THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 347 OF 2013

PETER MANSON OKEYO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner, **Peter Manson Okeyo Ouko**, (hereinafter the petitioner) was convicted and sentenced to death for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code** in **High Court Criminal Case No. 54 of 1999.** He lodged an appeal in the Court of Appeal, being **Court of Appeal Criminal Appeal No. 78 of 2002**. The Court of Appeal upheld his conviction. He is now an inmate at the Kamiti Main Prison.

2. The petitioner has now filed the present petition challenging the completeness and accuracy of the DNA evidence that was relied upon by the High Court and the Court of Appeal in reaching their decisions. He also seeks to enforce his constitutional right to access information under Article 35 (1) (a) of the Constitution.

The Petitioner's Case

3. The petitioner's case is contained in the Petition dated 4th July 2013; the affidavit in support sworn by the petitioner on the same date; his **Supplementary Motion for Post-conviction Forensic Testing and Access to Information** dated 19th August 2013 supported by his further affidavit sworn on 22nd August and his written submissions dated 23rd April 2014.

4. At the hearing of the petition and the Supplementary Notice of Motion, the petitioner, who was unrepresented, abandoned **Prayers 2** and **3** in the Original Motion and proceeded with prayer No. 1 and the prayers in the Supplementary Motion. The petitioner highlighted the written submissions dated 23rd April 2014 in so far as they touched on the subsisting prayers of the petition and the Supplementary Notice of Motion.

5. Prayer 1 of the Petition dated 23rd July 2013 seeks orders that he be granted ***"a Conservatory Order to be subjected to forensic DNA testing by both the Government Chemist as well as an independent***

forensic laboratory."

6. In the Supplementary Notice of Motion, the petitioner seeks orders, among others:

> ***1. That the following exhibits originally forwarded to the government Chemist by Buruburu Police station in connection with High Court Criminal Case no 54 of 1999 for testing, namely, the multi-coloured blood stained sweater of the deceased, the blood-stained mucoid material retrieved from the vagina of the deceased, the torn white under pant of the deceased, the blood of the deceased, the hair strand and the skin extracts from the blood stained finger nails be re-tested at both the Government Chemist and as an independent private forensic laboratory and the results so found be deposited with the court.***
>
> ***2. That true certified copies of all the laboratory analysis notes written at the time of the testing of the exhibits forwarded by Buruburu police station to the Government analyst regarding High Court Criminal Case no 54 of 1999 be provided to me. The petitioner and to the court for review of the same.***
>
> ***3. That true certified copies of all the documentation generated at the time of the analysis by Mr J.K Mungai, the Government Chemist, including true certified copies of the Test paper strips of the DNA (PW/HLDQA1) analysis alleged to have been used in the tests be provided to me, the petitioner.***
>
> ***4. That certified copies of all the post-modem examination photos taken at the City mortuary on 23/121998 in the case of Jennifer Wangari Macharia (deceased), be provided to me the petitioner.***
>
> ***5. That certified copies of all the scene of crime photos ref no CID/NA/SOC/VOL.6/47/99 dated 16/3/199 and taken on 19/12/1998 in the case of Jennifer Wangari Macharia (deceased), be provided to me, the petitioner.***

7. The petitioner has set out in his petition, his submissions and in his Supplemental Motion various arguments, some couched in the nature of prayers, which are captured hereunder.

8. The gist of the petitioner's case is that the trial court convicted him, and the appellate court upheld a conviction, that was based on DNA evidence that was inaccurate. It is his submission that the respondent, contrary to the law, purposefully, knowingly and willfully adduced incomplete and inaccurate DNA evidence in court; that there was deliberate manipulation by some members of the Buru Buru Police Station leading to acceptance by the court of evidence that the petitioner was linked to the crime in question; that the respondent provided selective information to the court, causing the court to reach a decision based on controverted and specious evidence. It is also his case that the respondent *"disingenuously crafted the case against (him) while in possession of and with knowledge that the laboratory raw notes and the Test Paper Strips of the DNA (PM/HLDQA1) analysis proved that the tests done were neither conclusive nor pointed to his guilt."*

9. The petitioner also challenges the rest of the evidence on the basis of which he was convicted, arguing, first, that the trial court was given inaccurate information in relation to the physical location of the scene of crime; that the prosecution witnesses fabricated evidence against him; and that the trial judge, Justice A. Etyang, having been removed, subsequent to his conviction, in the Ringera probe on corruption in the judiciary in October 2003, his conviction should not stand.

10. The petitioner contends that the decisions of both the High Court and the Court of Appeal were *non-sequiturs* as they ignored the dynamic fundamental law principle that the final decision of the court must be based on impartial and careful evaluation of evidence before it and not on extraneous factors, and that contrary to the judgment of the court, there is no evidence on record on the petitioner's DNA.

