REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CONST. CRIMINAL PETITION. NO. 32 OF 2016

KENNEDY OTIENO DALMAS….....PETITIONER

-versus-

REPUBLIC.....RESPONDENT

-consolidated with-

CONST. CRIMINAL PETITION NO. 33 OF 2016

DAN OLUOCH OTIENO.....PETITIONER

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioners herein, **Kennedy Otieno Dalmas** and **Dan Oluoch Otieno**, were jointly charged, tried and convicted of the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code Cap. 63** of the Laws of Kenya. They were subsequently sentenced to suffer death. That was in **Migori Senior Principal Magistrate's Court Criminal Case No. 670 of 2009** (hereinafter referred to as **'the criminal case'**).

2. The Petitioners then lodged an appeal before the High Court at Kisii. It was Criminal Appeal No. 208 of 2010. The appeal was heard and dismissed by **Makhandia & Sitati, JJ.** on 30/09/2011. The Petitioners then preferred a second appeal to the Court of Appeal at Kisumu in Criminal Appeal No. 298 of 2010. The appeal was also dismissed by a judgment rendered on 27/09/2013.

3. The Petitioners then opted to separately exercise their rights under **Article 50(6)** of the **Constitution** in seeking for a retrial of the criminal case in the current twin Petitions which were consolidated for hearing.

4. The Petitions were heard by way of oral evidence where the Petitioners testified on 25/06/2018. At the hearing of the Petitions the Petitioners appeared in person while **Miss Atieno** Learned Prosecution Counsel appeared for the State. The Petitioners challenged the way the criminal case was investigated and contended that the charge sheet did not contain the respective OB Nos. and the respective dates of their arrest. They also contended how they were arrested. The State did not call any evidence. At the close of the cases the parties left the matter to the decision of this Court.

5. The Petitions are based on **Article 50(6)** of the Constitution. The said provision of the Constitution

states as follows: -

> ***"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 appeal; and***
>
> ***(b) new and compelling evidence has become available."***

6. For the Petitioners to benefit from the above provisions, they must positively demonstrate the following two principles namely that: -

> **(a)** The Petitioners appeal was dismissed by the highest court to which the Applicant was entitled to appeal to or that the Applicant did not appeal within the time allowed for such an appeal; **and**
>
> **(b)** The Petitioners have new and compelling evidence relating to the criminal case.

7. Applying the said principles to this case, the Petitioners appealed to the Court of Appeal, but his appeal was disallowed. By then the Court of Appeal was the highest court in the land. That being so, the Petitions are competently before this Court.

8. Having so found, the Petitioners must demonstrate that indeed new and compelling evidence has become available and which evidence ought to be considered by the trial court.

9. What is new and compelling evidence was considered by the highest Court of this land in the case of **Col. Tom Martins Kibisu vs. Republic Sp. Ct. Petition No. 3 of 2014 (2014) eKLR** when the Supreme Court presented itself thus: -

> ***"[42] We are in agreement with the Court of Appeal that under Article 50(6), "new and compelling evidence" means "*** *evidence which was not available at the 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, a 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 the accused person."*** (emphasis added).

10. The Petitioners are therefore required to demonstrate that the evidence intended to be adduced ***was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial*** and that the said evidence ***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.***

11. It however must be remembered that ***"new and compelling evidence"*** does not involve the rehearing of the appeal. I have carefully perused the proceedings before the trial court in the criminal case and the decisions before the twin appellate Courts and found that all the grounds put forth in the twin Petitions were fully canvassed before the two Superior Courts. I hence find that there is no new evidence which is intended to be adduced at the retrial. The Petition are unsuccessful and are for rejection.

12. As Constitutional Court, this Court is called upon to ensure that the **Constitution** is upheld by all and everyone without an exception. All the Petitioners did not raise the issue of the constitutionality of the mandatory nature of the death sentence since at the filing of the Petitions the Supreme Court had not decided on the matter. Given that the Petitioners stand to benefit from the Supreme Court decision in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR** where the Court, rightly so, found and held that the mandatory nature of the death sentence in capital offences is unconstitutional since

mitigation is an important congruent element of fair trial, I will order that the criminal case be remitted to Migori Magistrate's Court, being the trial and sentencing court, for purposes of sentence re-hearing. I have no doubt that such remain the only reasonable way forward as the sentencing court will receive appropriate submissions from the prosecution and the defence prior to the sentencing.

13. One thing which I must clarify is that although the decision in **Francis Karioko Muruatetu** (supra) was on a murder case, the position changes not in the case of robbery with violence cases since **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides the only sentence on conviction to be a death sentence.

14. The upshot is that the Petitions for retrial are hereby dismissed, but the death sentence in the Criminal Case imposed on the Petitioners is hereby set-aside. The Criminal Case is hereby remitted to the Chief Magistrate's Court at Migori for hearing on sentence only and on a priority basis.

It is so ordered.

DELIVERED, DATED and **SIGNED at MIGORI this 4th day of October, 2018.**

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Kennedy Otieno Dalmas and **Dan Oluoch Otieno,** the Petitioners**.**

Joseph Kimanthi, Learned Prosecution Counsel instructed by the Office of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant