REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSOLIDATED MISCELLANEOUS CRIMINAL APPLICATIONS

NOS. 12, 14 & 15 OF 2011

MICHAEL MWANGI KAMAU....................................1ST PETITIONER

DAVID IBARE..2ND PETITIONER

PETER GIKONYO NYOIKE....................................3RD PETITIONER

VERSUS

REPUBLIC..RESPONDENT

JUDGMENT

1. The petitioners pray for a new trial. On 14th March 2002, the petitioners were convicted for robbery with violence by the Principal Magistrates Court, Eldoret, in criminal case number 3513 of 1999. They were sentenced to suffer death. Their appeals to the High Court were dismissed on 23rd January 2003. The petitioners lodged further appeals to the Court of Appeal. They were equally dismissed on 23rd September 2005.

2. The petitioners filed separate but identical *amended petitions* dated 21st September 2011. Except for the names of the petitioners, all the three petitions and depositions are similar; word for word. On 10th November 2011, all the petitions were consolidated. On 26th February 2014, the Court directed that Michael Mwangi Kamau shall be the 1st Petitioner, David Ibare the 2nd petitioner while Peter Gikonyo Nyoike would be the 3rd petitioner.

3. The *amended petitions* are predicated upon Article 50 (6) of the Constitution of Kenya 2010. The primary grounds can be condensed into five: first, that the petitioners were convicted largely on the basis of an inadmissible confession. The petitioners contend that amendments to the Evidence Act outlawed such confessions; and, in any case, that the confessions were at variance with the charge. Secondly, the petitioners aver that the prosecution was conducted by an unqualified prosecutor contrary to section 85 of the Criminal Procedure Code. Thirdly, the petitioners contend that their identification parades were flawed. Fourthly, the jurisdiction of the trial Magistrate to take a capital plea is challenged under section 7 of the Criminal Procedure Code. Lastly, the petitioners claim that they were held in police custody for more than fourteen days in contravention of section 72 of the repealed Constitution of Kenya.

4. Those matters are buttressed by depositions of the petitioners all sworn on 21st September 2011. I will

set out at length paragraphs 2 to 12 of the affidavit of Peter Gikonyo Nyoike which is a mirror image of the other affidavits by his co-petitioners-

> *"2. That I was arrested on 26th August 1999 according to the charge sheet.*
>
> *3. That I was arraigned in court on 10th September 1999 where I was jointly charged with David Ibare and Michael Mwangi Kamau with the offences of robbery with violence and being in possession of a fire arm without a fire arm certificate contrary to sections 96(2) of the Panel Code, Cap 63 and section 4(1) (a) of the Fire arms Act.*
>
> *4. That my incarceration at the police station exceeded the 14 days constitutional limitation set by then under Section 72 of the constitution.*
>
> *5. That this issue has not been considered by the courts hence it is a new and compelling reason for consideration.*
>
> *6. That the prosecution in the lower court was conducted by Police Constable Mwangi at page 10 of the lower court's proceedings hence it is clear that the trial violated the provisions of section 85 of the Criminal Procedure Code as [he] was below the rank of an Assistant Inspector of Police.*
>
> *7. That the plea was taken by the Resident Magistrate on 10.9.1999 without jurisdiction.*
>
> *8. That the court admitted [the] confession evidence and convicted on the same while the provisions of section 31 of the Evidence Act, Cap. 80 had been repealed by Act No. 5 of 2003; this denied me the opportunity to have the best advantage of legal system in my trial and the law.*
>
> *9. That the confession was irregular and inadmissible as the caution allegedly administered values the allegedly stolen property at Kshs 1,300,000 in count No 1 while the charge that was eventually tired by the court values the property at Kshs 5,500 in Cont 1 and does not mention the theft of the lorry KRZ 530.*
>
> *10. That the caution in the confession is administered in English without a translation while the alleged confession is made in Swahili language.*
>
> *11. That the identification parades could not be carried unless the complainant has given a description of the assailants to the police at the time of reporting.*
>
> *12. That Force Standing Order regulations (6iv) (a) was violated as the opportunity to have a friend or solicitor was denied and/or not informed about."*

5. Learned counsel for the petitioners submitted that section 31 of the Evidence Act was amended by Act 5 of 2003. By virtue of the amendment, the petitioners averred at paragraph 8 of their depositions, the impugned confession was inadmissible. Learned counsel also submitted that the plea was taken by a Resident Magistrate who lacked jurisdiction. Learned counsel's opinion was that those matters were *never* urged before the three courts that dealt with the case; and, that accordingly, they now constitute *new or compelling* evidence. I was thus implored to find there was a mistrial and to order a fresh trial.

6. The petition is contested by the respondent. It is contended that there is no new or compelling evidence to warrant a fresh trial; that the petition is a disguised appeal; and, that the petitioners had a full opportunity in any of the three courts to mount some or all the arguments now presented to this court. It was submitted that the petitioners were indolent and slept on their rights; and, that there is no proper foundation for the declarations sought in the petition. In a synopsis, the case for the State is that it did not violate the rights of the petitioners. The State prays that the consolidated petitions be dismissed.