11. The petitioner further submits that the case against him was fabricated by an unnamed person who

was a "cousin of the deceased" in that the respondent failed to include in the committal bundle what the petitioner refers to as *"any reference to any previous similar case fabricated against one John Maina Wachira in the Makadara Law Courts in 1995 by the principal mover in this case."* He submits that this was because the respondents did not wish either the petitioner or the court to see what he refers to as "the long established pattern and well woven web of deceit" peculiar to this particular witness, which the petitioner asserts was a critical omission of exculpatory evidence that vindicates him.

12. The petitioner claims that there is evidence that was never disclosed, in the form of test paper strips that contain never-disclosed evidence showing that the prosecution witness, **PW29,** the government analyst, misrepresented the test results. He submits that it is not strange for a government analyst to give biased opinion, placing reliance for this submission on the decision from the United States in **R -vs- Ward 1993 96 Cr. App. R. 1.** It is his submission that this alleged misrepresentation invalidates or demonstrates the perjury of the testimony of all the primary government witnesses, thereby justifying the grant of the prayer that he seeks.

13. The petitioner has also relied on various decisions from the United States such as **Joshua Kezer Cause No. 08AC-CC00293 Missouri** and **Clarence Brandley Writ No. 9, 691-03 The Court of Criminal Appeals for the State of Texas** to advance his case with regard to the suppression of DNA tests and lab notes and the repercussions of not producing the same; and **United States -vs- Bagley, 473 U.S 667, 682, 105 S. Ct. 3375, 3383 (1985)** and **Kyles -vs- Whitley 514 U.S 419, 435, 115 S. Ct. 1555, 1566 (1995)** for the proposition that there was a reasonable probability that the outcome of the trial would have been different if the evidence had been disclosed.

14. The petitioner also submits that the respondent disregarded the then constitution and was guilty of material non-disclosure; and that the respondent should therefore be cited for misleading the court once the truth is established after granting the prayers that the petitioner is seeking.

15. The petitioner also submits that there is a real threat of contravention of the constitutional rights of other litigants in Kenya to free and fair trials should the decisions reached by the courts in his case, **Republic -vs- Peter Manson Okeyo Criminal Case No. 54 of 1999** and **Peter Manson Okeyo -vs- Republic Criminal Appeal No. 78 of 2002** be used in determining their cases. However, as he has abandoned this limb of his petition regarding the precedent value of the two decisions, I shall say no more about it.

16. The petitioner argues that his Petition is premised on **Articles 1(1), 2(1) 2(4), 3, 51(1), 258 (1), 48, 159 (2) (d), 165 (3) (b)**,**259** and **262** as read with **Clause 6** of the **Sixth Schedule**; that it is also premised on **Section 120, 70** and **89 (2)** of the **Evidence Act Cap 80 Laws of Kenya, section 231 (1) (2) (b)** and **3 (b)(2)** of the **Criminal Procedure Code; sections 297, 298, 299, 322 (1) (2)** of the **Criminal Procedure Code** as read with **section 174** of the **Evidence Act** as regards whether the role and decision of assessors at trial, even though not binding on the courts, is so miniscule as not to deserve even mention**.** On this he relies on the decision in **Adad Gababa Pap -vs- R Criminal Appeal No. 175 of 2008.** He further relies on the decisions in **R -vs- Ward 1993 1WLR 619 96 Cr App Rep 1 (1993) 2 ALL ER 577** Court of Appeal (Criminal Division) where the prosecution case was found to have almost completely been based on inaccurate scientific evidence and manipulation by some members of the West Yorkshire Police investigating team and in **Attorney General -vs- Lamplough 1878 3 Ex D 214** for the proposition that schedules are integral parts of statutes in which they appear and must be interpreted as such.

17. The petitioner also asks the court to be guided by the decision in **R -vs- Ann Maguire and Others 1991 94 Crim. Appeal R 133, Thomas Patrick Cholmondeley -vs- Rep** for the proposition that failure to disclose what is known or possessed and which ought to have been disclosed is an irregularity in the course of a trial; that the duty of disclosure is a continuing one, and therefore the failure to disclose is a material irregularity; as well as the decision in **Regina -vs- Richardson; Regina -vs- Armstrong, Regina -vs- Hill EWCA Crim.20 October 1989 (Guildford Four Case)** in which the unreliability of police evidence led to the quashing of the sentences imposed on the appellants.

