



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
PETITION NO. 3 OF 2015

JACOB GITHINJI MACHARIA PETITIONER

Versus

STATE RESPONDENT

JUDGMENT

1. **Jacob Githinji Macharia**, the petitioner herein has invoked **Article 50(6)(a)** and **(b)** of the **Constitution**. He was convicted before the Senior Principal Magistrate Court at Nanyuki in **Criminal Case No. 1922 of 2010** on three counts of the **offences of robbery with violence**. He was sentenced to death. Being aggrieved by that conviction and sentence he appealed against both before the **High Court at Nyeri** in **Criminal Appeal No. 190 of 2011**. That appeal was dismissed by the High Court which upheld the magistrate's court conviction and sentence. The petitioner filed an appeal before the **Court of Appeal** sitting at Nyeri in **Criminal Appeal No. 10 of 2013**. Similarly his appeal before the Court of Appeal was dismissed.

2. Learned Counsel Mr. Maragia for the petitioner submitted that the petitioner had brought himself within the ambits of Article 50(6)(a) and (b) of the constitution. That article is in the following terms:

(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 learned counsel argued that the petitioner had met the first condition of that article that is, entitlement to a new trial because the Court of Appeal had heard his appeal. Learned counsel argued that the Court of Appeal in respect to this case was the highest court for the petitioner because the petitioner's case before that court did not raise any constitutional issues entitling the matter to be escalated to the Supreme Court. It was submitted on behalf of the petitioner that this indeed meant that the petitioner's appeal has been entertained to the highest court as required under article 50(6)(a).

3. Learned Principal Prosecuting Counsel Mr. Tanui did on that issue concede that the petitioner had had his appeal heard by the highest

court.

4. Indeed I am in agreement with the stand taken by both learned counsels that the petitioner had his case heard by the highest court. The **Article 163(4)** of the Constitution there are two instances in which an appeal lies from the Court of Appeal to the Supreme Court. That article provide as follows:

(4) Appeals shall lie from the Court of Appeal to the Supreme Court –

(a) as of right in any case involving the interpretation or application of this constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

5. On perusal of the judgment from the Principal Magistrate's Court to the High Court and finally to the Court of Appeal the issues raised in the petitioner's case did not call upon the interpretation of the constitution nor did they raise a matter of general public importance.

6. Having reached that threshold of satisfying article 50(6)(a) that is having had the petitioners case and entertained by the highest court this court will now examine whether the petitioner has shown **new and compelling evidence** to justify a new trial. **Justice W. A. Okwany** had occasion to consider the terms 'new evidence' in the case **CLIFF BIKERI MOKUA & ANOTHER V REPUBLIC (2016)eKLR** where she stated:-

"The meaning of the term "new evidence" was explained by the Supreme Court in the case of LT. COL. TOM MARTINS KIBISU VS REPUBLIC (2014) EKLR when the Supreme Court Judges P. K. Tunoi, M. K. Ibrahim, J. B. Ojwang, S. C. Wanjala and N. S. Ndungu agreed with the Court of Appeal by stating as follows:-

"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 which if adduced at the trial could 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."

Justice John M. Mativo in the case **MALI MALI OLE MOIYALE vs REPUBLIC (2016) eKLR** defined 'compelling' as

"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 arouse great deal of interest."

7. The thrust of the petitioner's petition is that had the Occurrence Book (OB) relating to his arrest been produced before the trial court and considered during the trial it would have led to his acquittal of the charges he faced. Further that there was a witness who witnessed the recovery of the stolen goods in respect of the charges of robbery with violence and who was not called by the prosecution but who now has sworn an affidavit exonerating the petitioner from connection with the recovery of the stolen items.

BACKGROUND

8. On the night of 7th October 2010 between 10 p.m. and 11 p.m. there were a series of robberies near the old market in Nanyuki town. Elizabeth Nyaguthi Mwangi PW 2 was in her house with her mother PW 1, her sister and two children. PW 2 was watching television with her son while the rest were asleep. There was some tampering with the front door. PW 2 noticed that there was torch light outside the house.

