



**HPA v Republic (Petition E003 of 2024)
[2024] KEHC 16080 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
PETITION E003 OF 2024
DR KAVEDZA, J
DECEMBER 20, 2024**

BETWEEN

HPA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner Hezron Pinito Ashioya filed the present petition dated 15th July 2024 seeking orders that the conviction and sentence delivered in Kibera Sexual Offences Case No 68 of 2015 and the decision of the High Court in Criminal Appeal No 107 of 2023 upholding the same be quashed. The petition is supported by grounds on the face thereof and an affidavit sworn by the Petitioner.
2. The averments made are that Petitioner was charged and after a full trial convicted for the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to serve twenty (20) years imprisonment. Being dissatisfied, he filed an appeal challenging his conviction and sentence vide Kibera Criminal Appeal No 107 of 2023. On 26th February 2024, this court dismissed his appeal. He has not filed an appeal to the Court of Appeal.
3. The petitioner contends that key prosecution witnesses PW1 and PW2 have come out to retract the testimonies they gave in the trial. They have made it clear that there was no penetration as alleged by PW1. Their retractions are set out in detail in their affidavits filed in support of the petition. The retractions are of significant consequence given that the prosecution’s case against the Petitioner would not have stood at the trial court in the absence of the evidence of PW1 and PW2 which evidence is now being retracted.
4. The respondent did not file a response to the Petition. I have considered the Petition in totality, and the applicable law.



5. I have considered the issues raised in this petition. The issues herein revolve around the application and interpretation of Article 50(6) of the Constitution. The said Article 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. Accordingly, for a party to invoke the foregoing provision, two conditions must be satisfied. The first condition requires that either: (a) the Petitioner's appeal has been dismissed by the highest court to which they have a right of appeal; or (b) the Petitioner has failed to appeal within the prescribed time limits. It is my understanding that the Petitioner may only exercise this right when, as a matter of law, all avenues of appeal have been exhausted, or where statutory limitations on time preclude further appeal. Simply put, an individual with an active appeal cannot avail themselves of the rights conferred under the above provision. My position reflects that in Jona Ngala Kilimbi v Republic [2016] eKLR, where the Court rendered itself as follows:

“In so far as there is no evidence that the applicant ever appealed against the Judgment on appeal dated by M. Odero J, we are of the view that we could conveniently treat this petition as one falling under Article 50(6)...we say so noting that one is entitled to invoke the provision provided his appeal to the last ultimate court has been dismissed or he never filed an appeal within time. Having taken the position that no appeal was filed to the court of appeal, the 1st prerequisite under Article 50(6) 1 a has thus been met.”

7. Concerning the first limb, the Article refers to the highest court to which a person is 'entitled to appeal,' rather than the highest appellate court in the jurisdiction. In essence, the determination focuses on the appellate route that is legally accessible to the Petitioner by right, rather than any discretionary appellate path. This distinction is intentional, as evidenced by the Constitution's choice of the term 'entitled to,' as opposed to a term such as 'available.'
8. In interpreting the Constitution, the majority in Njoya & 6 others v Attorney General & others (No 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR held that the Constitution should be interpreted broadly, liberally, and purposively, to give effect to its fundamental values and principles. Consistent with that interpretive spirit, the phrase 'the highest court to which the person is entitled to appeal' must similarly be construed broadly to fulfil the Constitution's objective of advancing the rule of law, human rights, and the fundamental freedoms set out in the Bill of Rights, thereby facilitating the development of the law.
9. In the present case, the Petitioner lodged an appeal with the High Court, which was subsequently dismissed. The Petitioner's right to appeal to the Court of Appeal has since lapsed, as the statutory period within which he was required to file the appeal has expired. In light of this, I conclude that this Court has jurisdiction to entertain this Petition.
10. The Petition herein is grounded on new and compelling factual evidence that has since become available. In his appeal before this Court, the Petitioner was denied the opportunity to adduce fresh evidence. He had therefore reached a final point in his ability to present new evidence. Based on this, I



find that the Petitioner has successfully met the initial requirement, demonstrating that his appeal was dismissed by the highest court to which he was entitled to appeal.

11. As regards the second criterion under Article 50(6), the question arises as to whether new and compelling evidence, previously unavailable, has now come to light. The Petitioner argues that the new evidence is crucial to his case.
12. I have considered the affidavits on record. Dorice Makokha, a 24-year-old states her father is serving a 20-year sentence for the offence of incest against her, an allegation she now denies. On October 24, 2015, Dorice was at home in Kawangware with her brothers, Alfred and Daniel. Their slightly drunk father confronted her for telling their mother about his neglect. In anger, he locked her in his room but later released her unharmed. She told her brothers everything was fine.
13. After sharing the incident with their neighbour, Mama Dan, two women from the children's department questioned her. Shortly after, she heard someone accuse her father of rape. The police arrested him and took the children to Muthangari Police Station. Their mother took Daniel, leaving Dorice and Alfred, who were later placed in Nest Children's Home until 2022. Dorice consistently denied being defiled, stating she only received counseling at Nairobi Women's Hospital, not medical tests.
14. Alfred Abuko Ashioya confirmed his father's 20-year sentence on November 25, 2020. He recently reviewed the court judgment and realized the conviction was based on statements he now wishes to retract. He insists his father never defiled Dorice and that the allegations were false, influenced by neighbours seeking to gain their grandmother's support. Alfred, burdened by guilt and lacking resources to intervene, hopes that revealing the truth will bring justice and free his father.
15. In my view, this evidence could qualify as compelling, in that it would have been admissible at trial, of substantial probative value, credible, and likely, if presented at trial or during the appeal, to have resulted in a different outcome. I am therefore satisfied that it meets the threshold for evidence that was not available at trial.
16. In the circumstances, as the Petitioner has met the second requirement under Article 50(6) of the Constitution, I hereby issue the following orders:
 - i. The petition dated July 15, 2024 is allowed with the effect that the conviction, of the trial court, affirmed by the High Court is quashed and the sentence imposed set aside.
 - ii. The file shall be placed before the Chief Magistrate Court for directions on January 14, 2025 for purposes of directions on taking a fresh plea and a re-trial.
 - iii. The Petitioner is released on a cash bail of Kshs 50,000 and in the alternative, he is released on a bond of Kshs 200,000.
 - iv. The Deputy Registrar is to notify the ODPP in charge Kibera High Court to liaise with the investigating officer or the relevant police station (Muthangari) to charge the Petitioner afresh.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:



Appellant present

Mburugu for the Respondent

Achode Court Assistant