18. It is his argument that **Article 25 (c) (d)** of the **Constitution,** which subsists from **Section 77** of the

former Constitution by virtue of **Clause 6** of the **Sixth Schedule,** is clear that there is no prescribed limitation either under **Section 84 (1)** in the **former Constitution** or **Article 23** of the **2010 Constitution** with regard to when one loses the right to pursue infringement of a fundamental right. He states that he has approached this court in its capacity as the superior court inferior in rank to the Court of Appeal having exhausted his rights of appeal up to the highest court; and that he has not approached this court in an appellate jurisdiction. On that premise, he urges the court to rule that this application is properly before the court, but that the rights are not to be availed under the former Constitution but under the current constitutional prescriptions.

19. The petitioner avers that the process leading to the collection of any exhibit used by the respondent or his agents for purposes of use in trial is based on the law and anything done outside the ambit of the law is, to the extent that it does not comply with any established law or procedure, thereby null and void.

20. The petitioner further contends that there is very pertinent evidence which was suppressed by the learned appeal court judges in their judgment and which could be one of the factors that caused them considerable anxiety, thus rendering the repeated arguments and statements of the prosecution patently false. He argues that this is new and compelling evidence to move the court to grant the prayers sought; that in light of the emergence of this new evidence, it is imperative that he gets the true DNA results for the items he has listed since this new evidence shows that no real DNA tests were done by the respondent's agents as the results tabulated do not conform to established forensic DNA testing procedure and results formulation.

21. The petitioner relies on the decision in **R -vs- Doheny and Adams 1997 1 Cr. App. R. 369, CA** to emphasise the procedural importance of presentation and assessment of DNA test results and poses the question why the Court of Appeal did not find it wise to remit his case for a new trial upon its finding that the requisite standard of proof had not been established on a balance of probabilities on the question of the vital DNA evidence that had been adduced.

22. With regard to his constitutional right under **Article 35 (1) (a)** and **(b)** of the **Constitution**, the petitioner avers that the information he is seeking is all in the custody of the State and so the respondent should be obliged to provide it to him. He relies in this regard on the decisions in **Nelson O. Kadison -vs- The Advocates Complaints Commission and AG Pet No. 549 of 2013** and **Nairobi Law Monthly -vs- Kengen and 6 Others (2013) eKLR**. He further contends that the information he needs relates to the death of his wife and mother to his two children and availing the information sought would not harm any legitimate aim.

23. In response to the respondent's submissions, he avers that the failure to detect the evidence earlier was not due to lack of diligence for he attempted in vain to force the government to conduct impartial investigations. He relies in support of this submission on the decision in **United States -vs- Gutierrez 2007 WL 3026609, W.D Tex. 2007),** adding that since his case meets the standards set out in **Brady -vs- Maryland, 373 U.S 83(1963) and Berry -vs- State, 10 Ga. 511, 1851 WL 1405,** he should be offered a new trial. It is his contention that perjury, obstruction and discovery of hitherto suppressed evidence are in themselves, or collectively, sufficient and compelling grounds for the grant of a new trial, and he relies on the decision in **Conley -vs- United States 415 F. 3D 183, 193-94 (1st Cir. 2005)** and **United States -vs- Garland 991 F. 2d 328, 330 (6th Cir. 1993).** He states that the fifth test in **Berry** (supra) is satisfied by dint of the fact that the letter showing that there were specimens recovered at the scene and not subjected to DNA tests or tendered in evidence in court; and that the evidence of one Caroline Wangu Machua regarding being with the deceased at the material time if introduced at a new trial, cumulatively or standing alone, would produce an acquittal.

24. The petitioner asks the court to remit this case back to the High Court for a new trial under **Article 50 (6)** of the **Constitution** on the basis of the new and very compelling evidence adduced for this would satisfy the constitutional threshold of fair trial and also give all parties the opportunity to properly interrogate the findings that will have been realized by the new DNA tests.

The Respondent's Case

25. The respondent has filed Grounds of Opposition dated 24th September 2013 and written submissions dated 1st July 2014 on which Learned Counsel, Mr. Ashimosi, relied in presenting the respondent's case.

26. In the grounds of opposition, the respondent argues that the petitioner was afforded the opportunity to cross-examine all witnesses during his trial at the High Court in **Criminal Case No. 54 of 1999;** that the prosecution proved the case against him beyond reasonable doubt; and that his appeal to the Court of Appeal was dismissed. It is its case that the prosecution provided all material evidence to the petitioner at the time of the trial and there is no evidence to show that the petitioner was not accorded facilities to prepare for his defence. The respondent also argues that the alleged contravention of the petitioner's rights took place before the promulgation of the 2010 Constitution whose application is prospective and not retrospective, relying in this regard on the decision in **Dancan Otieno Waga -vs- The Hon. Attorney General 2011 eKLR** and **Charo Karisa Thoya -vs- Republic 2011 eKLR**

27. The respondent argues that it is not enough for the petitioner merely to state that his rights were violated without specifically stating the nature of violation or infringement of such rights. It submits further that for a re-trial under **Article 50 (6)** of the **Constitution**, the petitioner must prove that he has appealed to the highest court to which he is entitled, or that the time for filing an appeal or review has lapsed; and secondly, new and compelling evidence has been discovered.

