REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CRIMINAL APPLICATION NO. 32 OF 2011

JAMES MUNENE KANYI…..……..APPPLICANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

By an undated application filed in this Court on 11th July, 2011, the applicant sought what I understand to be the following prayers:-

1. This Court grants the applicant leave to adduce new and additional evidence that has emerged and which in his view would be useful for this Court to arrive at a fair and just finding;

2. The applicant's appeal in this Court be reheard and this Court determine whether he should be tried afresh.

3. This Court sets aside its own judgment dismissing the appellant's appeal and the judgment of the Court of Appeal upholding it.

The application is not supported by any affidavit; however, on its face it is basically made on the premises that the applicant now has new and compelling evidence which was not available when his two appeals were heard in the High Court and in the Court of Appeal.

The state opposed the application and filed grounds of objection to that effect. In particular, it was stated on its behalf that it had not been demonstrated that the statements that the applicant wished to produce were not known or accessible to him at the time he was required to produce them; that the applicant had not demonstrated the nature of the evidence contained in those statements; that the applicant did not demonstrate that the failure by his witnesses to attend court and testify was due to factors beyond his control; and, that the applicant had not demonstrated the facts he alleges to have been overlooked in the relevant proceedings amounted to compelling evidence.

The applicant filed written submissions in support of his application; I must confess that it was not easy to follow these submissions having been written by a lay person. As far as I understood him, the applicant faulted both the trial and the appellate courts for respectively convicting and upholding the conviction on charges that were, in his view, not supported by cogent evidence. According to the applicant, the courts did not scrutinise the evidence on identification keenly.

The applicant also submitted that none of the prosecution witnesses ever mentioned him and that though he is alleged to have been arrested by members of the public none of them testified. Amongst the witnesses who testified, so the applicant submitted, none of them gave the applicant's description and if

both the trial court and the appellate courts had considered this fact, they would probably have arrived at a different conclusion.

It was the applicant's case that if the occurrence book number 63 of 12th July, 2005(Karatina police station) in which he was booked after arrest is produced, it will show that he was merely implicated in the commission of the crimes for which he was convicted and in particular the court will note that none of the witnesses ever gave the applicant's description when the crime was reported to the police.

The applicant also sought to have witnesses called to prove that he was a hard working businessman who was arrested while he was in the course of his business. He submitted that he was not accorded a fair trial because his trial was delayed for two years and no plausible explanation was given for the delay. The applicant also submitted that since the offence had been committed in Kirinyaga County he ought to have been tried in that county.

Counsel for the state opposed the application reiterating the grounds of objection; he added that the applicant was effectively challenging the decision of the Court of Appeal in this Court and that **article 50(a)** of the **Constitution** under which the application is filed is not meant for this particular purpose.

Counsel also argued that the applicant has not demonstrated that that he has any new evidence that can be regarded as compelling and in any event, if there is any evidence at all, the court has not been informed why the applicant could not produce it at his trial. As far as the occurrence book is concerned counsel submitted that this piece of evidence had been produced at the trial and that the Court of Appeal had deliberated on it before dismissing the applicant's appeal. Counsel relied on this Court's decisions in **Kisii High Court Criminal Appeal No. 135 of 2006 Rodgers Ondiek Nyakundi & Others versus Republic, Mombasa High Court Criminal Miscellaneous Application No. 2011 & 66B of 2011** and **Nairobi High Court Miscellaneous Application No. 271 of 2011, Wilson Thirimba Mwangi versus Director of Public Prosecutions** in support of his submissions.

Having invoked **article 50(6)** of the Constitution which basically is the foundation of the application, the application ought to have been filed as a petition. According to **rule 4(1)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** whenever any right or fundamental freedom is allegedly denied, violated or threatened, a person so affected or likely to be affected may make an application to this court in accordance with the rules; a person who institutes such an application is called a petitioner (see rule 2 thereof) implying that whatever the applicant files is a petition. Article 50(6) of the Constitution itself expressly states an applicant may "petition" the High Court; however, since there is no express bar to an applicant approaching the court in any other manner, the applicant's application can properly be determined in its present form.