When she went to the widow she saw 4 people outside the house. She took her mobile telephone with a view to calling for assistance. Before she could make a call the front door was hit with a stone and it opened. The four people entered and she noticed that they had *simis* (panga). The four people began to rob them of mobile phones and television with its remote control. One of those robbers hit her mother PW 1 with a panga. As a result PW 1 was cut on her left fore finger. As the person hit PW 1 and cut her he was demanding for money. The robbers left that home and went to their neighbours. Similarly their neighbours Faith Kendi (PW 3) had her house broken into. She too noted that the people had pangas and torches. They robbed her of Mobile phones, TV, one DVD , one amplifier and 3 remote controls. They also took from her house shoes, nail vanish and lotion. The robbers went to another neighbour's house called Joseph Maina Nderitu (PW 4). PW 4 heard noise outside as he slept together with his family. He then saw people break the window of his house and put a panga through the broken window demanding that PW 4 open the door. They threatened to kill him if he did not open the door. He opened the door and those people robbed him of kshs.500, a TV and a DVD with its remote control. Patrick Ngunyi PW 5 another neighbour to other who were robbed when the window of his house was broken and the robbers demanded that he opens for them he declined. The robbers pulled a wire through the window of the TV booster. They went away with it.

9.The evidence that led to the arrest of the petitioner was adduced by police officers Cpl Mutua Kirimi Paul (Kirimi) and PC Edward Gitonga (Gitonga). The essence to their evidence was that they received information from an informer that the petitioner had been seen coming from a house carrying two DVDs. Both officers went to the place that they were directed by that informer. They found the petitioner carrying two DVDs and three remote controls in a paper bag. When they confronted the petitioner he told them that he was a technician and that he was on the way to repair the DVDs. The police officers demanded to see his workshop and the owners of the DVDs. It was then that that the petitioner changed his explanation and led them to what he said was his house at the old market in Nanyuki town. The petitioner took the police officers to that house where they found other people. The police officers Kirimi and Gitonga searched that house but recovered nothing from there. They however arrested a person who was in that house who the petitioner said was the owner of the DVDs. That person was subsequently released without charge.

10.The informer led the police officers to the house that belonged to the petitioner's co-accused who was subsequently acquitted. From that house the police officers were able to recover the items that were the subject of the series of robberies of 7th October 2010.

ANALYSIS AND DETERMINATION.

11.The petitioner relied on OB No. 17/8/10/2010 and the affidavit of **Grace Kanini Mutungi** which brings out the following issues for consideration:

(a) As per the OB No. 17/8/10/2010 the recovered items from the house of the petitioner's co accused were not recovered from the person of the petition.

(b) The OB No. 17/8/10/2010 reflects that two male persons were arrested yet the evidence of the police officer Kirimi and Gitonga indicated that they arrested the petitioner and his female co accused Ann Kendi Muthee.

(c) The affidavit evidence of Grace Kanini Mutungi the care taker to the house where the goods were recovered stated that she saw two male persons under arrest in the police car when all the goods were recovered from the house rented by Ann Kendi Muthee.

12. Before delving into the issues I have identified above it is important to consider what **Justice Sitati** held in the case stated below in respect of the provisions of Article 50(6). In that decision the learned judge proffered the opinion that article 50(6) does not amount to an appeal against the decision of the court of appeal. In **RODGERS ONDIEK NYAKUNDI & 2 OTHER V STATE (2012) eKLR** Sitati J. stated:-

“It is now well settled that petition (or application in this case) under Article 50(6) is not a re-trial or an appeal, and that the court to which such petition or application is made has “no jurisdiction to consider and determine matter which have already been decided upon by the Court of Appeal. “The only duty this court has to fulfil is to see whether there is any *new and compelling evidence* to warrant an order for retrial. The applicant’s desire in this case is that the case be heard afresh so that all the evidence is placed before the court, including specimen evidence though he does not specify what the evidence is. There is no doubt that the applicant had every opportunity to apply to adduce fresh evidence before or at the hearing of his appeal. He could also have made such an application to the Court of Appeal. The door was closed and this court has no power to re-open it.”