28. It contends, first, that there is no new and compelling evidence as the petitioner has not demonstrated that the alleged evidence was not within his knowledge or could not be produced by him at the time of the trial or the appeal to the Court of Appeal; that he must also demonstrate that his appeal was dismissed by the highest appellate court in the land or that he did not appeal; or that new and compelling evidence which was not available during his trial has become available. The respondent submits that the highest court in the land is, as provided under **Article 162** of the **Constitution,** the Supreme Court, and the petitioner must show that his appeal went to the highest court in the land.

29. According to the respondent, **High Court Criminal Case No. 54 of 1999** was heard and determined on 24th May 2001, more than 12 years before the present petition, and the police records may have been destroyed, and the court cannot give orders in vain. The respondent further submits that the petitioner should show that new and compelling evidence has become available in order for **Article 50 (6)** of the **Constitution** to apply. It relies on the decisions in **Rose Kaiza -vs- Mpanju Kaiza 2009 eKLR, Ramathan Juma Abdalla and 2 Others -vs- Republic 2012 eKLR; Mzee Wanjie and 93 Others -vs- A.K Sakwa and 3 Others (1982-88) 1 Kar 465**, **James Mwangi Nganga -vs- Kenyatta University Council and Others Civil Appeal 200 eKLR** with regard to what amounts to new and compelling evidence and the principles to be followed by courts before which an application for review of a criminal trial is made.

30. It is its case further that the prosecution proved their case against the petitioner beyond any reasonable doubt and discharged its burden, a fact which was reaffirmed by the Court of Appeal. The petitioner was therefore accorded a fair hearing as provided by the Constitution, was convicted in accordance with the law, and this court cannot go against the decision of the superior court, relying on the decision of the court in **Rodgers Nyakundi and Others -vs- Republic Criminal Appeal No. 135 of 2006**.

31. With regard to the right of access to information under Article 35 (1) of the Constitution, the respondent submits that the information sought by the petitioner cannot be said to have been withheld without the petitioner having requested for it. The respondent relies on the decision in **Total Kenya and 9 Others -vs- The Director Criminal Investigation Department, the Commissioner of Police and 2 Others Petition No. 478 of 2012** and **Kenya Society for the Mentally Handicapped -vs- Attorney General, National Council for Persons with Disabilities and 4 Others Petition No. 155A of 2011** for the proposition that the rights under **Article 35 (1) (a)** of the **Constitution** is not self executing and that a petitioner must at least request for information before alleging that he or she has been denied access. The respondent therefore submits that this petition has no merit, is vexatious and an abuse of the court process, and should be dismissed with costs.

Determination

32. The petitioner has made lengthy but somewhat convoluted submissions on the alleged violation of his rights and the relief that he seeks from the court. A close examination of the submissions shows that the gravamen of the petitioner's grievance is that the evidence on the basis of which he was convicted in **Criminal Case No. 54 of 1999,** a conviction that was upheld by the court of Appeal, was insufficient.

33. In considering this matter, I must observe that there is some contradiction in the petitioner's submission on what he seeks from the court. At paragraph 7.2 of his written submissions in the section titled ***'applicability of Article 50(6)…",*** he submits that he has not made a prayer for a new trial in his pleadings. It is noteworthy, however, that at the very outset of his pleadings, he observes that his petition for post-conviction DNA testing emanates from the judgment of the Court of Appeal in Criminal Appeal No. 78 of 2002; and at paragraph 2.0 (iv), he states that there is new and compelling evidence to move the Court to grant the prayers that he is seeking. It is also worth observing that he was of the view, as expressed in his submissions, that the Court of Appeal should have ordered a new trial once it had doubts about the DNA evidence relied on, and that he also asks this court to remit the matter to the High Court for a new trial.

34. At any rate, the Constitution only gives the court power to re-open a matter in the circumstances provided under Article 50(6). Consequently, despite his assertion to the contrary, it is these provisions of the Constitution that will guide the determination of this matter.

35. From the summary of the submissions set out above, I believe that the issues that fall for determination are as follows:

> ***i. Whether the petitioner has met the threshold for ordering a new trial under Article 50 (6) of the Constitution.***
>
> ***ii. Whether there has been a violation of the petitioner's right to information under Article 35 (1) (a) of the Constitution.***

Whether the Petitioner has met the threshold for ordering a new trial under Article 50 (6) of the Constitution.

