



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**HIGH COURT MISC. CR. APPLICATION NO. 27 OF 2016**

**(CORAM: J. A. MAKAU – J.)**

**MALCOM ODHIAMBO OWINO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against both the conviction and the sentence*

*dated 5.9.2007 in Criminal Case No. 43 of 2007 in*

*Siaya Law Court before Hon. G.K. Mwaura – P.M.)*

**RULING**

1. The Applicant **MALCOM ODHIAMBO OWINO** through an application dated 2.2.2016 pursuant to **Article 50(6) (a) and (b) and Article 23 of the Constitution of Kenya 2010** and supervising Jurisdiction and fundamental Rights and Freedom of an individual and protection and freedom, the instant powers, through court practice 2006 sought the following orders:-

- i. That this petition be admitted and be allowed under Article 50(6) (a) and (b) of the Constitution of Kenya 2010 for review and compelling evidence.*
- ii. That the applicant was initially charged on suspicion of robbery with violence, arraigned before Chief Magistrate's Court at Siaya CR. C. No. 43 of 2007. tried, convicted and sentenced to suffer mandatory death on 5.9.2007 upon which he appealed to High Court at Kisumu in HCCRA No. 137 of 2007 which was dismissed on 18.11.2008, provoking him to file an appeal at Court of Appeal at Kisumu being CRA No. 250 of 2009 which was dismissed on 9.10.2015.*
- iii. That the applicant has done away with all appeals.*
- iv. That the petition is based on new and compelling evidence that has become available.*
- v. That the applicant beg for the production of the OB(Occurrence Book) for Ugenya Patrol Base to the alleged first Report of 15.12.2006 to be availed in Court on the date of hearing of this Petition.*
- vi. That further other ground will be adduced during the hearing of this petition for orders*

*therein.*

2. The Applicant relied on supporting affidavit dated 25.1.2016 in which he reiterated the contents of the grounds in support of his application and raised no new matters in his supportive affidavit. In his further supporting affidavit dated 25.4.2016 he attached the court proceedings of the trial court and appellate courts.

3. That at the hearing of the application the Applicant appeared in person whereas M/s. M. Odumba Learned Prosecution Counsel appeared for the State.

4. The Applicant in support of his application urged that his mode of arrest was not indicted in the trial courts proceedings, that he does not know the cause of his arrest; that no recovery was made from him, that OB of first Report should be availed, that he was convicted on basis of identification and identification parade as complainant stated he was assaulted by people known to him, that the charge is defective as it does not contain O.B. Number, that the new evidence is based on the O.B. that he was convicted on evidence of a single witness whereas there were other witnesses who were not called to give evidence, and that his case was not handled well.

5. M/s. M. Odumba, Learned Prosecution Counsel opposed the application stating that the application lacked merits and is not tenable before this court, that there is nothing new and compelling that the applicant has disclosed, that the matters raised were things which he knew as they were within his knowledge and the issues he raised were considered and determined in the appeal of the High Court and Court of Appeal.

6. The relevant Article under which this application is based is **Article 50 (6) (a) and (b) of the Constitution of Kenya 2010** which provides:-

*“(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.”*

7. The issue for my consideration is whether the applicant's application has met the threshold as provided for under **Article 50 (6) (a) and (b) of the Constitution of Kenya 2010** to warrant the court order for a new trial of the Appellant who has already been convicted and sentenced to suffer death?

8. In considering and allowing an application under **Article 50 (6) (a) and (b) of the Constitution of Kenya 2010** a person who is convicted of a criminal offence may petition the High Court for a new trial if, he had appealed, and the appeal 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 secondly there is new and compelling evidence which has become available. It is the duty of the Applicant to demonstrate to the court the new and compelling evidence which has become available so as to persuade the court to consider his application.

9. The Applicant through several annexures attached court proceedings in respect of **PMCRC 43 of 2007 Siaya** convicting the appellant on **5.9.2007, HCRA Nos. 135, 136, 137 of 2007** dismissing his appeal on **18.11.2008 and Court of Appeal CRA 250 of 2009** dismissing his appeal on 9th October 2015. In view of the above I am satisfied that the Applicant has demonstrated that he was convicted of a criminal offence and that he appealed to the highest court to which a person is entitled to appeal. He has thus satisfied the conditions set out under **Article 50 (6) (a) of the Constitution**.

10. The second condition is set out under **Article 50 (6) (b) of the Constitution 2010** which demands of the Applicant to demonstrate of new and compelling evidence has become available. **Article 50 (6) (a)**

**and (b) of the Constitution of 2010**, do not operate retrospectively or have retrospective force and cannot be applied for criminal proceedings which took place before the promulgation of new constitution, thus convictions which occurred before 27th August 2010. The Applicant's main ground is that the O.B. was not availed from Ugunja Patrol Base in respect of the alleged first Report of 15.12.2006. He also challenged the way he was identified and how the High Court and Court of Appeal conducted the appeal. This court is a Court of Parallel jurisdiction to the High Court and cannot sit on appeal on the judgment of the High Court as Applicant seems to think of **Article 50 (6) (a) and (b) of the Constitution** nor can it sit on appeal on the judgment of the court of Appeal on any of the grounds raised by the appellant as regards omission or errors purportedly made by the trial court as the same if any were made before the promulgation of the **new Constitution of 2010** and by virtue of that fact, **Article 50 (6) (a) and (b)** is not amenable to the Applicant. Secondly all matters raised as I have stated amount to grounds of appeal which were exhaustively dealt with by the Court of Appeal and whose decision binds this court, though this court can on new and compelling evidence being availed to it order a new trial under **article 50 (6) (b) of the Constitution of Kenya 2010**.

11. The Applicant in this application has mainly raised what seems to me to be grounds of appeal before this court which this court cannot consider as it lacks jurisdiction. The matter raised were exhaustively dealt with by the High Court and Court of Appeal for which this Court lacks jurisdiction to deal with. The Applicant has on the other hand not stated, what it is, that is new and compelling evidence that can be found in the O.B. He did not attempt to demonstrate the new and compelling evidence nor availed the same as required by **Article 50 (6) (a) and (b). of the Constitution of Kenya 2010**. He cannot leave the matter hanging in the air for the court to speculate. He has failed in my view to satisfy the conditions setout under **Article 50 (6) (b) of the Constitution**.

12. **The upshot is that the Applicant's application filed on 2.2.16 is without merits and is dismissed.**

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 2ND DAY OF JUNE, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 2ND DAY OF JUNE, 2016.**

**In the presence of:**

**Applicant in person - Present**

**M/s. Mourine Odumba for Republic**

**Court Clerk – Kevin Odhiambo**

**Court Clerk – Mohammed Akidah**

**J. A. MAKAU**

**JUDGE**