

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
MISCELLANEOUS CRIMINAL APPLICATION NO. E156 OF 2024

BARAKA KENGA CHENGO.....
APPLICANT_

VERSUS

REPUBLICRESPONDENT

RULING

1. By an Application dated 24.9.24, the Applicant seeks the following orders:
 1. ***THAT, the Honourable Court does issue an order for the retrial of the Applicant's case in light of Article 50(6)(b) of the Constitution of Kenya and in the interests of justiuce.***
 2. ***THAT, the Honourable Court does issue an order for renew (sic) of the Applicant's case in line with the provisions of Article 23(3) of the Constitution of Kenya.***
 3. ***THAT, costs of the application be provided for.***
2. The Applicant and others were jointly charged and convicted of the offence of murder in Malindi Criminal Case No. 19 of 2018. He and his co-accused were each sentenced to 35 years imprisonment. They all appealed to the Court of Appeal which in a judgment dated 22.9.22 upheld the conviction but reduced the sentence to 20 years.
3. The Applicant now seeks that this Court orders a retrial under Article 50(6) of the Constitution. His grounds are that he was unable to avail his witness given that he was in custody throughout his trial. He stated that he has now been able to trace the witness and that this qualifies as new evidence that warrants a retrial.
4. Despite being given an opportunity to respond to the Application, the Respondent did not file a response.
5. Article 50(6) of the Constitution 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.*

6. The Constitution accords an opportunity to a person to petition this court for a new trial on meeting 2 conditions. First, an applicant must demonstrate that his appeal has been dismissed by the highest court to which he is entitled to appeal or that he did not appeal within time. Second, an applicant must satisfy the court that new and compelling evidence has become available.

7. In **Kibisu v Republic [2014] KESC 55 (KLR)** the Supreme Court considered the import of Article 50(6) of the Constitution and defined new and compelling evidence as follows:

42. 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.

8. Flowing from the cited decision, it can be seen that an applicant must demonstrate that the despite exercising due diligence the new evidence could not have been availed at the trial. Further, an applicant must demonstrate that the new evidence is of high probative value and would have led to a different verdict.

9. In the instant case, the Applicant's appeal on conviction was dismissed by the Court of Appeal which is the highest court to which he was entitled to appeal, thereby meeting the first condition set out in Article 50(6) of the Constitution. On the second condition, the Applicant perceives the availability of a witness as new and compelling evidence.

10. To begin with, the witness who the Applicant says is now available is not named. Further, the nature of evidence to be adduced has not been disclosed. It is not enough for the Applicant to state that he now has a witness. Without naming the alleged witness and disclosing the nature

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of the evidence to be adduced, the Court is unable to make a determination as to whether the said evidence is new or compelling. In light of this, the Court finds that the conditions set out in Article 50(6) of the Constitution have not been met. Accordingly, the Application dated 24.9.24 lacks merit and the same is hereby dismissed.

DATED, SIGNED and DELIVERED at Malindi this 17th day of April 2026

M. THANDE
JUDGE

