REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

PETITION NO.53 OF 2014

ERNEST OTIENO KEYA

SULEIMAN OSUNDWA.....PETITIONERS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

By a petition dated 17th June, 2014, Ernest Otieno Keya, (the petitioner) has petitioned this court for the following reliefs:-

> *1 That the Honourable Court be pleased to order a re-trial of the accused on account of there being now (sic) and compelling evidence that has become available as contemplated by Article 50(6) (b) of the Constitution of Kenya.*
>
> *2. That this honourable Court do make any other orders that may meet the ends of justice.*

The petition is grounded on the facts appearing on the face of the petition namely – that the complainant has confessed that he does not know who robbed him and that he would in any event like to forgive and withdraw the complaint against the petitioner and that this is emergency new and compelling evidence that would necessitate a retrial.

The petition is supported by two affidavits, one by the petitioner sworn on 17th June, 2014 and another by one Reuben Shamala also sworn on even date. The Petitioner has stated in his affidavit that he was tried and convicted in the Senior Resident Magistrate's Court at Mumias in *Criminal Case No.834 of 2004* for the offence of robbery with violence and on appeal to the High Court, the conviction and sentence were upheld despite the fact that he has always maintained his innocence. The petitioner says that he recently got information that the complainant had confessed that he did not know the identity of the people who robbed him and that the petitioner may have not been one of them and further that circumstances prevailing then, may have not been condusive for a proper identification.

In the second affidavit, Reuben Shamala says that he was attacked on 6th July 2004 and several days later he mentioned the petitioner herein as one of the people who had attacked him. He deposes that after a period of reflection he is no longer positive about the identity of the petitioner/applicant. He therefore wishes that this matter be revisited afresh and an order made for release of the petitioner from prison.

Counsel for the petitioner filed written submissions dated 23rd September, 2015, and filed in court on the same day. The matter was then fixed for hearing on 29th September, 2015, and on the hearing day, *Miss Akinyi*, learned counsel for the petitioner appeared in court and addressed the court on the petition. Counsel highlighted the written submissions urging that there is new and compelling evidence to warrant a re-trial of the petitioner. According to the submissions, the petitioner was tried, convicted and sentenced in *Criminal Case No. 834 of 2004*. He appealed to the High Court in *Criminal Appeal No.55 of 2005* which was dismissed on 4th June, 2008 and then to the Court of Appeal in *Criminal Appeal No.410 of 2010* which was also dismissed. Learned counsel submitted that the new and compelling evidence is captured at paragraphs 3,4 and 7 of the affidavit of Reuben Shamalla to show that there was need to revisit the matter because of new and compelling evidence in terms of *Article 50(6)(b)* of the Constitution.

Mr Oroni, learned State prosecutor, opposed the petition saying that the deponent (complainant) was not in court and for that reason, the court could not ascertain whether or not it was him who had sworn the affidavit in support of the petitioner's petition. Learned prosecutor distinguished the present case with that of *Hassan Mohhamed Namwiba, Petition No.12 of 2014,* saying that in that case the complainant was in court and confirmed that he had sworn the affidavit.

I have carefully considered this petition, the affidavits in support thereof and submissions by counsel. I have also taken into account the decision cited by counsel for the petitioner.

The petitioner was charged with and tried for the offence of robbery with violence before Senior Resident Magistrate court at Mumias. The petitioner with another accused person had been charged with robbery with violence whose particulars were that on 6th July, 2004 at Shianda Market in Butere-Mumias District within the Western Province, jointly with others not before court while armed with a dangerous weapon, namely a pistol, robbed Reuben Shamalla of Kshs.22,407, and at, or immediately after the time of such robbery, wounded Reuben Shamalla.

The complainant testified and told the court that he was attacked by the petitioner who was from the same locality with him and therefore familiar. This information had been revealed to the complainant's brother by the complainant after two days in hospital. The complainant had said that he had recognised the assailants during the attack. Another witness PW2 *Ismail Makokha* also a robbery victim testified that at about 8.30 p.m. on the same day, he saw people walk into his shop, one asked for paraffin while three others asked for cigarettes. He knew the petitioner. He was threatened with a gun and told that they would shoot him if he did not co-operate. He was robbed of goods valued at Khs.4,000/-. An identification parade was conducted by PW5 , *Inspector Ben Onyango* for the petitioner and the complainant positively identified him.

On the basis of that evidence together with that of other witnesses, the petitioner was convicted and sentenced to death. He appealed to this court but on 4th June, 2008, *N.R.O. Ombija* and *GMB Kariuki JJ,* dismissed the appeal. Although counsel for the petitioner submitted that the petitioner appealed to the Court of Appeal, I have not seen that decision but nonetheless they say the appeal to that court was equally dismissed which means the conviction was upheld and sentence affirmed. The petitioner therefore comes before this court under *Article 50(6)* of the Constitution seeking a retrial saying there is new and compelling evidence.

