



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 25 OF 2016

**In the matter of contravention of fundamental rights & freedoms
under article 22 (1) of the Constitution of Kenya 2010**

AND

**In the matter of Articles 165 & 48, 50 (1), (2), (a), (c), (o), 6 (a) & (b),
51 (1), 159 (1),(2) (a), (c) and (d), 35 (a) (b), 25 (c) (d) 47 (1),
27 (1), (2) and 258 (1) of the Constitution,**

AND

**In the matter of sections 362, 211, 214, 213, 310, 87 (a), 306 of the Criminal
Procedure Code[1] & section 38 & 163 (1) & (c) of the Evidence Act[2]**

AND

In the matter of criminal case numbers 476 of 2004 & 2088 of 204,

BETWEEN

SIMON KARANJA WAINAINA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

On 25th February 2004 **Simon Karanja Wainaina** (herein after referred to at the petitioner) was arraigned before the Chief Magistrates Court in criminal case number **476** of 2004 charged with the offence of Robbery with violence contrary to Section **296 (2)** of the Penal Code.[3] He claims that he was acquitted of the said offence on 11th August 2004 only to be re-arrested and charged with the same offence again on 1st August 2004 in criminal case number 2008 of 2004. He stood trial and was convicted of the said offence and sentenced to suffer death in respect of counts one and two and a further sentence of 10 years

for count three and 10 years for count four.

His appeal to the High court against the said verdict was dismissed[4] and his further appeal to the Court of Appeal[5] was also dismissed in a judgement dated 19th November 2010 in which the court of appeal stated that it found no merit in the petitioners case.

Having exhausted his rights of appeal as aforesaid, the petitioner has now moved to this court citing the provisions of Articles **22 (1), 165, 48, 50 (1), (2) (a), (c) & (d), 35 (a), (b), 25 (c), (d), 47 (1), 27 (10), (2) & 258 (1)** of the Constitution of Kenya, 2010. The petitioner also invokes the provisions of sections **362, 211, 214, 213, 310, 87 (a), 138 & 306** of the Criminal Procedure Code[6] and sections **38 & 163 (1) & (c)** of the Evidence Act.[7]

The petitioners case is that he was acquitted of the said charges in case number **476** of 2004 only to be re-arrested and charged with the same offence in case **2088** of 2004, and that the trial was totally unfair in that the prosecution withdrew some counts and the case proceeded on the remaining counts which he claims contravened provisions of the criminal procedure code and his rights to a fair trial. The petitioner also claims written submissions were admitted contrary to the law and that the conviction was based on a defective charge sheet. In a nutshell, the petitioner claims that he was not accorded a fair trial, hence the reliefs sought in the petition and urged this court to order a retrial.

The petition is opposed. There is on record a replying affidavit sworn by Njoki Kihara, a prosecution Counsel in the office of the DPP dated 6th September 2016 in which she avers *inter alia* that the petition is incompetent, bad in law, misconceived, frivolous, vexatious and improperly before the court. She further avers that criminal case number **476** of 2004 was withdrawn on 11th August 2004 under section 87 (a) of the Criminal Procedure Code[8] and that the petitioner was subsequently charged with the same offence since the said section is not a bar to subsequent prosecution on the same facts. She stated that the court record in respect of criminal case number **476** of 2004 was disposed under The Records Disposal Act.[9] Subsequently, the petitioner was charged in criminal case number **2088** of 2004 with the same offence based on the same facts. It is the Respondents case that the petitioner was afforded a fair trial as per the constitution and that article 50 (6) of the constitution contemplates a situation whereby there is new and compelling evidence which is lacking in the present case.

The Constitution of Kenya 2010 is highly valued for its articulation. Some such astute drafting includes but not limited to Articles **165 (3) (d) (i) & (ii)** which provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is in consistent with, or in contravention of the constitution. Also relevant is article **50 (6) (a) & (b)** of the Constitution postulates 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; and

(b) new and compelling evidence has become available.