36. Article 50 of the **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 within the time allowed for appeal; and***
>
> ***(b) new and compelling evidence has become available.***

37. The issue of the circumstances in which the provisions of Article 50(6) will apply has been considered in several decisions of this court. In **Maurice Odhiambo Wesonga -vs- Republic High Court Petition No. 4 of 2013**, the court noted that:

> ***"…[6] A person who has been convicted and has exhausted all the appeals has the right, under Article 50(6) of the Constitution to seek a fresh trial by demonstrating that there is new and compelling evidence. This provision has been the subject of several decisions of the High Court among them; Ramadhan Juma Abdalla and 3 Others -vs- R Nairobi Petition No. 468 of 2012[2013]eKLR, Wilson Thirimba Mwangi -vs- Director of Public Prosecutions, Nairobi Petition No. 271 of 2011, [2012]eKLR, Mohamed Adbulrahman Said and Another -vs- Republic Mombasa Criminal Misc. Appl. Nos. 66A and 66B of 2011 (Unreported). The authorities demonstrate that in order for a petition under Article 50(6) of the Constitution to succeed, the petitioner must adduce new evidence in the sense that it must not have been available to the petitioner during the trial. It must be shown that the evidence could not have been obtained with***

reasonable diligence for use at the trial or was not available at the time of the hearing of the two appeals. Secondly, the evidence must be compelling meaning that it must be admissible, credible and not merely corroborative, cumulative, collateral or impeaching. It must be such that if it is considered in light of all the evidence, it must be such as to be favourable to the petitioner to the extent that it may possibly persuade a court of law to reach an entirely different decision than that already reached." (Emphasis added)

38. Similarly, in the case of **Patrick Macharia -vs- R Misc Crim App No. 14 of 2013** the court stated:

"…In order to invoke this court's jurisdiction under Article 50(6) of the Constitution 2010, the petitioner must demonstrate that;

a. His prayers were dismissed by the highest court of appeal in the land.

b. That new and compelling evidence has become available and which was not available at the time of his trial.

c. Alternatively the petitioner should show that he did not appeal in which case he must in addition demonstrated that there was new and compelling evidence had become available.

d. Further the Petitioner's case or appeal, whichever is applicable must have been concluded after the promulgation of the Constitution 2010.

…The procedure introduced under Article 50 (6) cannot be used to circumvent the due process of the law, or be used as a means of having a parallel appeal to the one prescribed under the Criminal Procedure Code. In regard to the new and compelling evidence, the question is whether the Petitioner has shown that the 'new' evidence was not available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of the hearing of the two appeals. The second test was for the Petitioner to show that the 'new' evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching. The evidence must be shown not only to be favourable to the Petitioner but likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts." (Emphasis added).

39. I fully agree with the principles enunciated by the court in the cases set out above. While the court in the case of **Patrick Macharia –vs- Republic (supra)** introduced the element of time with regard to the application of Article 50 (6) and states that the petitioner's case or appeal, whichever is applicable, must have been concluded after the promulgation of the Constitution 2010, this requirement has not prevented the court from considering matters in which the appeals or cases in question predated the new Constitution. This is so, for instance, in the case of **Ramadhan Juma Abdalla and Others -vs- Republic Petition No. 468 of 2012** where the petitioner's final appeal had been decided in 2007 and in **William Okungu Kitinya -vs- R Misc App. No. 58 of 2013** where the petitioner had been convicted in the year 2000 or thereabout and appealed to the Court of Appeal in 2004, the decision therein being rendered on 20th June 2008. In the present case, the petitioner was convicted in 2001 and the appeal was determined in 2005. In my view, therefore, should there be new and compelling evidence that meets the requirements set out in the **Patrick Macharia -vs- Republic** case**,** I am satisfied that the petitioner would be entitled to the application of Article 50 (6).

40. Does the petitioner qualify under the first test set under Article 50 (6)? He has appealed against his sentence to the Court of Appeal, and his appeal has been dismissed by the highest court to which he was entitled to appeal at the time of his conviction. The respondent argues that he has not appealed to the Supreme Court which, under Article 162, is the highest court in the hierarchy of courts in Kenya. However, Article 163(4) provides that:

(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).

41. Given that the petitioner's appeal was dismissed in 2005, for the Supreme Court to consider his appeal, it would need to be one in which the Court of Appeal or the Supreme Court has issued a certificate. The Supreme Court considered the question of appeals from the Court of Appeal in cases that had been concluded before the 2010 Constitution came into effect in the case of **Samuel Kamau Macharia & Anor -vs- Kenya Commercial Bank Ltd & 2 Others, Civil Application No. 2 of 2012.** It posed the question before it as follows:

"Notwithstanding the foregoing observations, we do not consider it necessary at this stage to order that the applicants go back to the Court of Appeal. This is due to the fact that before us, before us, there is a significant question regarding the appellate jurisdiction of this Court. The issue has been raised by the respondents. Can the Supreme Court entertain appeals from cases that had already been heard and determined by the Court of Appeal before this Court came into existence? Does the appellate jurisdiction of the Court stretch back to the time prior to the promulgation of the Constitution?"

