



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CR. APPLICATION NO. 17 OF 2014

IN THE MATTER OF: SECTIONS 22(1), 23(1) (3)(D) AND 50(6)(A)(B) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE PETITION OF ROBERT MBURUGU GITUMA

BETWEEN

ROBERT MBURUGU GITUMA.....PETITIONER

VERSUS

REPUBLIC OF KENYARESPONDENT

J U D G M E N T

1. **ROBERT MBURUGU GITUMA (hereinafter “the petitioner”)**, was on 1st February, 2001 arraigned before Chief Magistrates court Meru with the offence of robbery with violence contrary to **section 296 (2) of the Penal Code** the particulars being that on 25th October, 2000 at Kiige village near Nkubu Township in Meru Central District within Eastern Province, jointly with others not before court and while armed with dangerous weapons namely, pistol and rungun, the petitioner robbed **SAMUEL CHOKERA** Kshs. 65, 585/- and used personal violence against him.

2. After trial, the petitioner was convicted as charged and sentenced to death. His appeal to both the High Court (**Juma and Mulwa JJ**) and the Court of Appeal (**Tunoi, O’Kubasu and Githinji JJA**) were dismissed on 11th July, 2002 and 19th May, 2006, respectively.

3. By his Amended Petition dated 2nd October, 2017, the petitioner contended, inter alia, that the death sentence meted out to him was arbitrary and excessive; that it undermined his right to fair trial under **Article 50(2) of the Constitution**; that **Article 26(1)(3) of the Constitution** was breached; that the petitioner had discovered new and compelling evidence which was not available to him during the trial. He set out these new and compelling evidence in **paragraph 7** of the petition. He therefore prayed that there be declarations inter alia that his constitutional rights had been violated and that a retrial be ordered.

4. At the hearing of the petition, counsels addressed the court orally. Mr. Thangicia, Learned Counsel for the petitioner submitted that; the procedure leading to the conviction and sentencing of the petitioner was flawed which led to a miscarriage of justice; that the mode of identification of the petitioner was flawed; that the identification parade was flawed in that the requirements of the law as to the membership of the parade was not adhered to.

5. Counsel further submitted that the Complainant had since informed the petitioner while in prison that it was the police who led him to identify the petitioner; that there was no ballistic evidence to corroborate the oral evidence and that both the conviction and sentencing of the petitioner was marred with irregularities. Counsel cited the case of **Obedi Kilonzo Kivevo v. Republic (2015) eKLR** for the proposition that, where there is a fundamental mistake in the proceedings, the court ought to order a retrial.

6. On his part, Mr. Kiarie, Learned Counsel for the State opposed the petition. He submitted that applications under **Article 50(6) of the Constitution** are only allowed where one has already exhausted the appellate jurisdiction up to the Supreme Court which was not the case here. That was no compelling reason that had been advanced to warrant the court revisiting the trial of the petitioner;

7. Counsel further submitted that the issue of identification had been properly dealt with the Court of Appeal and cannot be raised now; that it was the petitioner who led the police to the recovery of one pistol. That the petitioner was represented by an advocate both before the High Court and Court of Appeal. Counsel cited the case of **Peter Manson Okeyo v. Republic (2014) eKLR** in support of the submission that there has to be new and compelling evidence for an application under **Article 50(6) of the Constitution** to be entertained.

8. I have considered the petition and the record. The issues that arise from the petition and submissions are:-

a. Whether the petitioner could make the present petition having not exhausted the appellate system up to the Supreme Court, and

b. Whether the petitioner has met the threshold for ordering a new trial under Article 50(6) of the Constitution.

9. It was Mr. Kiarie's submission that *Article 50(6) of the Constitution* presupposes a scenario where an applicant has exhausted all the available appellate channels including the Supreme Court. *Article 50(6) of the Constitution* provides: -

“(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 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”.

10. The petitioner's appeal was heard and dismissed by the Court of Appeal on 19th May, 2006. The Court of Appeal was the then highest court in the land. Can it then be that the petitioner should have appealed to the Supreme Court before invoking the provisions of *Article 50(6) of the Constitution*?

11. In Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Civ. Appl. No. 2 of 2012 when considering appeals that had been determined prior to 2010, the Supteme Court held:-

“Can the Supreme Court entertain appeals from cases that had already been finalized by the Court of Appeal before this Court came into existence? Does the appellate jurisdiction of the Court stretch back to the time prior to the promulgation of the Constitution.

.....

Decisions of the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the judgments of that court. If this Court were to allow appeals from cases that had been finalized by the Court of Appeal before the commencement of the Constitution of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens ...”.

12. From the forgoing, it is quite clear that the petitioner having exhausted the then existing appellate chain need not have preferred an appeal to the Supreme Court before approaching this Court with the present petition.

13. The second issue is whether the petitioner has met the threshold for ordering a new trial under Article 50(6) of the Constitution. The fulcrum in *Article 50(6)* is that there has become available ‘*new and compelling evidence*’ which was not available at the time of trial.

14. In his submissions, Mr. Thangicia for the petition attempted to show how flawed the trial of the petitioner had been. Indeed, he faulted the entire process of identification of the petitioner and how the courts had dealt with the issue.

15. ‘New’ has been defined by Blacks Law Dictionary, 8th Edn as ‘*recently discovered, recently come into being*’. Whilst ‘*compelling*’ has been defined in the Concise Oxford English Dictionary 9th Edn as ‘*powerfully evoking attention or admiration*’. What this Court has to decide therefore is whether there is anything recently discovered that evokes attention in relation to the petitioner's case.

16. The issue of flawed identification process was addressed by both the High Court and the Court of Appeal in their judgments. In this regard, that cannot be said to be new and compelling. Likewise the issue of lack of corroboration. Those are issues that existed at the time of the trial and cannot be raised as a basis of a petition under *Article 50(6) of the Constitution*.

17. The other issue that was raised in the petition was that the Complainant had confessed to the petitioner in prison that it is the police who had advised him to pick the petitioner in the identification parade. This issue was not pursued. In any event, such a sweeping statement cannot be a basis of ordering a retrial. There should at least have been a statement on oath by the Complainant to that effect on which he could be cross-examined. That issue therefore was a non-starter.

18. In view of the foregoing, I find the petition to be without merit and the same is hereby dismissed.

19. Before concluding this matter, I note that the petitioner was sentenced to death. At that time, that was the mandatory sentence for the offence of robbery with violence. By the Supreme Court's pronouncement in the case of Francis Karioko Muruatetu & Another v. Republic (2017) eKLR, I direct that the Court be addressed on the issue of sentencing only.

DATED and **DELIVERED** at Meru this 5th day of July, 2018.

A. MABEYA

JUDGE