



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL PETITION NO.3 OF 2016

DANIEL KINYUA GITONGA.....PETITIONER

VERSUS

THE REPUBLICRESPONDENT

J U D G M E N T

1. The petitioner in his petition dated 02/08/2016 seeks for orders that the petitioner's trials and convictions in Siakago SRM Cr. Case No. 782 of 2008, Embu HC Cr. Case No. 162 of 2009 and court of Appeal Nyeri Cr. Appeal No. 109 and 116 of 2012 be reviewed in light of new and compelling evidence namely Kiritiri police station OB No. 24. 8/8/2008.
2. It also seeks for an order of retrial before a court of competent jurisdiction.
3. In the supporting affidavit sworn by Morris Njage the advocate for the petitioner, it is stated that the petitioner was charged and convicted with two others by Senior Resident Magistrate Siakago of the offence of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to death.
4. He lodged an appeal in Embu High Court which was heard and dismissed by a two-judge bench.
5. A second appeal was lodged at the Court of Appeal sitting at Nyeri which dismissed the said appeal.
6. During the trial at Siakago Court, the appellant applied to be supplied with the investigation diary or the occurrence book (OB) report which request was not honoured. The trial proceeded to conclusion without the said document being availed. The High Court and the Court of Appeal did not have the benefit of seeing the document at the time of hearing the appeals.
7. It is argued that the conviction of the petitioner was based on recognition evidence adduced by PW1, PW3 and PW5 but was not supported by the OB report from Kiritiri police Station. The said OB report has now become available and ought to be admitted as new and compelling evidence under Article 50(6)(b) of the Constitution.
8. Bearing in mind that PW1, PW3 and PW5 did not give the name of the petitioner in the report, the new evidence that has been available is powerful and ought to be relied on to quash the convictions, set aside the order upholding the conviction order a retrial of the case.
9. The petitioner states that he is now a convict under a sentence of death having exhausted all the levels of appeal provided for by the law.
10. In the petition, it is argued that the petitioner was not to blame for the failure to avail the OB report.
11. The petition was vehemently opposed by the respondent relying on the replying affidavit of Brenda Nandwa a prosecution counsel seized of this petition.
12. It is deposed that the O.B No. 24 of 08/08/2008 does not disclose any new or compelling evidence as envisaged under article 50(6) and that orders for retrial cannot issue. The petitioner, the respondent states failed to utilize his option under Section 358 of the Criminal Procedure Code for admission of additional evidence. It is the respondent's case that the evidence of the three identifying witnesses PW1, PW3 and PW5 was sufficient to convict the petitioner as the conviction was upheld in the High Court and in the Court of Appeal.
13. The respondent deposes that the petitioner was failed to demonstrate any new ground or good reason to justify retrial. If this court would grant the orders for retrial, the respondent is convinced that such orders would not serve the interests of justice in that the witnesses may not be available to testify given the passage of time.
14. Both parties field submissions in this petition which have been taken into consideration in this judgment.

15. The issue for determination is the OB report No.24 of 08/08/2008 amounts to new and compelling evidence under Article 50(6) of the Constitution

16. The relevant law is Article 50(6) of the Constitution which 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, 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.

17. The burden of proof of the existence of new and compelling evidence lies on the petitioner as it was held in the case of **RODGERS ONDIEKI NYAKUNDI AND 2 OTHER VS REPUBLIC Kisii Criminal Appeal No. 135 of 2006**. It was held in that case in regard to an application under Article 50(6) that: -

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

b. That the evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching;

c.. Such evidence must not only be favourable to the applicant but it must be such evidence as is likely to persuade the court to reach an entirely different decision from the decision already reached by the two appellate courts.

18. It is important to look at the plain meaning of the words "new" and "compelling" in order to understand the meaning.

19. According to the Concise Oxford English Dictionary 12th Edition, the words are defined as follows: -

"new" means made, introduced or discovered recently or for the first time, not existing before.

"compelling" means forcing or oblige to do something, bring about by force or pressure or powerfully evoking attention or admiration.

20. The Supreme Court in the case of **LIEUTENANT MARTIN KIBISU VS. REPUBLIC Petition No. 3 of 2014** defined new and compelling evidence as: -

Evidence which was not available during the trial after exercise of due diligence. It must also be shown that evidence is sufficiently weighty and also that if it was available to the appellate courts, the conviction would have probably not have been sustained.

21. The observation of the supreme court is backed by the definition of the two words "new" and "compelling" is indeed quite comprehensive. The evidence must be new and powerful evoking attention. The applicant must show that either the evidence did not exist at the material time (during trial) or it would not have been obtained using due diligence.

22. The OB report in my view though not availed in court was available and would have been obtained with due diligence. The question is whether due diligence was exercised in the circumstances. The petitioner who was the 2nd accused in Siakago Criminal Case No.782 of 2008 applied for investigation diary and the charge sheet on 02/09/2008 which was the next court sitting after taking of the plea. The court gave the necessary order that the documents be supplied at his cost. Perusal of the proceedings shows that there was no reminder to the court on compliance or any other application.

23. From those facts I am not convinced that due diligence was used by the petitioner to obtain the OB report.

24. During the first appeal, the petitioner still had the option of applying for additional evidence under section 358 of the criminal procedure code. This option was not utilized by the petitioner.

35. The court must determine whether the evidence in issue herein if available at the time of the trial would have changed the outcome of the case.

26. The petitioner argues that the OB report did not contain the names of the suspects which means that the evidence of the key witnesses PW1, PW3 and PW5 was not backed by the said report.

27. These witnesses were the complainant and his two daughters who were travelling together by public means after closing their supermarket at Kiritiri. After alighting from the vehicle, they were attacked and robbed by (5) men some of whom were passengers in the same vehicle. The petitioner was arrested by members of public as he ran away from the scene.

28. The trial court and the appellate courts evaluated the evidence of recognition and found that the petitioner and two others had been positively identified. The investigating officer PW7 said it was the petitioner and another who assisted in arresting the other suspects from

whom some recoveries were made.

29. The petitioner apart from stating that the O.B report did not have the names of the suspects did not allege any disparity of the report and the evidence of the key witnesses.

30. It was held in the case of **KIBISU** (supra) that the new evidence must be of high probative value as to be capable of affecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against the petitioner.

31. It is my considered view that the petitioner has not discharged the burden of demonstrating that the OB report is new and compelling evidence that would have been material to the trial.

32. Even assuming that the court found the OB report to be new and compelling evidence, would it be in the interests of justice to order a retrial?The petitioner was convicted on 18/18/2009

33. It was held in the Court of Appeal case of **OPICHO VS. REPUBLIC [2009] KIR 369** that: -

In general, a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered conviction was set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill in gaps in the evidence.Each case must depend on its own circumstances and an order for retrial should be made where it serves the interests of justice.

34. In this petition, the trial was not illegal or defective and neither is there new and compelling evidence that has been discovered.

35. The age of the case is so advanced that availability of witnesses would be a nightmare on the part of the prosecution. The interests of justice will not be served by ordering a retrial.

36. Article 50 (6) is a product of the Constitution enacted in 2010 and came into force on 27/08/2010 This case is a case of 2008 where the trial was concluded in August 2009 The law applicable then was the repealed constitution which did not contain such a remedy for a retrial based on new and compelling evidence.

37. Article50(6) of the constitution is not applicable in this case and it is my considered opinion that the petitioner is not entitled to a remedy under this article. On this ground alone the petition must fail.

38. It is my finding that this petition has no merit and it is hereby dismissed with no order as to costs.

39. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Njage for Petitioner

Ms. Mati for State