The objective of the criminal justice process is that after a fair trial there should be a true verdict. So far as humanly possible, there should be no wrongful convictions, and where they occur, or if new evidence emerges which undermines the safety of a conviction, they will be quashed and re-trials may be ordered. [10] The foregoing position is articulated in Article **50 (6)** which lays down the following conditions, **(a)** the petitioner must have exhausted the laid down appeal mechanism open to him **or** the person did not appeal within the time allowed; and **(b)** there must be new and compelling evidence. **The** question, however, is whether the petitioner has met the above conditions which are critical criteria under Article **50(6)**.

The petitioner did appeal to the High Court and the Court of Appeal but both appeals were dismissed. Thus, the petitioner has exhausted his rights of appeal. The issue of the circumstances in which the provisions of Article 50 (6) will apply has been considered in several decisions of this court. In *Maurice Odhiambo Wesonga -vs- Republic*,^[11] the court noted:-

“..A person who has been convicted and has exhausted all the appeals has the right, under Article 50(6) of the Constitution to seek a fresh trial by demonstrating that there is new and compelling evidence. This provision has been the subject of several decisions of the High Court^[12]The authorities demonstrate that in order for a petition under Article 50(6) of the Constitution to succeed, the petitioner must adduce new evidence in the sense that it must not have been available to the petitioner during the trial. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals. Secondly, the evidence must be compelling meaning that it must be admissible, credible and not merely corroborative, cumulative, collateral or impeaching. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the petitioner to the extent that it may possibly persuade a court of law to reach an entirely different decision than that already reached.” (Emphasis added)

In my view "New" evidence for the purposes of article 50 (6) is evidence not adduced in the previous proceeding. "Compelling" means evidence which is reliable, substantial and highly probative of the case in the context of the outstanding issues, that is the issues which were in dispute in the first trial.^[13]

The core of the petitioner's case is that his rights to a fair trial were breached in contravention of the constitution and that was not accorded a fair trial. He claims that he was tried and acquitted of the said offence in criminal case number 476 of 2004 only to be re-arrested and charged with the same case in criminal case number 2088 of 2004. Counsel for the DPP stated case number 476 of 2004 was withdrawn under section 87 (a) of the Criminal Procedure Code which does not bar subsequent prosecution based on the same facts. I find no reason to doubt this explanation. The petitioner has not substantiated his allegations that he was tried and acquitted in case number 476 of 2004. There is nothing to show that the petitioner was tried twice for the same offence. I am persuaded that the petitioner was re-arrested and charged with the same case after the first case was withdrawn under section 87(a) as stated above. The said section is not a bar to subsequent prosecution on the same facts.

The judgment of the court of appeal summarizes the grounds of appeal advanced by the petitioner and it clearly shows that the alleged violations of the provisions of the Criminal Procedure Code cited by the petitioner in this petition were also raised in the court of appeal and the court of appeal considered the said allegations in its judgment. The same grounds cannot form the basis of the petition now before this court nor can this court sit on appeal on a decision of the court of appeal.

The petitioner has not proved the alleged contravention of his constitutional rights. To my mind, a person who alleges contravention of constitutional rights has a duty to give particulars of the alleged rights which he or she alleges have been contravened and also clearly demonstrate how they have been violated or threatened.

The operative words in article 50 (6) (b) of the Constitution are “**new and compelling evidence**” if a petitioner's case is to warrant a retrial. So what does the phrase “**new and compelling evidence**” mean? *Black's Law Dictionary*,^[14] 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,**” and in contradistinction and antithesis of the word “**used**”.^[15]

The *Concise Oxford English Dictionary*^[16] defines **compelling** as “**powerfully evoking attention or admiration.**” This definition was also adopted in the case of *Rodgers Ondiek Nyakundi and 2 Others -vs- Republic*^[17]

In my view, this definition 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. The petitioner has not explained when the alleged new and compelling evidence became available or why it was not adduced at the trial and what difference it would make if a retrial is ordered.

