REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO 6 OF 2014

IN THE MATTER UNDER ARTICLES 165 (3), 19, 20, 21, 22, 23, 24, 25, 50 (2) (a), (6), (7) AND (8) OF THE CONSTITUTION OF KENYA 2010

Mali Mali Ole Moiyale.....Petitioner

versus

Republic.....Respondent

JUDGEMENT

Mali Mali Ole Moiyale (herein after referred to at the petitioner) was convicted of the offence of Robbery with violence contrary to Section **296 (2)** of the Penal Code in criminal case number **1977** of **2006** and sentenced to suffer death. His appeal against the said verdict was dismissed by the High Court of Kenya at Nyeri in HCRA No 304 of 2007. His appeal to the Court of Appeal was also dismissed in a judgement rendered in Criminal Appeal No. 59 of 2014.

The petitioner now states that he has exhausted his rights of appeal as aforesaid, and has now moved to this court citing the provisions of Articles **19, 20, 21, 22, 23, 24, 25, 50 (2) (a), (6), (7), (8)** and **165 (3),** of the Constitution of Kenya, 2010.

The Constitution of Kenya 2010 is highly valued for its articulation. Some such astute drafting includes but not limited to Articles **165 (3) (d) (i) & (ii)** which provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is in consistent with, or in contravention of, the constitution. Article **50 (6) (a) & (b)** of the Constitution postulates 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; and

(b) new and compelling evidence has become available.

Guidance can be obtained from the decision in the United Kingdom case of *R -vs- A (2008)* where the court noted that:-

"…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…"

Article **50 (6)** lays down the following conditions, **(a)** the petitioner must have exhausted the laid down appeal mechanism open to him **or** the person did not appeal within the time allowed; and **(b)** there must be new and compelling evidence. The question, however, is whether the petitioner has met the above conditions which are critical criteria under Article **50(6).**

On **(a)** above, the petitioner did appeal to the High Court and the Court of Appeal but both appeals were dismissed. The petitioner has not appealed to the Supreme Court. Thus, the question that falls for determination is whether the petitioner has exhausted his rights of appeal within the meaning of article **50 (6) (a)** cited above. It is important to determine whether the petitioner ought to have proceeded to the Supreme Court. The Supreme Court, under Article **162** of the Constitution of Kenya, 2010 is the highest court in the hierarchy of courts in Kenya. Article **163(4)** of the Constitution of Kenya, 2010 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).*

The grounds of appeal raised by the petitioner in his appeal to the Court of appeal are summarized at pages **3** to **4** of the judgment rendered by the Court of Appeal. None of the aforesaid grounds raise any issue or issues *involving the interpretation or application of the Constitution* as envisaged under article **163 (4) (a)** of the constitution cited above. Similarly, the ground of appeal in his appeal to the High Court do not raise any grounds *involving the interpretation or application of the Constitution.* The petition before does not in my view raise issues touching on interpretation or application of the constitution as envisaged under article 163 (4) cited above nor has the petitioner stated so. Further there is nothing to show that the Supreme Court, or the Court of Appeal, has certified that a matter of general public importance is involved in this appeal, hence article **163 (4) (b)** cited above does not apply. Thus, in my view, it was not open for the petitioner to proceed to the Supreme Court under the above article, hence he has in my view exhausted his rights of appeal since his appeal to the High Court and the Court of Appeal was dismissed as stated above.

The second test is provided under article **50 (6) (b)** of the constitution. Discussing a similar issue**, Ondunga J** in *Peter Manson Okeyo vs Republic* stated that the issue of the circumstances in which the provisions of Article **50 (6)** will apply has been considered in several decisions of this court and cited the case of *Maurice Odhiambo Wesonga -vs- Republic* where the court noted that:-

*"…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.....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)

In the above cited United Kingdom case of *R -vs- A (2008)* new and compelling evidence was defined as follows:-

"…"New" for the purposes of this section is evidence not adduced in the previous proceedings… "Compelling" is also defined, and means evidence which is reliable, substantial and highly probative of the case ..... in the context of the outstanding issues, that is the issues which were in dispute in the first trial…"

The core of the petitioner's case is that his rights to a fair trial were breached in contravention of the constitution, hence he was not accorded a fair trial. The petitioner has not given details as to why his trial was not fair nor has he given grounds or particulars for the alleged contravention of his constitutional rights. To my mind, a person who alleges contravention of constitutional rights has a duty to give particulars of the alleged rights which he or she alleges have been contravened.