Article 50(6) under which the application has been made states as follows:-

> ***50. (1)…***
>
> ***(2)…***
>
> ***(3)…***
>
> ***(4)…***
>
> ***(5)…***
>
> ***(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.

The applicant's appeals were dismissed both in the High Court and in the Court of Appeal; since this latter court is the highest court to which the applicant could possibly appeal, the application has satisfied the first of the two limbs prescribed by this article. Whether *"new and compelling evidence has become available"* is the only question that this court has to grapple with.

Looking at the appellant's application and his submissions, there is nothing that suggests that he has new and compelling evidence which could have influenced the trial court and the appellate courts to reach any decision other than the decision they came to.

All the issues that the appellant has raised were raised and considered right from the trial court through to the Court of Appeal; in particular the courts considered the questions of identification of the appellant; the weight of the evidence of the witnesses who testified and the question of the occurrence book. In fact on this latter issue, the appellant had raised it as a ground of appeal in this Court and in its judgment, the Court determined that the applicant had a chance to look at the occurrence book. The applicant is quoted to have said at his trial that "I have now read the occurrence book properly"; this implies that he had been provided with the book and therefore it be an outright lie for him to insist at this moment that this book was not availed to him.

As far as defence witnesses are concerned, the record from the trial court shows that when the applicant was put on his defence he informed the court that he would only call one witness; indeed this witness testified on behalf of the applicant after the court issued a production order for him to be produced in court. There is simply nothing on record that suggests the applicant intended to call any other witness or witnesses.

I agree with the learned counsel for the state that all that the applicant has attempted to do in this application is to question afresh the decisions in the trial court and the appellate courts. Such an application which is brought under the guise of enforcing article 50(6) of the Constitution cannot be countenanced; it is not the intention of the Constitution that this Court should sit on appeal of decisions delivered by the Court of Appeal or vary its own decisions except in those circumstances that have been specifically prescribed in article 50(6) of the Constitution. As I have said elsewhere before, **article 50 (6),** in my humble view**,** is not a carte blanche for this court to regurgitate issues that have been conclusively determined either by itself or by the court above it; if that were the case, litigation in the criminal process would never come to an end. (**See Nyeri High Court Miscellaneous Application No. 16 of 2010 (Joseph Muriuki Njogu versus Republic).**

Just as I observed in *Joseph Muriuki Njogu versus Republic* (supra) so it is in this application; the availability of the new and compelling evidence is a condition precedent to the application for a retrial under this particular provision of the Constitution; it is a burden which any applicant seeking to invoke article 50(6) of the Constitution must prove to have been discharged to the satisfaction of the court before his application or petition is allowed.

What amounts to ***"new and compelling evidence"*** is a question of fact and would largely depend on the circumstances of each particular case. I would suppose, however, that whatever the case, the evidence must the kind that is likely to have influenced the decision of the trial court or, where an appeal has been lodged, the appellate court, had it been brought to either court's attention in time. In other words, to be compelling, the evidence must be sufficient enough to alter, in a material way, the trial or the appellate courts' opinion if it had been brought to these courts' attention prior to their respective decisions.

Apart from the evidence's sufficiency, I would also add that under **article 50(6)** of the **Constitution,** it is upon the applicant or a petitioner for retrial to demonstrate that he could not access or produce the evidence in issue despite his reasonable efforts to do so or that he would still fail in his endeavour even after exercise of due diligence. None of these things has been established in the present application.

For the reasons I have given, I am satisfied the applicant's application falls far below the threshold set by

article 50(6) for a retrial. It is not merited and it is hereby dismissed. It is so ordered.

Signed, dated and delivered this 7th October, 2016

Ngaah Jairus

JUDGE