



IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM: CHERERE -J)

CRIMINAL PETITION NUMBER 2 OF 2016

BETWEEN

GEOFFREY JUMA MUKABA.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. **GEOFFREY JUMA MUKABA**, (hereinafter referred to as the petitioner) was convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the Penal Code in **Bungoma Criminal Case No. 1564 of 2009**. He lodged an appeal in the High Court; being **Bungoma High Court Criminal Appeal No. 121 of 2010** and the conviction and sentence were upheld. He subsequently appealed to the Court of Appeal in **Eldoret Criminal Appeal No.204 of 2011**. The Court of Appeal similarly upheld his conviction.

The Petitioner's Case

2. The petitioner's case is contained in the Petition filed on 19th August, 2016 supported by his affidavit sworn on the 10th August, 2016.
3. When the petition came up for hearing on 8th November, 2018, the petitioner submitted that he was wholly relying on his submission filed on 7th November, 2018.
4. From the submissions, I have deduced the following issues which the petitioner alleges are new.

1. **Time spent in custody**
2. **Period taken before his arrest**
3. **Identification by a single witness**
4. **Contradictory evidence**
5. **Identification**

The Respondent's Case

9. Mr. Oimbo learned counsel for the state opposed the petition on the ground that it did not raise any new evidence worthy of consideration.

Determination

10. The first issue for determination is whether the Petition has met the threshold for reconsideration of the trial under Article 50 (6) of the Constitution.

11. **Article 50** of the **Constitution** provides that:

(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.

12. The issue of the circumstances in which the provisions of Article 50(6) will apply has been considered in several decisions. The Supreme Court approved the Court of Appeal definition of new and compelling evidence in the case of ***Tom Martins Kibisu vs Republic [2014] eKLR*** as:–

“Evidence that was not available at the time of the trial or could not have been available upon exercise of due diligence, and evidence sufficiently weighty that if it was available to the trial or the appellate court, the conviction would probably not have been sustained.”

13. As stated herein above, petitioner has appealed against his sentence to the High Court and the Court of Appeal. In the circumstances, therefore, I am satisfied that the petitioner has met the first criteria set in Article 50(6) as he has exhausted the appeal mechanism open to him.

14. The second issue for determination is whether there is New and Compelling Evidence to Warrant a New Trial. The operative words in the Constitution are **“new and compelling evidence”**. The Black’s **Law Dictionary, 8th Edition**, defines **“new”** as: **“recently discovered, recently come into being.”** **Taxmann’s Law Dictionary** states that the word **“new”** must be construed as meaning **“not existing before, newly made, or brought into existence for the first time.”** The **Concise Oxford English Dictionary 9th Edition** defines **compelling** as **“powerfully evoking attention or admiration.”**

15. In my considered view, **new and compelling evidence** implies that the evidence said to be new and compelling must have been recently discovered or has just come into being and is evidence that will evoke attention and rouse a great deal of interest.

16. Records from the 3 courts that tried the petitioner clearly show that the issues raised in this petition were addressed. This court therefore declines to render an opinion on these issues because to do so would amount to sitting on appeal in the Court of Appeal decision.

17. In light of my findings on the issues set out above, I find that the petition has no merit it is hereby dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 9th DAY OF November 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Ribba & Diannah

Petitioner -

For the Respondent-