7. I have considered the *amended petitions*, the respective depositions and rival submissions. The petitions are anchored on Article 50(6) of the Constitution of Kenya 2010. To succeed under that head,

the petitioners must demonstrate two matters: that their *appeals* against conviction have been dismissed by the *highest court*; and, that *new and compelling evidence* has become available. The reason is self-evident: Article 50(6) is not an avenue for a further or non-existent appeal. See *Mohamed Abdulrahman Said and another v Republic*, Mombasa, High Court Misc. Criminal Appl. 66A & 66B of 2011 [2012] eKLR, *Rodgers Ondiek Nyakundi v State* Kisii, High Court Criminal Appeal 135 of 2006 [2012] eKLR.

8. In *Mohamed Abdulrahman Said and another v Republic* (supra), Odero and Nzioka JJ dealt at length with the meaning of *new* and *compelling* evidence. The learned judges stated as follows-

> *"In our understanding therefore, 'new' evidence must mean evidence that is recent in origin, has recently been discovered and was not known or available at the time of trial or at the time of hearing of the first two appeals.*
>
> *"Aside from the requirement that the additional evidence be 'new' Article 50(6)(b) also requires that such evidence be 'compelling'. Once again we will turn to the Concise Oxford Dictionary 9th Edition where the ordinary English meaning of the term compelling is given as "rousing strong interest, attention, conviction or admiration.*
>
> *"Thus, this evidence must be very strong and convincing evidence – evidence which may possibly persuade a court of law to reach an entirely different decision………."*

9. In the instant case, the petitioners have exhausted their rights of appeal to the Court of Appeal. It is not clear whether the doors of the highest court in our land, the Supreme Court, have closed shut. But on the face of it, the ordinary rights to a criminal appeal under the repealed Constitution have all been exploited.

10. The key question for determination is whether the petitioners have obtained *new and compelling evidence*. The answer is in the *negative*. What the three petitioners are saying is that they have brand new *legal points* that they never *argued* in any of the three courts. I would start with his incarceration by the police in excess of fourteen days. That matter cannot by any stretch of imagination constitute new or compelling evidence. Furthermore the remedy for violation of section 72 of the repealed Constitution is not an acquittal: it lies in a civil action for damages. Section 31 of the Evidence Act was amended way back in the year 2003 by dint of Act 5 of 2003. On 14th March 2002, the petitioners were convicted for robbery with violence by the Principal Magistrates Court, Eldoret. Their appeals to the High Court were dismissed on 23rd January 2003. Clearly, the amendments to the Evidence Act had not taken effect. It would be to turn logic onto its head to say the trial court disregarded the Act in admitting the confession. The petitioners did not raise the matter of jurisdiction of the Resident Magistrate or the competence of the police prosecutor in their appeals to the High Court or the Court of Appeal. The same can be said of the belated arguments about the veracity of the evidence from the police identification parades.

11. The petitioners' plea for a new trial must thus be treated with utmost *caution*. The need for *caution* was well expressed in *Rodgers Ondiek Nyakundi v State* Kisii, High Court Criminal Appeal 135 of 2006 [2012] eKLR. The Court cited with approval the decision in *Rose Kaiza v Angelo Mpanju Kaiza* Mombasa, Court of Appeal, Civil Appeal 225 of 2008 (unreported). See also *Wilson Thirimba Mwangi v DPP* [2012] eKLR. In *Mulla on the Code of Civil Procedure* volume 4 page 4115, at paragraph 13, the following passage dealing with review in civil actions appears-

> *" Applications on this ground must be treated with great caution……..Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."*

12. I am afraid the petitioners have not established that they have *new* and *compelling* evidence. The

consolidated petitions are a *disguised* further *appeal* against their conviction and sentence. When I interrogate the entire petition, the petitioners' motivation seems to be to re-open the criminal trial at all costs. The supporting depositions do not rise to the threshold of new and compelling evidence *which was not available or within the knowledge of the petitioners when their trial at the Magistrates Court was held or their subsequent appeals to the High Court and Court of Appeal were heard.*

13. I am not persuaded that the averments in paragraphs 2 to 11 of the respective supporting depositions disclose that the petitioners were denied a fair trial; or, that new and compelling evidence has surfaced that would have led the Principal Magistrates Court, the High Court or the Court of Appeal to reach a dramatically different conclusion. I am thus *unable* to hold that the proceedings amounted to a *mistrial*.

14. In the end, the petitioners have not met the legal threshold of Article 50(6) of the Constitution of Kenya 2010. It follows as a corollary that the Court cannot order a new trial. The upshot is that the three consolidated petitions are hereby dismissed. In the interests of justice, I will make no orders on costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 7th day of May 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Ms. Kosgey for Mr. Kigamwa for all the petitioners instructed by Wambua Kigamwa & Company Advocates (The 2nd and 3rd petitioners present; the 1st petitioner absent).

Ms. Karanja for the respondent instructed by the Office of the Director of Public Prosecutions.

Mr. J. Kemboi, Court clerk.