REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL PETITION NUMBER 1 OF 2014

GEOFFEY MWANGI GITHINJI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nakuru (Maraga and Emukule JJ) dated 6th May 2010

JUDGMENT

1. **Geoffrey Mwangi Githinji** was charged with the offence of Robbery with Violence Contrary to **Section 296(2)of Penal Code** and in the alternative handling stolen property contrary to **Section 322 of the Penal Code** in the Chief Magistrate's Court at Nakuru in **Case No. 3655 of 2009**. He was convicted and sentenced to life imprisonment. He lodged an appeal against both conviction and sentence in the **Nakuru High Court** vide **Criminal Appeal No.323 of 2010.** It was heard on the 6th May and 2013 was dismissed. He preferred a second appeal vide **Criminal Appeal No.639 of 2010** but on the 15th November 2013 the appeal was once again dismissed.

2. **Article 50(6)** of the Kenya Constitution provides that:

"(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 with the time allowed for appeal.

(b) And new and compelling evidence has become available."

3. In his petition dated 1st July 2014 and supported by his sworn affidavit and filed on the 10th July 2014, **the petitioner seeks an order for a new trial in Nakuru Chief Magistrate's Court in Criminal Case Number 3655 of 2009.** He raises the following grounds in support:

(1) that after the dismissal of this appeal by the Court of Appeal,

(2) that he discovered important material that is relevant to the case, which was not available to him during the primary hearing and the appeal stage

(3) that he believes that if the new evidence was availed to the court, it could have influenced the outcome of the trial. **It is stated that the new and compelling evidence is**

contained in Nakuru Police Station OB 47 of **7th July 2009, OB 14 of 13th July 2014, and Eldoret Police Station OB 54 of 15th June 2009** and evidence recorded in court in respect of the said **OB** entries.

4. **OB 47 of 7th June 2009** at Nakuru Police Station indicated that the petitioner was booked to be charged with the offence of robbery with violence. No other detail as to how or what was the subject and victim of the robbery. The complainant was not shown.

In **OB 14 of 13th July 2014,** it is indicated that the Petitioner and another, Jacob Chege were being taken to court without complain.

The complainant was one Mark Kiprotich Kibor.

5. In his testimony in chief, the complainant Mark Kiprotich Kibor, PW1, testified, on the 14th August 2009 that at about 2.30 pm at Ngata Bridge – along the Eldoret Nakuru road, he was violently robbed of his motor **Registration Number KAL 758J Datsun PickUp** and a mobile phone and Kshs.15,000/= and thereafter on the same day reported the incident at the Nakuru police station, and he went back to Eldoret where he had come from. On cross examination he stated that the **incident took place at 2.30 p.m. on 15th June 2009**.

He never testified that he reported the same incident at Eldoret police station.

An officer from Eldoret police Station one P.C Kennedy Obiti Force No.83290 testified that in July 2009 he received information that somebody had been robbed of his vehicle at Ngata Bridge and he arrested the Petitioner on the 7th July 2009 at the Nakuru Police Station. He did not disclose to the court that the incident had also been booked at the Eldoret Police Station under **OB 54 of 15th June 2009** at **2.00p.m**. by the complainant Mark Kiprotich Kibor.

This OB 54 of of 15th June 2009 shows that at 1.20p.m, the above complainant reported that he was at Housing Finance Corporation of Kenya(HFCK) Bank at Eldoret and had parked his Nissan PickUp Registration Number **KAL 758J** outside and when he came out, he found the vehicle missing. He then reported the incident at the Eldoret Police Station and the entry was recorded at 2.00p.m.

6. On the 21st May 2015 Police Officer PC No. 85185, Stephen Mbiti stationed at Eldoret Police Station attended this court and produced **OB No 54 of 15th June 2009.** He stated that there was **a report of theft of a motor vehicle made by Mark Kiprotich Kibor** the complainant in the **Nakuru Chief Magistrate's Criminal** case **No.3655 of 2009.** Before this court, the said officer produced an extract from the occurrence book to prove the same. He stated that the report was made at 2.00p.m., the vehicle having been found missing at 1.20p.m. This is at Eldoret Police Station.

At this point, it is instructive to mention that the said **OB No 54 15th June 2009** was not mentioned anywhere or produced by the prosecution and/or the complainant during the trial at Nakuru. Indeed the Director of Public Prosecutions (DPP) representative, Ms Rugut had no questions to put to the above police officer.

