



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL MISCELLANEOUS CASE NO. 16 OF 2013

STEPHEN KIMANTHI MUTHUNGA

ALIAS WANUGU.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The application herein by way of Notice of Motion is brought pursuant to provisions of Article 50(6) (a) & (b) of the Constitution of Kenya, 2010. The applicant has petitioned this court for a new trial. Originally, the applicant was charged in Criminal Case No. 1692 of 2003 before Chief Magistrate Machakos with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. He was convicted and sentenced to death on 2nd March, 2004 as prescribed by the law.
2. He appealed to the High Court against the conviction and sentence in HCRA No. 54 of 2004. The appeal was considered and dismissed. He preferred a second appeal to the Kenya Court of Appeal Case No. 112/2007 which was also dismissed. He now presents his plea following the promulgation of the Constitution of Kenya, 2010.
3. In his submissions he argues that he has new and compelling evidence that will prove his innocence. He stated that he tendered a defence that was not considered by the trial court and the two (2) superior courts. Therefore, this resulted into a miscarriage of justice.
4. **Mr. Mwangi**, State Counsel opposed the application. He argued that the applicant had not gone to the Highest Court on the land and had not shown that indeed he had compelling evidence. He submitted that the applicant was heard by the Highest Court in 2007. Six (6) years has elapsed ever since. Three (3) years have elapsed since the promulgation of the Constitution. He dismissed the application as an afterthought.
5. Article 50(6) (a) & (b) of the Constitution provide 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 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.”***
6. The applicant has stated that he appealed to the Court of Appeal which was then the Highest Court in the Republic. The court considered his case and dismissed it. He had no other avenue to pursue. He waited to suffer his fate.
 7. The applicant argued that he has new and compelling evidence which calls for a retrial. He stated

- that he was not able to get a witness who would have adduced evidence to establish that the complainant had known him before the offence was committed.
8. In this case the applicant was charged with three (3) counts. He was eventually convicted in two (2) counts. The complainant in the first count was **David Makali Mutunga** while the complainant in the 2nd count was **Rosena Makali**. The applicant did not specify which particular complainant knew him before the occurrence of the incident. In any case according to the evidence on record, none of the complainants identified the applicant. He was identified by PW2, **Anna Ndunge**.
 9. One of the grounds of appeal was the issue of identification. The High Court considered the issue and was satisfied that the identification was positive. Similarly the Kenya Court of Appeal dealt with the issue and confirmed the findings reached by the High Court. Calling a witness to state that either of the complainants knew the applicant before will be an afterthought. Secondly, it will not be compelling evidence because the complainants were not able to identify him. The evidence will infact be irrelevant.
 10. In the premises the Applicant has failed to demonstrate the need to re-open the case for a new trial. The application is therefore dismissed.
 11. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 5TH day of JULY, 2013.

L.N. MUTENDE

JUDGE