



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 341 OF 2015

**In the matter of Article 21 (1), (3), (4), 22 (1), (3), (f), 24, 25 (c), 27 (1),
(2), 50 (2), (b), (f), (j), (c), 50 (6), (a) of the Constitution of Kenya 2010**

and

In the matter of Rule 4 of the constitution of Kenya Practice and Procedure Rules, 2013

and

In the matter of Criminal Procedure Code, Cap 75

and

In the matter of Criminal Appeal No. 693 of 2010, High Court of Kenya at Nairobi

and

In the matter of Criminal Case No. 4715 of 2009, at Makadara Law Court

BETWEEN

Elly Opande Nyasaka.....Petitioner

versus

Republic.....Respondent

JUDGEMENT

The petitioner was tried and convicted of the offence of Robbery with violence contrary to section 296 (2) of the Penal Code^[1] in Criminal Case number 4715 of 2008, Makadara, Nairobi and was sentenced to death on 30th November 2010. His appeal to the High Court Kenya^[2] was dismissed on 5TH December 2013. The petitioner now seeks orders that his rights to a fair trial were violated and an order for re-trial.

There is nothing to show that the petitioner appealed to the court of Appeal against the High court

decision. Consequently the petitioner in my view has not exhausted his rights of appeal as prescribed under the law. However, 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.

Sub-article (a) above contemplates two scenarios, namely, where a person has exhausted his rights of appeal to the highest court in the land **OR** where the person did not appeal within the time allowed. In both scenarios there must be new and compelling evidence.

I have carefully studied the submissions by the petitioner and counsel for the Respondent together with all the authorities cited therein.

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. [3] 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 appealed appeal to the High Court and but did not appeal to the Court of Appeal. So he does not fall under the first category. Secondly, there is no mention at all as to why he did not appeal to the Court of Appeal and whether he intended to appeal and if so, what prevented him from filing the appeal. Nevertheless, I will accept that his petition falls under the second category of sub-article (a), but even then he must satisfy the test laid down in sub-article (b), that is, he must satisfy the requirement of the existence of new and compelling evidence.

The circumstances under which the provisions of Article 50 (6) will apply were considered in several decisions of this court. In *Maurice Odhiambo Wesonga -vs- Republic*, [4] 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 [5]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. [6]

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 not given the opportunity to prepare his defence, hence a violation of his constitutional rights to a fair trial. To me, if at all this allegation was true, then it ought to have formed his grounds of appeal to the high court. The High court judgment clearly shows the grounds he raised in the high court. In his appeal he did not mention at all that he was not afforded an opportunity to defend himself nor has he 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 were been violated or threatened and how they affected his trial to the extent that the trial was unfair.

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. *Black's Law Dictionary*,^[7] 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**”.^[8]

The *Concise Oxford English Dictionary*^[9] 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*^[10]

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.

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.

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*^[11] 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^[12] 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 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, 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. In my view the allegation that the petitioner was not afforded the opportunity to defend himself has not been proved. In fact at paragraph 12 of the high court judgment, his defense offered in the lower court has been reproduced. In my view, 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 February 2017

John M. Mativo

Judge

[1] Cap 63, Laws of Kenya

[2] Being High Court Criminal Appeal No. 693 of 2010

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

[4] High Court Petition No. 4 of 2013

[5] 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).

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

[7] 8th Edition

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

[9] 9th Edition

[10] Criminal Appeal 135 of 2006.

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

[12] [2014]