Article 50(6) provides as follows:-

"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 Constitution sets two conditions for a retrial to be ordered. First, there must have been conviction for a criminal offence and the petitioner must have either appealed to the highest court and his appeal dismissed or time for such appeal has lapsed. Second, there must be new and compelling evidence. From the record, the petitioner was convicted of the offence of robbery with violence. He appealed to the High Court and his appeal was dismissed. And although Counsel submitted that a subsequent appeal to the Court of Appeal was also dismissed I have not seen that judgment. That notwithstanding, this position satisfied the first condition under *Article 50(6)* of the Constitution.

The question I have to decide is whether the petitioner has satisfied the second requirement, that of "*new and compelling evidence*." The petitioner says that the complainant has revealed that he is not sure that the petitioner was the one who robbed him. He has deponed in his affidavit in support of the petition where relevant as follows:-

> "*paragraph 5 . That it was only recently that I got information that the complainant has a confession to make regarding the identity of the person who robbed him and that the circumstances prevailing then were not and could not lend itself to positive identification/recognition.*
>
> *Para 6. That the complainant indicates that I was not the one who robbed him.*
>
> *Para 7. That a retrial will clarify all the issues in this case.*
>
> *Para 8 .....*
>
> *Para 9. That the evidence of the complainant was not sufficiently corroborated*."

And what does the "*complainant*" say? In an affidavit by a person said to be *Reuben Shamalla,* sworn on 17th June 2014 the same day with that of the petitioner, he depones where relevant as follows:-

> "*Para 3. That I mentioned the name of the applicant herein some days after the incident from the information I had received while in hospital.*
>
> *Para 4. That after being shot I was traumatized and was admitted for a long term.*
>
> *Para 5. That after a period of reflection I am no longer positive about the identification of the applicant.*
>
> *Para 7. That I would wish that this matter be revisited a fresh and an order be made for his release from prison*."

It is on the basis of this that the petitioner has moved this court saying he has new and compelling evidence. New and compelling evidence has been defined by the Supreme Court in the case of *Tom Martins Kibisu vs Republic [2014] eKLR* as follows:-

> *"We are in agreement with the Court of Appeal that 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, and which, if adduced at the trial would probably have led to a different verdict." (emphasis provided)*

The petitioner herein relies on the affidavit said to be by the complainant who says he doubts whether the petitioner is one who robbed him. That is really what this petition is all about. And this is said to be after a long reflection. Is this "*new evidence*" and "*compelling evidence*" as contemplated by *Article 50(6),* of the Constitution and as defined by the Court of Appeal with approval of the Supreme Court? To my mind, this is not new and compelling evidence. The petitioner underwent a criminal trial and the complainant testified that he knew the petitioner and had recognised him for the simple reason that they were from the same locality. He also identified him during an identification parade. On the basis of this

evidence he was convicted. This evidence was also accepted on appeal. It appears that there is now a change of heart which cannot be in accord with the definition of "*new and compelling evidence*." *Article 50(6*) does not contemplate situations where after a criminal trial process leading to conviction upto the highest court has been concluded, change of heart or mind should lead to a new trial. Doubt is neither new evidence nor compelling evidence. It is not so material as to affect the original trial neither is it evidence that could not be available during trial despite due diligence.

The petitioner also says that there was no proper corroboration of the evidence against him. That again is a ground of appeal that the petitioner had an opportunity to pursue during his appeals and cannot at this stage be said to be new evidence, let alone, compelling evidence. The trial court and courts on appeal considered the totality of the evidence including that of identification and corroboration and concluded that the petitioner was properly identified and evidence against him corroborated. That is why his appeal failed, conviction upheld and sentence affirmed.

A petition under *Article 50(6)* is not about re-hearing of the appeal or re-evaluating evidence afresh. It is about some independent evidence that brings out a completely new dimension to the case such that a tribunal, properly directing its mind on that "*new evidence,*" would find itself legally obliged to re-open the case for a fresh trial. It is not and should never be about feelings, doubts or even thoughts of forgiving a petitioner, but evidence that compels the court to re-think the original position taken in the matter. In other words, A*rticle 50(6)* is intended to ensure that justice is done but not to aid release or forgiveness of a petitioner. In the words of the Supreme Court in *Tom Martins Kibisu* (supra):-

> *"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, committal trial process, the conviction entered or the sentence passed against the accused person."*

Taking into account the above legal position and after a careful examination of the whole matter, I have come to the inescapable conclusion that what is raised in this petition does not meet the threshold of new and compelling evidence in terms of *Article 50(6)* of the Constitution to warrant this court to order a re-trial. Consequently the petition dated 17th June 2014, is hereby dismissed.

Dated and delivered at Kakamega this 3rd December, 2015.

E.C. MWITA

JUDGE