee Wanjie & 93 others –vs- A.K. Sakwa & 3 others [1982-88] 1 KAR 465**. In that case, Chesoni, Ag JA enunciated the principles to be followed by a court before which an application for review is made. The following are the principles:-

> **a) The applicant must show that the evidence could not have been obtained with reasonable diligence for use at the trial;**
>
> **b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;**
>
> **c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.**

26. The right for review as provided under Article 50 (6) of the Constitution has its historical basis under common law doctrine of error of **coram nobis**. Thus, a defendant who was dissatisfied with the result of his case was entitled to petition the appellate court for review on the ground that there were facts that were unknown to him at the time of the trial and that if these facts had been known, they would have changed the outcome of the case.

27. If the applicant persuaded the court to grant a new trial on the basis of those new facts, the judge would then determine the case afresh. Article 50 (6) of the Constitution is premised on that doctrine and represents a big paradigm shift from the old constitution which did not allow for such an opportunity to an applicant who discovered new facts after he had been tried and convicted.

28. In effect, the writ of **coram nobis** was available for curing an error of fact not apparent on the face of the record and for which the applicant could not be held accountable. As seen from the **Mzee Wanjie case** (above) the writ was not available where an applicant would eventually take advantage of the alleged error at the trial, such as where the facts complained of were known before or at the trial or where the applicant alleges that his counsel knew of the existence of the facts but failed to present the same. See generally the **Rose Kaiza case (above) and Edward N. Robinson, the Writs of Error Coram Nobisu and Coram Vobis, 2 Duke Bar Journal, 29-37 [1951] and Dobie –vs- Commonwealth of Virgina 198 Va. 762, 96 S.E. 2d 747 [1957]cited by the court in the Wilson Thirimba Mwangi case (above).**

29. What comes out from the above cited cases is that the court before which an application seeking to re-open a case is made, must exercise great caution when dealing with such an application. As seen from the provisions of the CPR, a civil court dealing with such an application will only grant the prayer if it is clear that new and important evidence which was not available to the applicant at the time of trial despite diligent efforts is now available. The bottom line is that the courts must be extremely cautious when presented with such applications.

30. For similar applications in criminal matters, the case of **Mohamed Abdulrahiman Said & another –vs- Republic, Mombasa Cr. Misc. Application NOs.66 A and 66 B of 2001(unreported),** a case cited with approval in the **Wislon Thirimba Mwangi case (above)**, is relevant the 2 Judge comprising Odero and Nzioka JJ considered the meaning of "new and compelling evidence" as envisaged by Article 50 (6) (b). The learned judges took the ordinary meaning of the word "new" from the Concise Oxford Dictionary 9th Edition and stated:

> "The word "new" is defined in the Concise Oxford Dictionary 9th Edition as; **"of recent origin", or made invented, discovered, acquired or experienced recently or now for the first time." The learned judges went on to say, "In our understanding therefore, "new" evidence must mean evidence that is recent in origin, has been recently discovered and was not known or available at the time of trial or at the time of hearing of the first two appeals." As regards the meaning of compelling evidence, the learned judges stated: "Once again we will turn to the Concise Oxford Dictionary 9th Edition where the ordinary English meaning of the term compelling is given as "rousing strong interest, attention, conviction or admiration." Thus the evidence must be very strong and convincing evidence – evidence which may possibly persuade a court of law to reach an entirely different decision.**

31. In **BLACKS LAW DICTIONARY Eighth Edition**, the word "new" as relates to the context of the application before me is defined as adj. (of a person, animal or thing) recently come into being; 2. (of anything) recently discovered" while the word "compelling" which is derived from the verb to compel" means "to come or bring about by force, threats or overwhelming pressure." In other words new and compelling evidence is evidence that is being seen for the very first time and it must be overwhelming evidence.

32. The above are the principles to be applied to this application. It is also the law in this case that the burden of satisfying the conditions of Article 50 (6) of the Constitution lies squarely on the shoulders of the applicant herein. The applicant must therefore show this court that:-

33. There is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at the trial or that the evidence was not available at the time of the hearing of the two appeals.