13. Again before I begin to look at the issues identified above I will caution myself as did **Justice Janet Mulwa** in the case **Geoffrey Mwangi Githinji vs Republic (2015) eKLR** where the judge stated:

“The court of Appeal has called for exercise of caution when considering an application for review based on discovery of new and fresh evidence. In *D. L. Lowe & Co. Ltd –vs- Banque Indosuez – Civil Application No. Nai 217 of 1998* (unreported) it was observed;

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strength that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

14. With the above caution and the wisdom of the learned Judge’s holding, I will consider the issues raised above.

15. In the first issue the petitioner submitted that he would not have been convicted if the OB was produced during his trial. For proper appreciation of his argument it is important to reproduce the OB. That is, the original photocopy of the OB and not the extracted copy submitted by the petitioner’s advocate. My preference in relying on the original photocopy OB is based on my opinion that the extracted copy is not a true copy of the OB No. 17/8/10/2010. That OB is in the following terms:-

10.00PM: ACTION TAKEN PRISONERS IN EXHIBITS

RECORDED. Now Cpl Gitonga OC crime, Cpl Kirimi and P.C. Billey do take action against two male adults who are to be charged for the offence of Robbery with violence that occurred on the night of 7th/09/2010 within old market area and which the scene was visited by P.C. Mshore, P.C. Likwa and Cpl Kirimi. On this material day at around 8.00 a.m. and with Reliable Resources (*sic*) the said culprits were arrested within old market in there (*sic*) house and the following items recorded Three T.V. sets make (1) LG Black 14” (2)Tousda in make 14” YSO 8070582 (3) Samsung 14” S4 85677092 DVD’s Machines (1) Sony make type DVD – SR 200P Black (2) D. Dvd S/No. L 63625318521, Assorted Remote Control (5) Electrical Extensions (2) panga and swords four in number, Assorted clothes and shoes, suitcase mini black and red in colour. Also recorded is an instrument that is locally made is issued to make a loud noise when hit hard on the ground imitating the sound of a firearm so as to scare the victims. Now the persons are searched and placed in cells by P.C. Qarachy while appearing drunk.

16. There are various issues raised by the petitioner. The one issue that the petitioner emphasised on regarding that OB was that the recovered items were reflected as having been recovered at Ann Kendi Muthee’s house. The reason why the petitioner laid emphasis on this statement in the OB was because the trial court found that the prosecution had failed to prove that the petitioner had any connection to the house where the stolen items were recovered. That since the trial court found in its judgment that the petitioner had no connection to the house where the recovery took place and since the OB indicates all items were found in that house the petitioner could not have had the DVDs the police officers said he was

carrying in a paper bag. The trial court stated thus:-

“The other evidence is that some other electronics were found in a house a distance away from where the accused (petitioner) was arrested. However there is no evidence to connect the accused (petitioner) with the goods recovered from the said house. There was no evidence that the house belonged to him (petitioner). The accused (petitioner) thereby was not found in possession of the goods recovered in the house.”

17. Similarly the petitioner referred to the judgment of the Court of Appeal which court reached a similar conclusion as did the trial court. The Court of Appeal while approving the conclusion of the trial court stated that there was no connection of the petition to the house where other items were recovered. The Court of Appeal stated thus:-

“We also note from the evidence that the other stolen items were recovered in a house which was pointed out by the informer and not the appellant.

18. In considering the statement in the OB which showed that the items were recovered from the house one has to see that statement in the light of the testimony of Kirimi and Gitonga. Kirimi in his evidence stated that he and Gitonga following information from an informer saw the petitioner emerge from the house carrying a paper bag containing two DVDs and 3 Remote Controls. It was from that house that the stolen items were recovered. This is what Kirimi stated in his evidence.