I appreciate that a difficult balancing exercise is required in determining what amounts to new and compelling evidence. I also strongly feel we must not set the test too low or too high or too wide. What is crucial is to establish a very high test regarding the calibre of the fresh evidence and its likely consequences in a trial. It is the function of this court to determine whether there is enough evidence to justify quashing an acquittal and ordering a fresh trial, in which case the court should focus totally on the quality of the evidence. Perhaps phraseology such as, *"the evidence must be new and compelling, and it must be essential, in the interests of justice, that a new trial should take place"* would be appropriate. Perhaps that would sufficiently express how powerful the new evidence would need to be.

In my view, though not exhaustive, examples of evidence which might be regarded as 'new' would include *a witness who did not appear at the original trial; a weapon or other object which has now been found; or the results of DNA tests which were not available at the time of the original trial; or relevant documentary evidence that was not available at the time of the trial; or discovery of new and important matter which was not available despite the use of due diligence* .

In petition number 6 of 2014-(Nyeri), this court expressed the view that evidence is compelling if it is reliable, substantial and, in the context of the outstanding issues, it appears highly probative of the case in question. The new evidence must in itself be substantial and in my view it must relate to the crime in question and it would be in the interests of justice for a retrial to take place.

It must be demonstrated that the new and compelling evidence casts doubts on the conviction. The requirements are only met if there is new and compelling evidence against the petitioner in relation to the offence. I should emphasize that evidence is new if it was not adduced in the proceedings in which the person was convicted and was not within the knowledge of the petitioner in spite of exercise of due diligence. Evidence is compelling if **(a)** it is reliable, **(b)** it is substantial, and **(c)** in the context of the outstanding issues, it appears highly probative of the case against the convicted person. The outstanding issues are the issues in dispute in the proceedings in which the person was convicted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

Evidence will be fresh if it was not adduced in the proceedings at which the person was convicted and it could not, even with the exercise of reasonable diligence, have been adduced at that trial.

In *Lieutenant Martin Kibisu vs Republic*^[18] the Supreme Court upheld the finding of the Court of Appeal on definition of new and compelling evidence. *It was defined as evidence which was not available during trial after exercise of due diligence.*

The principles that should be considered before a retrial can be allowed were also restated in *Tom Martins Kibisu vs Republic*^[19] where the Supreme held:-

"..... under Article 50(6), "new evidence" means "evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been available 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, 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 an accused person."

The petitioner is under a duty to establish that there is new and compelling evidence which could not be

procured with due diligence at the time of the trial. From the material before me, I am not persuaded that the petitioner has discharged this duty.

In the circumstances, therefore, I am not satisfied that the petitioner has met the criteria set out in Article 50 (6) (a) & (b) of the constitution. Accordingly, I find that the petitioners petition has no merits and I hereby dismiss it.

Orders accordingly

Signed, dated and delivered at Nairobi this 20th day of January 2017

John M. Mativo

Judge

[1] Cap 75, Laws of Kenya

[2] Cap 80, Laws of Kenya

[3] Cap 63, Laws of Kenya

[4] HCR App No. 1 of 2006

[5] CA CR App No. 235 of 2006

[6] Supra

[7] Supra

[8] Supra

[9] Cap 14, Laws of Kenya

[10] R -vs- A (2008) EWCA Crim 2908

[11] High Court Petition No. 4 of 2013

[12] among them; Ramadhan Juma Abdalla and 3 Others -vs- R Nairobi Petition No. 468 of 2012[2013]eKLR, Wilson Thirimba Mwangi -vs- Director of Public Prosecutions, Nairobi Petition No. 271 of 2011, [2012]eKLR, Mohamed Abdulrahman Said and Another -vs- Republic Mombasa Criminal Misc. Appl. Nos. 66A and 66B of 2011 (Unreported).

[13] R -vs- A (2008) EWCA Crim 2908

[14] 8th Edition

[15] (D.P Mittal, Taxmann's Law Dictionary (Taxmann Allied Services (P) Ltd, New Delhi).

[16] 9th Edition

[17] Criminal Appeal 135 of 2006.

[18] *supreme court petition no. 3 of 2014*

