



**Auru v Republic (Miscellaneous Application E013 of 2023)
[2023] KEHC 25918 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS APPLICATION E013 OF 2023
RN NYAKUNDI, J
NOVEMBER 29, 2023**

BETWEEN

ESEKON AURU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction on sentence in the Resident Magistrate Court at Lodwar Sexual Offences Case No. 39 of 2019 by Hon. M. K Muchiri (RM) dated 24th January, 2020)

JUDGMENT

Before Hon. Justice R. Nyakundi

Edward Kakoi for the State

Background

1. The petitioner Esekon Auru was charged of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. The brief particulars being that on 30.6.2019 in Turkana Central Sub County intentionally caused his penis to penetrate the vagina of DA a child aged 12 years. The petitioner pleaded not guilty to the main offence and the alternative on committing an indecent Act contrary to section 11 of the same Act. In consonant with Article 50 (2) (a) of the Constitution, the petitioner remained presumed innocent until the contrary is proved by the prosecution.
2. Having been informed of the charge of defilement with sufficient detail to answer it, the trial began in earnest by the prosecution presenting witnesses in support of the elements of the offence. The standard and the burden of proof in criminal cases as established centuries ago and domesticated in our laws under section 107(1) 108, 109 of the evidence act it rests with the prosecution at all times. That standard of proof is beyond reasonable doubt and it never shifts to the accused person. what is at stake under



criminal law are ingredients of mens rea and actus reus. (See *R v Nyambura* (2011) eKLR [Gupta v R](#) (1983) eKLR 388. *Mudakwa v R* (2000) eKLR [Kioko v R](#) (1983) eKLR 289.

3. In discharging the burden of proof for the penetration, age and identification against the petitioner, it's on record four witnesses were summoned accordingly by the prosecution.
4. Thereafter the petitioner was placed on his defence that resulted in a decision of the court dated 7.1.2020 with orders on conviction and sentence of 10 years imprisonment. It appears the petitioner elected not to appeal but a notice of motion filed in court on 3/2/2023 seeking the following orders:
 1. That My Lordship, the applicant was arrested, charged, tried and convicted to ten (10) years imprisonment and convicted for defilement contrary to section 8(1) 8(3) of [Sexual Offences Act](#) No. 3 of 2006
 2. That the applicant request the high court help the applicant serve the remaining period of time under non-custodial sentence section 62 (a) of the [sexual offences act](#) and section 39 (2)
 3. That the applicant relies on articles 22(1) 23(1) 27(1) (2) (q) of the [Constitution](#) of Kenya 2010
 4. My Lordship, may the applicant request be considered
5. In support of the notice of motion is an affidavit filed simultaneously with the application which deposes as follows:
 1. That: I am a Kenya adult of sound mind competent to swear affidavit.
 2. That I was sentenced to ten years for defilement of a child.
 3. That my lordship I pleaded not guilty at the trial.
 4. That my lordship I was not bailed out until conviction.
 5. That My Honorable justice the applicant is a first offender with no previous criminal records.
 6. That My Honorable justice the applicant is aged 61 years old.
 7. That the applicant will be law abiding upon receiving liberty.
 8. That the applicant has no previous criminal record.
 9. That what I have deposed herein is true and correct to the best of my knowledge, belief and understanding.
6. From the records the prosecution seems not have filed any submissions challenging the application.

Determination

7. Notwithstanding the application involving Article 22(1) 23(1) 27(1) 50(1) 2 (a) of the [Constitution](#), the gist of it is precisely premised under Article 50 (6) (a) (b) of the [Constitution](#), which states as follows:
 1. 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.

8. The basis of this application is therefore upon the applicant to demonstrate that there is new and compelling evidence or exceptional circumstances which in the interests of justice warrant reconsideration to review the 10 years custodial sentence. The provisions are also aimed at preventing an injustice. It's a provision that preserves the applicant's right to equal treatment before the law and as it's informed by the command in Article 27(1) of the Constitution. This review as espoused in Article 50(6) (a) and (b) of the Constitution the relevant factors to incorporate in the decision as submitted by the applicant include whether the new evidence constitutes;

- a. Importance of the issues raised
- b. Nature and gravity of the crime committed
- c. The nature and length of the sentence imposed
- d. Interests of the victims against which the crime was committed
- e. Interest of the society
- f. Errors on points of law on the face of the record

9. In giving weight to grounds submitted by the applicant no one factor is decisive. Any discussion of Article 50(6) (a) & (b) of the Constitution requires a detailed examination of its scope and application on new and compelling evidence. It is akin to the principles discussed in the case of Ajit Kumar Rath v State of Orisa & others, 9 Supreme Court Cases 596 at page 608. Thus

" The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilizing it. It may be pointed out that the expression "any other sufficient reason" ... means a reason sufficiently analogous to those specified in the rule"

See also the case of Nyamogo & Nyamogo v Kogo (2001) E.A 170.

10. The scheme of classification on new compelling evidence in which an order of the court can be reviewed is as clearly stated in the case of South Africa in *S v Persons* (2008) 2 SACR 355. The court observed *inter alia*

" On the meaning and interpretation of exceptional /compelling circumstance, there are wide ranging opinions on the definition of this concept. Generally speaking exceptional is indicative of something unusual, remarkable, peculiar or simply different. All these depend on their context and in the particular circumstances of the specific case under consideration."

11. It seems to me therefore that under Article 50(6) (b) of the Constitution new compelling evidence must be such as to persuade a review court that it would be in the interest of justice to review the impugned order on sentence imposed by the trial court to the advantage of the applicant. The



overriding consideration in review of the sentence so complained of is for the inherent jurisdiction of the court to be exercised to uphold the rule of law, equality, accountability and promotion and protection of human rights. (See article 10 of the *Constitution*). The court also affirms that the due process being a component of the rule of law was adhered to by the trial court as demonstrated in the record whose evaluation has been of relevance in determining this question on review of sentence. This application cannot be granted for it is not within the contours of section 362, 364, and 382 of the *Criminal Procedure Code*. In consonance to the principles of justice and fair procedure which is just, fair and reasonable on the touchstone of article 50 (6) (a) & (b) of the *Constitution* it is observed that the application lacks merit. I therefore decline to interfere with the decision to entitle the applicant a review of sentence. Right of appeal explained.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 29TH DAY OF NOVEMBER, 2023

.....

R. NYAKUNDI

JUDGE

In the presence of;

Mr. Kakoi for the state

Applicant in person