42. The Supreme Court considered whether the Constitution conferred upon aggrieved parties a retrospective right of appeal from decisions of the Court of Appeal, which hitherto bore the stamp of finality in all matters, to the Supreme Court and concluded as follows:

"***Decisions of the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the judgments of that court. If this court were to allow appeals from cases that had been finalized by the Court of Appeal before the commencement of the Constitution of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens ….***

We hold that Article 163 (4) (b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court before the commencement of the Constitution".

43. In the circumstances, therefore, I am satisfied that the petitioner has met the first criteria set in Article 50(6) as he has exhausted the appeal mechanism open to him. The question, however, is whether he has met the second, and in my view, more critical criteria under Article 50(6).

Whether there is New and Compelling Evidence to Warrant a New Trial

44. The core of the petitioner's case is that the DNA evidence that was relied on to convict him was inaccurate. He therefore seeks orders for post-conviction DNA testing. The operative words in the Constitution are ***"new and compelling evidence"*** if a petitioner's case is to warrant a retrial. So what does the phrase ***"new and compelling evidence"*** mean? **Black's Law Dictionary, 8th Edition,** defines "***new***" as: "***recently discovered, recently come into being."*** **Taxmann's Law Dictionary** states that the word **"new"** must be construed as meaning ***"not existing before, newly made, or brought into existence for the first time***," and in contradistinction and antithesis of the word **"used". (D.P Mittal, Taxmann's Law Dictionary (Taxmann Allied Services (P) Ltd, New Delhi).**

45. The **Concise Oxford English Dictionary 9th Edition** defines **compelling** as "***powerfully evoking attention or admiration."*** **This definition was also adopted in the case of Rodgers Ondiek Nyakundi and 2 Others -vs- Republic Criminal Appeal 135 of 2006.**

46. In my view, this definition 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 rouse a great deal of interest. At para 3.8 of his written submissions, the petitioner states that:

"There lies very pertinent evidence by the person who acknowledges as being the last to be with the deceased on the night in question, one Caroline Wangu Machua, which evidence was suppressed by the learned appeal court judges in their judgment and that the thrust of this evidence is that she was with the deceased from a few minutes to 8pm…"

47. The petitioner goes on to evaluate some of the evidence that was adduced before the court and refers to the Court of Appeal's judgment where the said evidence was taken into consideration. At paragraph 3.24, page 7 of his petition, he states:

"allow me to refer you to evidence on record as also captured on page 15 of the judgment… which holds that on the material night I was not wearing a Kaunda or a kanzu like mswahili or a coat with a kanzu. The evidence on record and the exhibits tendered to the government analyst by the respondents as what I was wearing on the material night were a Red Heavy Tee-Shirt and a Green Mid-Brown Trouser, thus it is obvious that the person allegedly seen by PW1 and PW2 on the fateful night was not and could not have been me."

48. The petitioner goes on to state at **para 4.19** of his written submissions that ***"… in my trial and appeal, there are no reasons given by the judges for differing with the unanimous decision of NOT GUILTY reached by the three assessors in trial."***

49. It is apparent from his submissions that the petitioner's application for post-conviction DNA testing is premised on his dissatisfaction with the presentation of the data on the DNA report. His contention is that the presentation does not conform to established forensic DNA testing procedures and results formulation; and that the information supplied to him at trial was incomplete and was not based on any scientific standpoint. He demands what he refers to as the factual results of proper DNA testing done according to acceptable scientific standards as well as the truth as to what happened when the tests were done at the government chemist.

50. The petitioner further claims at para 6.15 of his submissions that:

"…in my seeking post-conviction DNA testing, I humbly invite the court to appreciate the fact that there was absolutely no finding given on, even though there had been clear instructions given to the government analyst in the Exhibit Memo Form and captured on page 15 line 13 – 15 of the judgment that the under-pant of the deceased was to be tested to establish the presence or lack thereof of semen …"

51. He argues that the said examination was either not done, or if it was done, the results were deliberately suppressed. He then submits at **para 6.18** that:

"…However kindly note that the specimen are switched during the alleged testing and thus in the report, it is the deceased's trouser that is marked B (i) while the deceased's pullover is marked B (ii) respectively. <u>This has the effect of invalidating the alleged results which the learned judges of appeal held as safe in all material aspects</u> and warrant a grant of my prayers for post-conviction testing to establish the true results on each of the items now that new facts have emerged on how the real results ought to be like." (Emphasis added).