“We went to the place we were referred to. We found the said person carrying the two DVDs. We asked him where he was taking them. He said that he was taking them for repair. The informer led us to the house where the said Githinji (petitioner) had been seen coming from. We went to the house. We searched it”.

19. Kirimi informed the court that the items that were recovered from the house did not include the two DVDs that the petitioner was found carrying. Similarly Gitonga stated that when they were directed by the informer to the house they found the items that had been stolen which were TVs and a locally made object. Gitonga was very specific about the recovery of the DVDS. He stated:-

“There are the two DVDs we found with the first accused (petitioner)”.

20. While recalling that the duty of this court is not to conduct a retrial however in my examination of the statement in the OB and the evidence of both the arresting police officers reveal that the alleged inconsistency is not of a compelling nature. Compelling in my mind is evidence that is of such nature that it cannot be ignored. It ought to be irresistible. This is not the case here. There are two reasons I say so. The first is that it ought to be appreciated that an OB ordinarily records events of either a crime that occurred or an event in the police station. An OB is kept at the police station. Such record in the OB depending on who records it may not always reflect what occurred 100 percent and I do not think it is intended to. What is of far greater probative value is the evidence that is tendered under oath at the trial. It therefore follows that the evidence tendered under oath by Kirimi and Gitonga is of greater value than the record of the OB. The second reason I hold that the statement in the OB to the effect that the stolen items were recovered in the house is not of compelling nature is because of the evidence tendered by the arresting police officers. Kirimi stated that he and Gitonga were informed by an informer that the petitioner emerged from the house where eventually stolen items were recovered. The understanding one gets from that evidence is that the petitioner had obtained the DVDs in his paper bag from the subject house where all the other items were recovered. It will therefore follow that when the recovered items were recorded in the OB the two DVDs were included as being part of those items that were found in the subject house. Kirimi on being cross examined stated in respect to the petitioner's arrest that he was arrested with the two DVDs near the subject house. Indeed he stated that the arrest took place about 5 metres away from the house. In my view five metres is a very close proximity and can be said to amount to the petitioner being arrested next to the house. It is important to note that PW 3 identified one of the recovered DVDs and while identifying it he produced a receipt for it. The other DVD was identified by PW 4 who identified it by his initials JM that were on it. The trial court magistrate had this to say on the

recovery of the DVD from the petitioner:-

“I am however convinced that the accused was arrested by PC Kirimi and PC Gitonga at a corridor of a house while in possession of two DVDs I am convicted that the police men were telling the truth on the issue.”

21.The trial court applied the doctrine of recent possession in convicting the petitioner.

22.In my view that summation by the trial court of the prosecution’s evidence would not have been tampered by the disclosure that the OB reflected all the goods which included the DVD as having been recovered from the house.

23.Before I concluded on the first issue I wish to say that the original OB had some alterations just before the word “house”. It is not clear to me whether that alteration was done by the original recorder and if so why he did not initial the alteration. It does seem that the altered word could either have been ‘the’ or ‘there’ or ‘their’ house. The petitioner produced what he called the extract of the OB. That extract does not entirely reflect what is in the original OB reproduced above in this judgement. There are additions made therein such as the names of the two suspects that were arrested following the recovery of the stolen items were inserted in the extracted copy of the OB that are not in the original ob. There is also change made in the extract relating to the date of the robbery recorded in the original OB. I will later on in this judgment touch on that date reflected as the date of the robbery in the original ob.

24.Learned counsel for the petitioner also raised the following in his submissions.

“That the conflict here is that it was not possible for two police officers who happened to be PW 7 and (Kirimi) PW 8 (Gitonga) to have left at the station at 10.00 proceed to the scene of the crime, remove the goods from the house, proceed to the market place where PW 2 managed to see the suspects and return to the police with the arrested persons at the same time.”

25.That submission in my view is very short sighted. I say so because although the recorder of the OB indicated the recording time as 10.00 a.m. the fact is that within the body of the OB reproduced above it was stated as follows:-

“On this material day at 8.00 a.m. the said culprits (petitioner and another male suspect) were arrested within old market.”