The operative words in article **50 (6) (b)** of 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 Dictionarry d*efines *"**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.**

The *Concise Oxford English Dictionary d*efines **compelling** as *"**powerfully evoking attention or admiration."*** This definition was also adopted in the case of *Rodgers Ondiek Nyakundi and 2 Others -vs- Republic*

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. The petitioner alleges in his affidavit that *"new and compelling evidence is available"* but he has not in his affidavit given details of the alleged new and compelling evidence for this court to satisfy itself that the evidence meets the criteria set out in article **50 (6) (b)** set out above. Secondly, the petitioner has not explained when the alleged new and compelling evidence became available or why it was not adduced at the trial and what difference if any it would make if retrial is ordered. In absence of the aforesaid details, this court is left guessing as to the nature of the alleged new and compelling evidence if any and cannot determine whether it was not available at the time of the trial nor can the court weigh the impact if any such evidence will have if allowed.

I share the views expressed in the above cited case of *R -vs- A (2008).* It is important, however, to get the details right. I appreciate that a difficult balancing exercise is required in determining what amounts to new and compelling evidence. I also strongly feel we must not set the test too low or too high or too wide.

What is crucial is to establish a very high test regarding the calibre of the fresh evidence and its likely

consequences in a trial. It is the function of this court to determine whether there is enough evidence to justify quashing an acquittal and ordering a fresh trial, in which case the court should focus totally on the quality of the evidence. Perhaps phraseology such as, *"the evidence must be new and compelling, and it must be essential, in the interests of justice, that a new trial should take place"* would be appropriate. Perhaps that would sufficiently express how powerful the new evidence would need to be.

Though this is an important area in legal practice and development of our criminal jurisprudence, courts in Kenya have not given a clear guidance on details of what constitutes new evidence and I think this can best be done by giving examples. In my view, though not exhaustive, examples of evidence which might be regarded as *'new'* would include *a witness who did not appear at the original trial;* a *weapon* or *other object which has now been found;* or the *results of DNA tests which were not available at the time of the original trial*; or *relevant documentary evidence that was not available at the time of the trial; or discovery of new and important matter which was not available despite the use of due diligence* .

Evidence is compelling if it is reliable, substantial and, in the context of the outstanding issues, it appears highly probative of the case in question. The new evidence must in itself be substantial and in my view it must relate to the crime in question and it would be in the interests of justice for a retrial to take place.

It must be demonstrated that the new and compelling evidence casts doubts on the conviction. The requirements are only met if there is new and compelling evidence against the petitioner in relation to the offence. I should emphasize that evidence is new if it was not adduced in the proceedings in which the person was convicted. Evidence is compelling if **(a)** it is reliable, **(b)** it is substantial, and **(c)** in the context of the outstanding issues, it appears highly probative of the case against the convicted person.

The outstanding issues are the issues in dispute in the proceedings in which the person was convicted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

Evidence will be fresh if it was not adduced in the proceedings at which the person was convicted and it could not, even with the exercise of reasonable diligence, have been adduced at that trial.

In *Lieutnant Martin Kibisu vs Republic* the Supreme Court upheld the finding of the Court of Appeal on definition of new and compelling evidence. *It was defined as evidence which was not available during trial after exercise of due diligence.*

The principles that should be considered before a retrial can be allowed were also restated in *Tom Martins Kibisu vs Republic where the* Supreme held:-

"..... 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."

The petitioner is under a duty to establish that there is new and compelling evidence which could not be procured with due diligence at the time of the trial. From the material before me, I am not persuaded that the petitioner has discharged this duty.

In the circumstances, therefore, I am not satisfied that the petitioner has met the criteria set out in Article **50 (6) (a) & (b)** of the constitution. Accordingly, I find that the petitioners petition has no merits and I hereby dismiss it.

Orders accordingly

Signed, dated and delivered at Nyeri this **6th** day of **June** 2016

John M. Mativo

Judge