REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEUS CRIMINAL APPLICATION NO. 53 OF 2012

JAMES MWANGI NJOROGE .....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

R U L I N G

The application before this court was premised on **Article 50(6)** as read with **Article 159** of the **Constitution** of **Kenya, 2010**.

The applicant, **JAMES MWANGI NJOROGE**, is seeking an order for retrial.

The brief history of the matter is that the applicant was tried before the Magistrate's court. That court convicted him for the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

Being dissatisfied with the decision of the trial court, the applicant lodged an appeal to the High Court. The said appeal was dismissed, after the High Court found no merit in it.

The applicant was still dissatisfied with the verdict of the High Court. He therefore appealed to the Court of Appeal. After the Court of Appeal had given the consideration to the appeal, they dismissed it**.**

In view of the fact that the Court of Appeal was then the highest court in Kenya, their determination should have brought the matter to a close. However, on 27th August 2010, Kenya promulgated a new Constitution. **Article 50(6)** of the **Constitution** stipulates 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."**

That is the provision which the applicant has invoked. He has asserted that new and compelling evidence had emerged.

What is the new and compelling evidence that has become available to the applicant?

The applicant says it was the tenancy dispute between him and his Landlord, which led to the arrest and incarceration of the applicant.

In his view, if that evidence had been made available to the trial court, or to the High Court, the said Courts would have arrived at a different verdict.

The exact nature of the evidence which the applicant is making reference to is contained in an affidavit sworn by **HODORIA CARLUS WAIGANJO,** (hereinafter cited as 'Hodoria').

Hodoria said that he and the applicant both operated businesses at Kiamichael place in Kiambu. Their said businesses were nest to each other.

Hodoria also said that the complainant, **PETER NGOTHO NJONGORO**, was the owner of the building which housed the two businesses which were urn by the applicant and Hodoria, respectively. According to Hodoria, he was outside his shop on 21st November 2001, when he saw the Landlord (P.W.1) accompanied by police officers. Hodoria further states that the applicant was questioned by the police officers, outside the applicant's shop.

After the police officers had talked to the applicant for sometimes, they hand-cuffed the applicant. The police officers proceeded to beat up the applicant;

> **"With the help of Bosko who was the Landlord of the cereal shop which the Applicant occupied."**

Hodoria later learnt that the applicant had been detained in the police station.

The foregoing constitutes the contents of the affidavit sworn by Hodoria.

There is nothing in the affidavit which suggests that Hodoria came by some new evidence subsequent to the trial and conviction of the applicant.

Hodoria was at the scene when the applicant was arrested. He does not disclose why he did not offer himself as a witness in the case. He could have been a witness for either the prosecution or for the defence. But he did neither.

Hodoria basically, confirmed, in his affidavit, that Bosko was the Landlord of the shop which the applicant used to operate. He has not indicated the existence of any dispute between the applicant and the complainant.

But, most significantly, if there existed a dispute between the applicant and the complainant, that would be a fact that was always in the personal knowledge of the applicant. It is not something about which the applicant only became aware of, subsequent to his conviction. Therefore, it is a matter that the applicant could have raised when he was cross-examining the complainant. But he never raised that line of defence, when he was cross-examining the complainant.

The learned trial magistrate addressed her mind to that aspect of the matter as follows:

> **"His defence is that he was arrested after quarrelling with PW1 over his shop. I do not believe him."**

Therefore, the High Court re-evaluated the evidence on record. Having done so, the Court said:

> **"We find the appellant's defence was clearly an afterthought. The alleged quarrel he had with the Complainant, and which happened on the day before his arrest was never raised during the Complainant's cross-examination."**

From the aforegoing excerpts it is clear that the applicant actually knew of the alleged dispute between him and the complainant. It is also clear that he put forward that alleged dispute as a defence.

However, the trial court rejected that defence as an afterthought. In that respect, when the matter was before the High Court, that court also re-affirmed the finding by the trial court.

Article 50(6) of the **Constitution** is not intended to provide a person who had been convicted another opportunity to fill-up gaps which he had, in his defence.

By suggesting that Hodoria could corroborate the defence, the applicant is simply saying that he had become wiser after having been convicted and was seeking another opportunity to fill-up gaps which he had, in his defence.

He is saying that if he had known better at the time he was on trial, he would have got Hodoria to testify as one of his witnesses.

Ignorance of the law, or lack of knowledge about procedures, is not, of itself, a basis for re-opening a case.

In the judgment of the Court of Appeal in **JAMES MWANGI NJOROGE VS REPUBLIC, CR. APPEAL NO. 9 OF 2006**, it was held as follows:

> **"The evidence against the appellant was overwhelming. He was properly convicted and this appeal has no merit. It is dismissed."**

In our considered view, the applicant has failed to put before us any **new and compelling evidence which has become available**, to warrant a retrial.

The application before us is thus without merit. It is therefore dismissed.

DATED SIGNED and **DELIVERED at Nairobi** this ***2nd*** day of ***October*** **2013.**

F. A. OCHIENG **L. A. ACHODE**

JUDGE **JUDGE**