



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**PETITION NO. 1 OF 2016**

**RICHARD CHEMJOR NGEIYWA .....PETITIONER**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

1. The Applicant was charged with the offence of **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars were that **on 17<sup>th</sup> day of March 1997 at ADC Farm Chorlim being armed with dangerous or offensive weapons namely AK 47 assault rifle robbed Stanley Kariuki Karanja cash Kshs 220,000/- and at or immediately before or after such robbery shot dead John Muturi Karanja.**

2. He was convicted and sentenced by the lower court. His appeal to the High Court was dismissed on 29/5/2001 by Hon. Justice R. Nambuye and Alnasir Visram. (As they were)

3. His appeal to the court of Appeal was dismissed on 1/10/2004 by Hon Justices of Appeal Omolo, Okubasu and Githinji.

4. He has then filed this motion taking advantage of the promulgation of the new Constitution and specifically the provisions of Article 50 thereof. He has argued in his amended petition that there is a new and compelling evidence namely the details contained in the Occurrence Book (O.B) of 17<sup>th</sup> March 1997 at Endeless police station.

5. He argued that the identification parade was Improper as the complainant had given the description of the applicant at the time of reporting.

6. When this matter came up for hearing the court granted the applicant leave and order to have the two police stations namely Kitale and Endeless to produce and give the applicant the O.B. of 17<sup>th</sup> March 1997. The said order dated 9/3/2017 is on record. Unfortunately the said O.B. was not produced and save for the supporting affidavit of the petitioner sworn on 15/9/2017 which attempts to give details of what is supposedly contained in the said O.B.

7. The application essentially inches on that specific O.B. which I supposed dealt with identification. I have had the privilege of reading both the High Court and Court of Appeal decisions and in my view the issues raised by the applicant were clearly dealt with.

8. The High Court in its decision stated at page 11 that;

***“ We agree with the learned trial magistrate's findings that the outlined circumstances were conducive which was testified on identification parade and found to be intact and flawless. We are satisfied that the appellant was positively identified to be among the two people who robbed PW1 and his brother.”***

9. On its part the Court of Appeal concluded that;

***“We are satisfied that there was overwhelming evidence to support the decisions of the two courts below and that there are no grounds on which this court can lawfully interfere with those findings.”***

10. In my view therefore, even if the petitioner was to get the alleged O.B. it may not be of much probative value as the two decisions as well as that of the trial court seemed to have captured the same.

11. Article 50(6) of the Constitution states that;

***“(6) A person who is convicted of a criminal offence may petition the high court for a new retrial if***

**a) The persons 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.**

**b) And new and compelling evidence has been available.”**

12. The Petitioner/Applicant will not benefit from the above portion of the Constitution for the twin reasons that he did not produce to this court the impugned Occurrence Book and that even then the three decisions had squarely dealt with the matter .

13. In any case the appellant appealed to the highest court at that time, namely the Court of Appeal.

14. At any rate the people he has mentioned in his written submissions including Tom Kesolio Simwa and others were people whom he knew and there was no reason why he did not take advantage afforded to him in the entire litigation exercise.

15. The petition is hereby dismissed.

**Delivered, signed and dated at Kitale this 10<sup>th</sup> day of May 2018.**

**H.K. CHEMITEI**

**JUDGE**

**10/5/18**

**In the presence of:**

**M/S Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**