26.The time of the arrest of the petitioner from that record seems to have been 8.00 Oclock and not 10.00 a.m. as submitted by his learned counsel. That timing in the OB is corroborated by the affidavit of Grace Kanini Mutungi (Kanini) care taker of subject house. In that affidavit which the petitioner relies in this matter upon at paragraph 7 kanini stated that the police officer went to the subject house at 9.00 a.m.

27.The second issue identified above is that there was discrepancy between the record in the OB where it was recorded that 2 male persons were arrested and the police officer’s testimony at the trial. The OB reflected as follows:-

“... Action against two male adults who are to be charged for the offence of robbery with violence....”

28.Although the petitioner’s learned counsel submitted that the police officer’s evidence did not support what is reflected in the OB I disagree. My disagreement is supported by the evidence of both the arresting police officers. Kirimi on being cross examined by the petitioner who was then acting in person, responded as follows:-

“We arrested you (the petitioner) because we found you with the DVDs. We arrested another person at that place. He stayed in the cells for about 2 days.”

Gitonga on being cross examined stated as follows:

“I do not recall when I released the other person.”

It is clear that the other person this officer was referring to was not the petitioner's female co-accused Ann Kendi because earlier in his evidence in chief this police officer stated that that female co-accused of the petitioner was arrested by Kirimi and that he saw her at the police station later on.

29. It would follow that the arrest of the petitioner together with another male person was an incident which was at a different time to that of the arrest of the female co-accused to the petitioner. That would explain why the female co-accused was not recorded in the OB.

30. The submissions of the Learned Counsel Mr. Maragia in respect to the second issue is therefore rejected. It does not amount to new and compelling evidence that is required under Article 50(6).

31. The third issue raised by the petitioner was to the effect that the affidavit filed in this matter shows evidence which if it were available before the trial court could have led to petitioner's acquittal. Kirimi in his evidence in chief stated that the house where the goods were recovered was identified to them by the land lady as belonging to Ann Kendi. Ann Kendi was arrested few metres from that house. Gitonga corroborated that evidence that it was the land lady who stated that the house was rented by Ann Kendi.

32. The affidavit sworn on 11th March 2016 and filed in this matter on the same day sworn by Grace Kanini Mutungi is a basis on which that the petitioner raised the third issue identified above. The petitioner contends that had the evidence of that affidavit been brought before the trial court he would not have been convicted.

33. Kanini deponed in her affidavit that she was on 8th October 2010 the care taker of the plot when the subject house was rented by Ann Kendi. At 9.00am she saw 2 officers arrive at the plot and they proceeded to ask her of the identity of the person who had rented the subject house. She informed them that the house was rented by Ann Kendi. The police broke the padlock to the house in Kanini's presence and once inside the house that they recovered all the items that were listed in the OB which included the two DVDs and some remote controls. It is Kanini's testimony through that affidavit that the officers took those items to their vehicle and asked Kanini to accompany them which she did. Kanini deponed that in the police vehicle she saw two men under arrest whom she gathered from the policemen's conversation through the telephone that they were called James and Jacob. She also deponed that she gathered from that telephone conversation that the police officer was informing someone that they had recovered the items from the subject house which included DVD and remote control. She stated that she was informed by the police officer that they would return to take her statement in respect to this matter. She however said in her affidavit that she was never summoned to record a statement and nor did she testify in the case involving the items recovered from the subject house. She reiterated in her affidavit that all the items recorded in the OB were recovered from the subject house. She was certain about that because she deponed that she assisted the police to carry these items to the vehicle.

