



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
PETITION NO.181 OF 2015

M I PETITIONER

VERSUS

OFFICE OF THE DPP RESPONDENT

JUDGMENT

The petitioner, (*M I*) was charged before the principal magistrate's court at Butali with the offence maim contrary to *section 234* of the Penal Code, on 9th October, 2015. He pleaded guilty to the charge and was convicted on his own plea and sentenced to a prison term of five (5) years.

On 2nd November, 2015, the petitioner lodged the present petition dated 28th October, 2015 under *Article 50(6)* of the Constitution and sought the following orders:

1. THAT this honourable court be pleased to order the re-trial of Butali Criminal case No.949 of 2015 on account of new and compelling evidence that has emerged.
2. THAT this Honourable court do make such orders as the circumstances may demand.

The petition was based on the grounds that parties in the matter had reconciled and that the complainant was to withdraw the complaint before plea was taken.

The petition is supported by two affidavits sworn by *M I*, the petitioner and *E I* said to be the complainant in the criminal case before the Butali court, both sworn on 28th October, 2015. In his supporting affidavit, the petitioner deposes that when he was charged before the Butali court he was unrepresented and pleaded guilty on the belief that the matter had been resolved although the complainant who is his wife was not in court at the time the plea was taken. The petitioner further depones that he is the sole bread winner and given the sentence meted out on him, his children and wife are suffering. He further depones that had the court been made aware of the agreement between the parties probably the matter would have been withdrawn.

E I in what is called "petition," but which I believe was meant to be affidavit, states that she was the complainant before the trial court and that the petitioner is her husband with whom they have two (2) children having been so married in 2008. Their children namely *V I* and *Y T I* are aged 5 years and 9 months respectively. She further states that they had a domestic disagreement on 5th October, 2015, and she sustained injuries on her hand. She reported the matter at Kabras Police Station and as a result the

petitioner was arrested but their families met and agreed to reconcile and the accused paid Kshs.8000/- to her father and the matter was to be withdrawn but the petitioner was arraigned in court on 9th October, 2015. She rushed to court to withdraw the complaint but found that the matter had already been dealt with and the petitioner sentenced to five years' imprisonment after pleading guilty. According to the deponent, the petitioner is the sole bread winner and his continued incarceration will cause hardship to the family. She therefore pleads that the petitioner be released.

During the hearing of the petition, Mr Kiveu learned counsel for the petitioner urged the petition and pleaded with the court to allow the petition, saying that the petitioner and complainant are husband and wife, and although the petitioner was charged before the trial court, they had reconciled the matter but the complainant was not able to be in court before the plea was taken and the petitioner convicted and sentenced. He referred to a copy of the agreement attached to the affidavit of the complainant to show that parties had indeed reconciled. Counsel was of the view that had the trial court been informed of the reconciliation, the decision would have been different. In the learned counsel's view this is a matter that can be canvassed under *Article 50(6)* of the Constitution.

Mr Oroni learned State Prosecutor did not oppose the petition saying that he had seen the petition and a copy of the agreement which clearly showed that parties had indeed reconciled. He was also of the view that this matter falls under *Article 50(6)* of the Constitution and should thus be allowed.

This being a petition under *Article 50(6)* of the Constitution, one has to look at the conditions set out under that Article.

Article 50(6) provides as follows:-

"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 allowed to appeal or the person did not appeal within the time allowed for appeal; and*
- b) new and compelling evidence has become available.*

A petitioner seeking to benefit from *Article 50(6)* must first and foremost show that he/she was convicted of a criminal offence and thereafter appealed to the highest court that could hear his appeal or that he did not appeal and time for filing such an appeal has since lapsed. The record shows that the petitioner was charged in court on 9th October, 2015 and pleaded guilty to the charge. He was convicted on his own plea of guilty and sentenced to five years imprisonment on the same day. Mr Kiveu, learned counsel for the petitioner, says that the petitioner did not file an appeal. The petitioner could mount an appeal within fourteen (14) days from the date of his conviction. The petition was filed on 2nd November, 2015, which is clearly after the fourteen days allowed by law to file an appeal. I am therefore satisfied that the petitioner has satisfied the first test under *Article 50(6)(a)*.

The petitioner is then required to show that new and compelling evidence has after his conviction, become available. The petition before court has to be considered on the basis of availability of new and compelling evidence.

A conviction is, in law final, unless new and compelling evidence has become available, thus giving a petitioner the opportunity presented by *Article 50(6)* of the Constitution to petition the High Court for a new trial. The Court of Appeal with the approval of the Supreme Court, defined 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."

The record of the proceedings before the trial court shows that the petitioner pleaded guilty to the charge

and was thus convicted on his own plea of guilty. In mitigation the petitioner is recorded to have said:-

“E (complainant) is my wife. We have 2 kids. They depend on me. We crossed. I did not know it could go this way (sic) our families sat and agreed. We agreed. I am 33 years old.”

The new evidence that the petitioner says has become available is the fact that the parties had reconciled and he had paid the complainant's family Kshs.8000/-. He also says that he is the sole bread winner and his family will suffer without him. Counsel submitted that had the fact of reconciliation been brought to the court's attention, the result would have been different.

However, I note from the record that the petitioner did inform the trial court that he was husband to the complainant, that they had two children and that his family depended on him. He also informed the court that the two families had met and agreed. This means that the issues that are being raised before this court as new and compelling evidence, were brought to the trial court's attention at the time the court entered a conviction and meted out sentence. In my respectful view, this is not new and compelling evidence as envisaged by *Article 50(6)* of the Constitution and defined by the Court of Appeal with the concurrence of the Supreme Court. What is contained in the affidavit of both the petitioner and E I, was before the trial court and that court duly considered them before rendering itself on the matter. They are not therefore new and cannot be compelling as envisaged by *Article 50(6)* of the Constitution.

Although the learned State Prosecutor did not oppose the petition, I do not think that alone aids the petitioner's cause. The law on new and compelling evidence, as I understand it, means new and completely different evidence from that which was before the trial court that is admissible and that is likely to affect the earlier decision. As this court said in the case of *Ernest Otieno Keya & another vs Republic* [2015] eKLR:-

“A petition under Article 50(6) is not about re-hearing of the appeal or re-evaluating evidence afresh. It is about some independent evidence that brings out a completely new dimension to the case such that a tribunal properly directing its mind on that “new evidence” would find itself legally obliged to re-open the case for a fresh trial. It is not and should never be about feelings, doubts or even thoughts of forgiving a petitioner, but evidence that compels the court to re-think the original position taken in the matter.”

Deciding on the same issue in the case of *Evans Sagero v Republic*, [2014] eKLR Majanja, J. after reviewing several decisions on *Article 50(6)* of the Constitution said:-

“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.”

Looking at the present petition, what the petitioner has presented as new and compelling evidence is nothing but mitigation. The fact that the matter had already been compromised between the respective families and that the complainant had agreed to withdraw the complaint is not new and compelling evidence, neither is it evidence that could not be available after due diligence. The trial court was alive to the matters presented in this petition and fully appreciated them while sentencing the petitioner. They are not new and compelling evidence as would be expected.

For the foregoing reason, I am not persuaded that the petition meets the threshold set by *Article 50(6)* of the Constitution and the same is hereby dismissed.

Dated and delivered at Kakamega this 10th day of February, 2016.

E. C. MWITA

JUDGE