52. He goes on to submit at **para 6.19** about mislabeling of samples and cross-contamination of samples, then argues that the respondent ***"deliberately withheld exculpatory evidence which exonerate me… which new and compelling evidence as well as the information I am seeking, namely, long withheld evidence from the government analyst – in the form of the laboratory notes as well as Test Paper Strips of the DNA (PM/HLDQA1) analysis"*** which he submits would demonstrate the violations against him and justify the grant of the prayers that he was seeking.

53. At **page 21 para 3** of his written submission the petitioner states that ***"having inexplicably delayed release of the alleged DNA results by 7 months for a test that ordinarily takes a week at most to conduct, there can be no doubt that the raw lab notes were suppressed by the prosecution and they only***

reluctantly and selectively gave what was favourable to their case and not the true results…"

54. I have deliberately quoted parts of the petitioner's submissions above to show that the gist of his case is premised on the evidence that was adduced in court and relied upon both by the trial court and the Court of Appeal. It is my further observation that although the petitioner repeatedly argues that his case is not an appeal, his submissions and arguments reveal otherwise.

55. Article 50 (6) of the **Constitution** sets out the threshold for ordering a new trial. The test, as detailed above, is the discovery of new and compelling evidence. As is evident from the extracts of the petitioner's submissions set out above, what the petitioner is challenging is the evidence that was adduced in the High Court during his trial, and which he challenged, and was considered at length, by the Court of Appeal to which he appealed following his conviction.

56. In the United Kingdom case of **R -vs- A (2008) EWCA Crim 2908,** the court notes that:

> ***"… [25] The objective of the criminal justice process is that after a fair trial there should be a true verdict. So far as humanly possible, there should be no wrongful convictions, and where they occur, or if new evidence emerges which undermines the safety of a conviction, they will be quashed and re-trials may be ordered… [31] "New" for the purposes of this section is evidence not adduced in the previous proceedings… [32] "Compelling" is also defined, and means evidence which is reliable, substantial and highly probative of the case against the acquitted person in the context of the outstanding issues, that is the issues which were in dispute in the first trial…"***

57. In the present case, the petitioner has not, in my view, shown the discovery of ***"new"*** and ***"compelling"*** evidence that would justify a new trial. He is requesting for two courses of action which the court cannot engage in. The first is to sit on appeal on the decision of the Court of Appeal, and consider what the petitioner considers the failure of the appellate court to consider the weaknesses of the prosecution case against him, particularly with respect to the DNA evidence adduced by the prosecution.

58. Secondly, his quest is for new DNA testing for the purpose of disproving the DNA results from the tests previously conducted that were relied upon both by the trial and appellate court. In my view, this does not amount to discovery of new and compelling evidence. Essentially, what the petitioner is asking the court to do is to assist him to re-open his case so that additional evidence which he considers was not adduced or tested during his trial and appeal can be unearthed. More importantly, however, it is to be noted that the Court of Appeal did consider the issue of evidence adduced against the petitioner. It pointed out as follows at page 18 of its judgment:

> *"…**the appellant had persistently since day one of the death of his wife asked for DNA tests and analyses. The main reason he assigned for the requisitioning of the test was:** 'I have strong suspicions that this crime was committed in a house within the police lines and my wife's body dumped where it was found. This is consistent with two scratch marks that were on her left leg and which I believe she sustained when being pushed through a hole in the fence.' **However, the appellant did not give any basis for his suspicion nor did the evidence establish that the killing was committed in any house within or without the police lines. We think that the appellant's assertion was only meant to mislead the investigation which was definitely closing in on him."***

59. The court then followed with an in depth analysis of DNA evidence in criminal proceedings. It stated as follows with regard to the DNA evidence in the case:

> "***In our view, the DNA test analysis conducted by PW29 is logically relevant evidence in the trial of the appellant who had actually petitioned for it. It is not in any way, we think so, prejudicial to him… indeed, PW29 had the appropriate level of knowledge and skill derived from long experience in his field of operation or practical training. However, PW29 has not given any evidence of DNA analysis comparisons together with the calculations of the random occurrence ratio. Again, the prosecution has not provided sufficient details of how the calculations were***

carried out so as to allow the basis of those calculations to be scrutinized. We would take this opportunity to remind the prosecution in cases involving DNA evidence or similar highly technical scientific evidence to adduce evidence from the experts which is sufficiently detailed in its explanation of the relevant science so as to enable the court to carry out its proper function itself in deciding the issues. We conclude, therefore, that the DNA profiles and analysis evidence as tendered by PW29 was not satisfactory and cannot be relied upon solely to found a conviction." (Emphasis added)

60. It is thus evident that the Court of Appeal acknowledged the fact of the insufficiency of the DNA evidence that had been adduced and reached the conclusion that the DNA evidence could not **solely** be relied on to arrive at a conviction. In its view as expressed at page 25 with regard to the challenge to the circumstantial evidence:

*"…**It is trite that an offence like murder can be established by evidence tendered directly proving it or by evidence from which a reasonable person can draw the inference that murder had been committed. It is well established that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt".***

61. The Court of Appeal went on to state that:

"The facts surrounding the violent cohabitation, the threats uttered by the appellant to the deceased, and to her mother and sister and the conduct of the appellant on the morning of the murder were incompatible with the appellant's innocence and inconsistent with any other rational conclusion than that of guilt. We conclude, therefore, that the evidence against the appellant is sufficient to sustain a conviction on the circumstantial evidence alone or both on circumstantial evidence and direct evidence as proffered by PW1 and PW12." (Emphasis added)

62. It is thus clear that the appellate court considered the issue of DNA evidence in the case and placed little reliance on it in reaching the conclusion that the conviction of the petitioner was safe. There is therefore no basis for the prayer for the post-conviction DNA test that the petitioner is seeking: he has not established that he has new and compelling evidence, and what he is seeking is re-opening of a matter that had been heard and determined, and his appeal from the decision of the trial court found to be without merit.

63. I therefore find and hold that the petitioner has not met the second test under Article 50(6) of the Constitution in that there is no new and compelling evidence to warrant a new trial. His petition and the Supplementary Motion for post conviction DNA testing therefore have no merit.

Violation of the Petitioner's Right to Information

64. The petitioner has also premised his petition and motion on Article 35 (1)(a) of the Constitution, which provides that:

1. Every citizen has the right of access to –

a. Information held by the State; …

65. That every citizen has the right to information held by the state is not, I believe, in dispute. The transmission of information from the state to its citizens ensures and promotes transparency and is essential in a democracy for the promotion of good governance. However, as has been held by our courts in various decisions, the right to information is not self-executing. A party who claims the right has been infringed or is threatened with infringement must show that he or she made a request for such information, and that the request for information was not acceded to.

66. In the case of **Kenya Society for the Mentally Handicapped –vs- The Attorney General and Others Petition No. 155A of 2011** the court ruled that:

> ***"…[42] The basis for prayers 8 and 9 is that the petitioner is entitled to information and list of persons with mental and intellectual disabilities together with aggregated information. The request is grounded on the right of access to information under Article 35 of the Constitution…***
>
> ***[43] I am not inclined to grant prayers 8 and 9 of the application as the petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order. I find that the petitioner did not make the request for information to the respondents hence I dismiss this request…"***

67. Similarly, in **Total Kenya and 9 Others -vs- Director of Criminal Investigation Department and Others Petition No 478 of 2012, the court held:**

> ***[7]"…Article 35(1) entitles every citizen access to information held by the State. This provision is not self-executing. The petitioners must at least request for information before it is given to them. If the information is not sought, it cannot be argued that in fact, the provision has been violated. I have read the petition and deposition and there is no evidence that the petitioners requested for any information from the respondents and as such no breach has been established in this respect…"***

68. Finally, in **Michael Juma Otieno -vs- Executive Director, Non-Governmental Organizations Co-ordination Board Petition No. 6 of 2012**, the court observed as follows:

> ***"…The petitioner seeks that information to test whether the procurement complied with Article 227 and the provisions of the Public Procurement and Disposal Act. To the extent that the petitioner wrote to the respondent seeking the information and found no response, I declare that the petitioner's right to information under Article 35(1) was violated.*** (Emphasis added).

69. I agree with the findings of the court in **Nelson O. Kadison -vs- The Advocates Complaints Commission and Attorney General** and **Nairobi Law Monthly -vs- Kengen and 6 Others (supra)**. The court in the two cases found, correctly in my view, that the petitioners had requested for information from the state, but that the requests had been denied by the state, which was under a duty to provide access to information under Article 35(1)(a).

70. In the present case, the petitioner has not demonstrated that he requested for any information from the state, and that such information was denied. However, if I understand his case correctly, what he is seeking is to have DNA tests conducted, the result of which he believes will lead to his exoneration. Thus, it is not information held by the state that he is seeking: as observed above, he is seeking to obtain new evidence from analysis of specimens that were analysed and presented in evidence at the time of his trial. This in my view, is not within the ambit of Article 35(1)(a).

71. In light of my findings on the two issues set out above, I find that the petition and the Supplementary Notice of Motion have no merit and are hereby dismissed with no order as to costs.

Dated and Signed at Nairobi this 7th day of November 2014

MUMBI NGUGI

JUDGE

Dated, Delivered and Signed at Nairobi this 11th day of November 2014

G. V. ODUNGA

JUDGE

Mr Peter Manson Ouko petitioner in person

Mr Ashimosi instructed by the Director of Public Prosecution for the respondent