34. I have considered the entire affidavit of Kanini. It was sworn in the year 2016. She was employed as a care taker at the plot where the recovery was done but she left that employment in the year 2012. It is in my view incredible that almost 6 years later she is able to recall the exact items removed from that house. It does however seem that due to passage of time she made an error in stating that both DVDs were of Sony make. That is not supported by the prosecution evidence in particular in respect to PW 4. PW 4 said that his DVD was of D make. Kanini also made an error in listing the number of pangas and swords recovered from the house. The OB records them to be 4 in number. One wonders if such errors were made by Kanini where she did not even mention the locally assembled instrument that made noise what other errors were made by her. She could therefore be genuinely mistaken that the DVDs were recovered from the house when in fact she may have seen them in the police vehicle not knowing that the petitioner had been arrested earlier with them. Certainly the affidavit evidence of Kanini does not reveal compelling evidence to warrant an order for retrial. The caution referred to in the case decided by Justice Mulwa comes to play in considering the affidavit evidence of Kanini. The judge referring to a Court of

Appeal decision stated and that it is easy for a party who has lost a case to see the weak parts of the case and therefore be tempted to procure evidence which will strengthen the weak parts.

35. Above all in my view the OB does not reflect the correct date of the series of robberies. The date reflected in the OB as the date of those robberies is 7th September 2010. It is however clear from the prosecution's evidence, the various counts the petitioner faced and even the petitioner's defence that the series of robberies occurred on 7th of October 2010. With that error reflected in the OB one is left wondering whether that OB is indeed the one that recorded the events that led to the arrest of the petitioner or whether it related to another event altogether. It is difficult to pin that OB to the arrest of the petitioner and the recovery of the stolen goods because no names were mentioned in the OB of the suspects who were arrested.

36. As correctly submitted by the learned principal prosecuting counsel Mr. Tanui, the evidence about the OB was not new. It seems to have been in possession of the petitioner when this matter was before the court of appeal. This is what is reflected in the judgment of the court of appeal:-

“Miss Mwai learned counsel of the appellant (petitioner), submitted that the two lower courts erred in invoking the doctrine of recent possession to convict the appellant. She argued that the extract of the occurrence book before the court indicated that the suspects were arrested in the house where the stolen goods were recovered. However the evidence on record is that the appellant (petitioner) was arrested on the street and not in the house. According to her (Miss Mwai) the appellant (Petitioner) was not found in possession of any of the stolen items. She urged us to allow the appeal”.

37. That quote from the judgment of the Court of Appeal proved that the evidence of the OB was not new to the petitioner at all. If that evidence was available before the court of appeal as it seem to have been the petitioner should have invoked **Rule 29** of the **Court of Appeal Rules** to have that evidence admitted as additional evidence to his appeal. That is the evidence relating to the OB. To appreciate the power to receive fresh evidence before the court of appeal I will reproduce Rule 29 as follows:

“Rule 29:

(1) On any appeal from a decision of a superior court acting in the exercise of it's original jurisdiction, the court shall have power:-

(a) To re-appraise the evidence and to draw inferences of fact; and

(b) In its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.

(2) When additional evidence is taken by the court, it may be oral or by affidavit and the court may allow the cross-examination or any deponent.

(3) When additional evidence is taken by the trial court, it shall certify such evidence to the court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the court, without any such statements of opinion.

(4) The parties to the appeal shall be entitled to be present when such additional evidence is taken, but such evidence shall not be taken in the presence of assessors.”

38. The final comment I wish to make from the OB presented by the petitioner is that that OB has various grammar and spelling mistakes. For example the word **“resources”** is used when infact reading the sentence the correct word should have been **“sources”**. The English language in that OB is also wanting. For example in the OB it is recorded **“action taken prisoner in exhibit recorded”** that sentence does not communicate anything meaningful. The errors in that OB goes to support my earlier holding that what is

of greater probative value is the evidence tendered under oath.

40. In the end it is my view that the petitioners prayer for new trial must and does fail. It failed to meet the threshold of Article 50(6)(a) and (b) of the constitution. **This matter is dismissed with no orders as to costs.**

DATED AND DELIVERED THIS 9TH DAY OF NOVEMBER 2016.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Petitioner:

For Petitioner:

For Respondent:

COURT

Judgment read in open court.

MARY KASANGO

JUDGE