7. Mr. Maragia Advocate appearing for the petitioner urged the court that the new evidence as contained in OB 54 of 15th June 2009 at Eldoret police Station was withheld by the prosecution during the trial and that there was no way, even after exercising due diligence would the petitioner have had knowledge of the same, the alleged offence having been committed at Nakuru Ngata Bridge, and all proceedings thereafter having taken place at the Nakuru police station and the Chief Magistrate's court.

8. It is the petitioner's contention that given the facts as evidenced by the three Occurrence book(OB) entries and extracts it would not have been possible for the complainant to be at Ngata Bridge, the place of the alleged robbery with violence at 2.30p.m, well over 150 kilometres from Eldoret police station where it was shown he reported at 2.00p.m, unless he flew, which he did not.

Further, it could not have been possible to have the subject motor vehicle having been stolen, in the absence of the driver, the complainant, at 1.20p.m. at Eldoret and released after police investigations, and to be violently stolen again at 2.30pm at Ngata bridge, on the same day, a distance of over 150 KMs as aforestated.

9. The petitioner has urged that this piece of new evidence of the OB 54 of 15th June 2009 is very relevant and proves that the charges preferred against the Petitioner were fabricated. It is his assertion that the petitioner, if he had knowledge of this new evidence he would not have let go as it would, if produced then, produced a different verdict by the trial court and the appeal courts thereafter.

He further contends that in view of the **OB No 54 of 15th June 2009** whose contents have not been disputed or controverted, then, there was no robbery with violence of the complainants motor vehicle by the petitioner or anybody else. That being the case then, it is urged that the prosecution's case in the trial court ought to be disregarded completely.

10. In the above circumstances, it is submitted that the petitioner should, in the worst scenario, have been charged with the offence of theft of the vehicle at Ngata Bridge, and not with, robbery with violence as the circumstances do no add up. It is due to the above that the Petitioner prays for an order for a new trial where the new evidence may be presented to the trial court for its evaluation.

11. In response to the petition, the office of the Director of Prosecutions(DPP) stated that there is no new evidence as the existence of **Ob 54 of 15th June 2009** was in his knowledge all through and that being represented by counsel, due diligence would have been done to produce the new evidence. Ms. Rugut for the DPP stated that even if the court allows a new trial, the verdict would be the same. No elaboration or demonstration was offered. She urged the court to dismiss the petition.

12. The court has considered the petition, the supporting affidavit, evidence tendered in court, all the OB extracts tendered during the trial, and submissions by counsel.

The main issue for this courts determination is whether evidence contained in police **OB No. 54 of 15th June 2009** at the Eldoret Police Station amounts to **NEW** and **compelling evidence** to warrant and persuade this court to order a retrial.

13. **Article 50(6) (a) of the Constitution 2010** – as quoted above, gives a right a convict to petition for a new trial after the persons appeal has been dismissed by the highest court or after time for appealing has lapsed.

Article 35(1) entitles every citizen the right of access to information from the state, while **Article 35(1) (b)** entitles a citizen to information held by another person and required for the exercise or protection of any right or fundamental freedom.

See **Wilson Thirimba Mwangi – vs- DPP KLR Judicial Review Miscl**. A**pplication No. 271 of 2011-**

The Petitioner was not in a position to have had knowledge of the report by the complainant at the Eldoret Police Station, as he had already been arrested and placed in custody at Nakuru police

station.

14. As stated above, all alleged activities, the theft, use of violence and prosecution and court hearings all took place at Nakuru. The state (DPP) withheld that very crucial information that another report had been made by the complainant at Eldoret Police Station, of theft of the said motor vehicle, and not Robbery with violence as reported at the Nakuru police station. All these is alleged to have taken place in a span of 1hour, and a distance of over 150 Kilometres apart.

Having considered the proceedings before the trial court, I must state that there is, in view of the new evidence, reasonable doubt as to the conviction and eventual sentence of the petitioner to life imprisonment for the offence of Robbery with Violence Contrary to **Section 292(2) of the Penal Code.**

15. 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 observed

> ***"where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of 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 pa*rt in adducing all possible evidence at the hearing."**

For a party to take advantage of **Article 50** of the **Constitution**, it must understand that this right is not an avenue to a further appeal as the court has no jurisdiction to consider and determine matters already adjudicated upon by the Court of Appeal as in the case in this matter. It is limited to the court to test whether the said new and compelling evidence could not have been available to the petitioner at the time of trial and even appeal with exercise of utmost and due deligence. The only duty that this court has to fulfil is to see whether there is any new and compelling evidence to warrant an order for retrial. So has the petitioner presented the "new and compelling evidence" for consideration by the court?

