REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CORAM: R. MWONGO, J.

MISCELLANEOUS CRIMINAL APPLICATION NO. E190 OF 2025

MICHAEL IRERI……APPLICANT

-VERSUS-

REPUBLIC……RESPONDENT

R U L I N G

Background

1. The applicant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was convicted in Siakago MCCR No. 569 of 2020 of a lesser charge of grievous harm contrary to section 234 of the Penal Code. He was sentenced to 15 years imprisonment.
2. He filed an appeal in Embu HCCRA E081 of 2024 challenging the findings of the trial court. In that case, the applicant informed the court that he would like an opportunity to introduce new evidence in the form of an affidavit sworn by a witness to the incident. That, therefore, it was necessary that a retrial be ordered. The court directed the applicant to file a constitutional petition separately on those grounds. With those directions, the applicant withdrew his appeal and filed the application herein.

The Application

3. Through his undated application, the applicant is seeking that the conviction be quashed, sentence set aside, he be set at liberty and a re-trial be ordered. According to him, the trial court should have acquitted him altogether when the prosecution failed to prove its case beyond reasonable doubt. The basis for seeking retrial is that the applicant has found new evidence in the form of an affidavit sworn by an eye witness to the offence, exonerating him.

Grounds of Opposition

4. The respondent opposed the application stating that the same does not meet the conditions set out under Article 50(6) of the Constitution for granting of the prayers sought.

Parties' Submissions

5. The application was canvassed by way of written submissions.
6. In his written submissions, the applicant argued that the court has jurisdiction under article 165 of the Constitution to determine the application. He relied on Article 22(1) of the Constitution which provides for his right to institute legal proceedings where his rights have been violated. He also relied on Articles 47(1) and 50(2)(q) of the Constitution. He stated that one Njagi Kiragu has sworn an affidavit on the circumstances of the night of the incident and this affidavit needs to be produced as evidence. That the complainant has since made peace with him and he has reformed through prisoner empowerment programmes and he is a rehabilitated person now.
7. The respondent relied on Article 50(6) of the Constitution and the case of **Kibisu v Republic [2014] KESC 55 (KLR)** in which the court analyzed this provision of the Constitution and concluded that a retrial under these circumstances can be ordered conditionally. In that case, the court also gave the meaning of "new evidence" and "compelling evidence". The respondent herein argued that the new and compelling evidence that the applicant is referring to did not meet the threshold discussed in that case. It stated that the prosecution witnesses answered all the questions asked by the applicant in cross-examination. That the affidavit was not annexed to the application, neither was it produced by the applicant in his defense. That the applicant has not demonstrated that there is new evidence which was not available at the time of the trial, which evidence has since become available.

Issue for Determination

8. The issue for determination is whether the application should be allowed.

Analysis and Determination

9. The applicant is seeking that he be retried based on newly found evidence in the form of an affidavit by a witness who does not place him at the scene of crime. He had been charged with robbery with violence but on the strength of section 179 of the Criminal Procedure Code, he was convicted of the offence of grievous harm and sentenced to 15 years imprisonment. He now states that there is new evidence which proves that he was not at the crime scene at the time of the incident. That the evidence in the form of an affidavit has become available but it was not available at the time of the trial.

10. The application is premised on Article 50(6) of the Constitution which 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***."

11. This provision creates 2 conditions namely that the applicant ought to have had his appeals to the highest court dismissed or he did not appeal within the required time and that he has found new and compelling evidence. For the first limb of the provision, the applicant ought to have appealed to the High Court and the Court of Appeal and had his first and second appeals dismissed before filing a constitutional petition in the High Court. He however, withdrew his first appeal and the matter was marked as closed.

12. In the case of **Philip Mueke Maingi v Republic [2017] KEHC 4815 (KLR)** the court, while determining a petition filed under Article 50(6) of the Constitution, stated thus:

> "***For a petition under article 50 to succeed, this court must be satisfied that the petition is based on the fresh and compelling evidence exception and it is likely that a new trial would be fair having regard to the circumstances of the case. Evidence is new if it was not adduced at the trial of the offence; and it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and 'compelling' if- it is reliable; and it is substantial; and it is highly probative in the context of the issues in dispute at the trial of the offence.***
>
> ***In my view, the architect of article 50 of the constitution is that after a criminal trial ends in a conviction, the defendant can file a motion for a new trial only after the conditions stipulated in article 50 (6) are satisfied. The High courts can grant an order or re-trial —though rarely—to correct significant errors that happened during trial or if substantial new evidence of innocence comes to light. It must be shown that the new and compelling evidence will correct such significant errors, and that such evidence was not available during***

the trial and could not have been available even with the exercise of due diligence.

The new evidence generally must have been unknown to the defense during trial, could not have been reasonably possible to discover before or during trial, and can be capable of causing the court to reach a different verdict.

All the authorities cited above are in agreement that courts are extremely clear about what "new evidence" means. At the risk of repeating myself, it can safely be said there are four criteria that must be met for new evidence to considered in a petition for a new trial:-

1. The evidence is newly discovered and the petitioner did not know about it prior to, or during the trial;

2. The evidence must be material and not merely cumulative;

3. The petitioner's failure to learn about the evidence before the verdict was not because of lack of diligence; and

4. The new evidence is significant enough that it would likely result in a different outcome if a new trial is granted.

The petitioner is under a duty to establish the above four conditions."

13. Further, in **Kibisu v Republic (supra)**, the Supreme Court held:

"***Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be 'new and compelling evidence'.***

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." 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, the criminal trial process, the conviction entered, or the sentence passed against an accused person."

14. The applicant has alluded that the new evidence is an affidavit sworn by one Njagi Kiragu who attests to the fact that the applicant was not present at the crime scene at the time of the offence. He has however, failed to demonstrate that he exercised due diligence to secure such evidence during the trial, to no avail. From a perusal of the proceedings of the trial court, the applicant did cross-examine the prosecution witnesses extensively.

Disposition

15. The averments by the applicant are clearly not persuasive enough to warrant granting orders for a new trial. Accordingly, the application is hereby disallowed, and dismissed.
16. Orders accordingly.

Delivered, dated and signed at Embu High Court this 04th day of March, 2026.

_____

R. MWONGO
JUDGE

Delivered in the presence of:

1. Applicant Present in Court
2. Ms. Mwaniki for the Respondent
3. Francis Munyao - Court Assistant