



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 10 OF 2018

DAVID MUGO KIMUNGE.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. The applicant brings this application undated but filed on 23/03/2018 under Article 50(6) of the Constitution seeking for the following orders: -

*That the Court makes a declaration that the decision of high court in **JOSEPH KABERIA & OTHERS VS REPUBLIC** **Petition No. 610 of 2010** and the decision of Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER VS REPUBLIC** **Petition No. 15 & 16 of 2015** are now new and compelling evidence within the meaning of Article 50(6) of the Constitution.*

2. The petitioner did not swear an affidavit in support of the application but attached decisions which he relies on: -

a) JOSEPH KABERIA & OTHERS VS REPUBLIC **Petition No. 610 of 2010**

b) FRANCIS KARIOKO MURUATETU & ANOTHER VS REPUBLIC **Petition No. 15 of 2015** **Supreme Court of Kenya**

3. In his submissions, the applicant urged the court to rely on the two decisions he relies on make an order in his favour under Article 50(6). The gist of his argument was that the two decisions should be taken as new and compelling evidence with high probative value that should affect the charge, conviction and sentence passed against the accused.

4. It is further argued that after the **Kaberia** case, any charges against an accused person for any offence under Section 296(2) of the Penal Code should not be held to be valid. He argued further that from the **Muruatetu** decision, he should not have been serving death sentence.

5. The respondent opposed the application on grounds that the orders for retrial will not serve the interests of justice because the witnesses will not be found in a case where the trial took place in 2012.

6. However, the respondent says she agrees with the principles in the decisions of **Francis K. Muruatetu petition** (supra) and has no objection to the applicant being sent to the trial court to be heard on re-sentencing.

7. In rejoinder, the applicant changed his argument in the application and stated that he did not want retrial as he had indicated earlier. He would be happy to be sent to the trial court for sentencing.

8. **Article 50(6)** gives a person who has been convicted of a criminal offence and whose appeal has been dismissed by the highest court, a right to apply for a retrial in the High Court where new and compelling evidence may become available.

9. The application before me is brought under Article 50(6) and therefore seeks for retrial. The decisions in the **Francis K. Muruatetu** and that of **Kaberia** are Court pronouncements and cannot be referred to as new and compelling evidence under Article 50(6).

10. The applicant also relied on the High Court Meru case of **DOUGLAS MUTHAURA NTORIBI Misc. Criminal Application No. 4 of 2015** where the court set aside the death sentence and imposed an imprisonment sentence of fifteen (15) years.

11. This leads me to the conclusion that the applicant was a bit mixed up on the principles set out in the **Francis Muruatetu** case and the **Kaberia** case one hand and the provisions of Article 50(6).

12. In **Muratetu** case, the supreme Court declared unconstitutional the mandatory nature of death sentence under Section 204 of the Penal Code which is also applicable to Section 296(2) of the Penal Code.

13. In the **Douglas Muthaura** case, the judge applied the principles in the **Muruatetu** case.

14. Article 50(6) deals with the right to apply for a retrial where new and compelling evidence has become available.

15. I find that no new and compelling evidence has been availed by the applicant herein and his application under Article 50(6) must fail.

16. I order that the same stands disallowed.

17. However, the applicant having stated in open court that he wants to be re-heard on sentence, I have no good reason to decline to grant his prayer.

18. Since I do not have the benefit of the full proceedings of the lower court in Embu CM Criminal Case No. 1890 of 2010. I hereby order that the applicant be and is hereby referred to the Chief Magistrate for hearing on re-sentencing.

DATED, DELIVERED AND SIGNED AT EMBU THIS 14TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mate for Respondent

Applicant