16. The alleged new and compelling evidence in this matter was placed before me on the 21st May 2015 by production OB NO. 54 of 15th June 2009 by an officer from Eldoret Police station, one P.C Stephen Mbiti, No. 85185. As earlier stated, the DPP representative had no questions to the said officer.

In the case **Rodgers Ondiek Nyakundi & 2 Others – vs- Republic High** court at **Kisii Criminal Appeal No. 135 of 2006,** it was held that the burden of satisfying the conditions of **Article 50 (6) of the Constitution** lies on the applicant who must show that:

> (a) There is new evidence which must not have been available to him during the trial, and that evidence could not have been obtained with reasonable diligence for use at the trial or at the time of hearing of the two appeals
>
> (b) That the evidence is compelling, is admissible and credible and not merely corroborative, cumulative collateral or impeaching.
>
> (c) Such evidence must not only be favourable to the applicant but it must be such evidence as is likely to persuade the court to reach an entirely different decision from the decision already reached by the two appellate Courts.

17. This court has already addressed itself as to condition (a) above and found that the petitioner despite reasonable deligence was not able to obtain the new evidence at the time of his trial and at hearing of the two appeals.

On condition (b), is the new evidence compelling, credible and admissible? The said evidence presents to me as being credible, compelling and admissible. For avoidance of doubt, the said evidence vide **OB 54 of 15th June 2009** was a report of theft of the subject motor vehicle by the complainant. He found it fit not to disclose to the court that he had made a report of a different commission of an alleged offence, theft of his motor vehicle at Eldoret while he was at the HFCK Bank at 2.00p.m. He opted to make another report at Nakuru Police station of Robbery with violence of the same motor vehicle, same day at 2.30 p.m. at Ngata Bridge.

Both reports were duly entered in the Occurrence Books (OB) in both stations. I want to believe that the complainant did not disclose the report of the alleged theft of the motor vehicle at Eldoret to the police station at Nakuru because if such was disclosed, it would then amount to gross miscarriage of Justice upon the petitioner. It is my further finding that had the two reports at Eldoret and Nakuru, and the OB extracts been produced in the trial court and for consideration by the Court of Appeal, a different verdict would have been arrived at by both the trial court and the appellate Courts.

18. Robbery with violence contrary to **Section 296(2) of the Penal Code** attracts completely different and severe sentence as opposed to a charge of theft of a motor vehicle.

In light of the above, this court is persuaded that the petition is merited as is allowed. Regard goes to the petitioners Advocates, Mr. Maragia of Maragia & Company Advocates who supplied numerous decisions to ease the courts work. I have read through all of them and considered others.

On the contrary, the office of the DPP in my view in regard to its very shallow oral submissions, fell short of conceeding to the petition. That as it may be, I shall allow the petition dated 1st July 2014 and make an order of a new trial in respect of the petitioner in Nakuru Chief Magistrate Court **Criminal Case No. 3655 of 2009,** before a different **Chief Magistrate.**

19. Having made such finding, should this then lead to a complete new trial, by re-opening of the prosecution case all together?

I have looked at the proceedings in the trial court during the year 2009, from June to November 2009. Seven prosecution witnesses testified, 5(five) of them were police officers from various police stations. Under **Section 134** of the **Evidence Act, Chapter 80 Laws of Kenya**, their evidence may be adopted by the court should their attendance in court prove to be difficult, which should not be the case if such officers are still in service or by consent of the defence and the prosecution.

20. As to the production of the new evidence, the petitioner shall be at liberty to produce the New evidence contained in:

(a) OB NO. 54 of 20th June 2009

(b) OB NO. 47 of 7th July 2009

(c) OB No.14 of 13th July 2009

(d) Evidence taken in court on 6th November 2014 in respect of (a) and (b) above

(e) Evidence taken in court in respect of (a) above on the 21st May 2015.

The Petitioner shall be at liberty to recall any of the prosecution witnesses in respect of the new evidence for cross examination, and also use the same in his defence.

I shall leave the mode of retrial to the directions of the trial court, the Chief Magistrates Court at Nakuru.

Dated, signed and delivered in open court this 3rd day of November 2015.

JANET MULWA

JUDGE