34. The evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching. Such evidence must not only be favourable to the applicant but it 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.

35. In the instant case, the petitioner has alleged in para 5 in support of the petition that he learnt the report of the incident made to police was in respect of an offence of stealing a motor vehicle but not robbery with violence as charged. The petitioner is among many other convicted persons who have come to court seeking new trials on grounds that their fundamental rights under the constitution were violated.

36. It was held in **Chikolingo –vs- Attorney General of Trindad and Tobago [1981] 1 All CR 244,** a case that was cited with approval in the **Wilson Thirimba Mwangi** case (above) that;

> ***"In the first place, no human right or fundamental freedom --- is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in persons serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to, then none can say there was an error-"***

37. Recently, the above reasoning was adopted by the Court of Appeal in the case of **Methodist Church in Kenya Trustees Registered & another –vs- Rev. Jeremiah Muku & another, Court of Appeal Civil appeal No.233 of 2008 (unreported)**. The Court of Appeal said:-

> ***"As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review."***

38. In the instant case, the applicant appealed against both conviction and sentence, not just once but twice and in both instances, his appeals were dismissed. As stated by the court in the **Wilson Thirimba Mwangi** case (above) this application;

> ***"cannot be used as an alternative forum to lodge collateral attacks against decisions of the appellate courts nor can it be used as a general substitute for the normal procedures in the court system which are clearly provided for under Article 50 of the Constitution."***

39. It is now well settled that a Petition (or application as in this case) under Article 50 (6) is not a retrial or an appeal, and that the court to which such a petition or application is made has ***"no jurisdiction to consider and determine matters which have already been decided upon by the Court of Appeal.***"

40. The only duty that this court has to fulfill is to see whether there is any new and compelling evidence to warrant an order for retrial. The applicant's desire in this case is that the case be heard afresh so that all the evidence is placed before the court, including the relevant OB.

41. A perusal of the record reveals that the petitioner was originally tried and convicted in **Machakos CM'S Criminal case No. 5043 of 2014**. He appealed to the **High Court in Machakos Criminal Appeal No. 67 of 2006**. The appeal was dismissed. He further appealed to the **Court of Appeal in Nairobi Criminal Appeal No. 407 of 2017**. The appeal was also dismissed. From the aforegoing, it is clear that the petitioner has appealed to the highest Court to which a person is entitled to appeal hence satisfying the first limb of Article 50 (6).

42. The second limb requires the petitioner to demonstrate that new and compelling evidence has become available. From the outset, it is important to point out that our laws do not apply retrospectively. Therefore, Article 50(6) cannot apply to criminal proceedings which took place before 27th August 2010-when the current Constitution was promulgated. The applicant was convicted on 31st May 2006.

43. Be that as it may, the petitioner contends that the OB extract No. 8/15/11/2004 from Mtito Andei police station constitutes new and compelling evidence. Further, in his affidavit in support of the petition, he depones that the said OB extract was not within his knowledge during trial or at any stage during appeal.

44. This is interesting because page 43 of the lower Court proceedings reveals that on 17th March 2006, the petitioner requested to be supplied with the aforementioned OB extract and the Court ordered as much. This issue was never revisited, probably because the OB extract was furnished. This clearly shows that the existence of the OB extract was within the applicant's knowledge.

45. Does the OB extract contain compelling evidence? According to the petitioner, the report made to the police as per the OB extract was about theft of a motor vehicle yet he was charged with the offence of robbery with violence. In my view, the Court should take judicial notice of the fact that after a report is made to the police; they usually follow it up with investigations which ultimately inform the charges to be preferred against a suspect.

CONCLUSION

46. In light of all the above, I find and hold that the petitioner herein has not met the conditions of Article 50 (6) of the Constitution to warrant the grant of the orders sought vide his instant petition. The same is accordingly dismissed with no order as to costs.

SIGNED, DATED AND DELIVERED THIS 10TH DAY OF APRIL, 2018.

C. KARIUKI

JUDGE

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