



**Onyambu v Republic (Miscellaneous Criminal Application
26 of 2020) [2022] KEHC 11280 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL APPLICATION 26 OF 2020**

F GIKONYO, J

MAY 31, 2022

BETWEEN

GIBSON MAKINI ONYAMBU APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence in Narok
CMCR No. 619 of 2014 and HCCRA 14 OF 2016 at Narok)*

JUDGMENT

New Evidence

- [1] Before me is an application dated 19th July 2021 seeking the following orders: -
- i. That this honourable court be pleased to direct the receiving and admission of the victim's certificate of birth issued on 13th October 2011 as the applicant's evidence.
 - ii. That the Narok County Registrar of Birth and Deaths be ordered to provide a certified copy or details of entry No. xxxx of certificate of birth No. xxxx.
 - iii. That this honourable court be pleased to admit the said evidence and copy of the same be produced.
 - iv. That upon the grant of prayer (1) and (2) above this honourable court does permit the said evidential value does form part of the grounds for review of this honourable court judgment delivered on 8th November 2017. The application is premised upon 7 grounds set out on the face of the application.
- [2] The respondent opposed the application and filed the replying affidavit filed on 23rd August 2021 sworn on 12th August 2021 by Anthony Karanja Ndungu.



- [3] The applicant was convicted and sentenced to serve 20 years' imprisonment in respect of the offence of defilement contrary to section 8(1) (3) of *Sexual Offences Act* No. 3 of 2006. He filed appeal; Narok HCCRA 14 OF 2016 which appeal was dismissed. The appellate court upheld the sentence of 20 years on the ground that the prosecution evidence was cogent, consistent and reliable.

Applicant's submission.

- [4] The applicant submitted that this court has jurisdiction to address violation of rights. He relied on Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others, Application No. 2 Of 2011, *The Owners Of Motor Vessel Lillian 'S' Vs Caltex Oil (Kenya) Ltd* [1989] KLR1, Article 23(1), 25 (C) 27, And 50(2) (p) of *the Constitution Elijah Njibia Wakianda v Republic* [2016] eKLR.
- [5] The applicant submitted that new and compelling evidence has become available. He relied on the case of *Elgood v Regina* [1968 E.A 274
- [6] The applicant submitted that this court has powers to review his case under Article 23 (3) (f) 50(2) (q) of *the Constitution*.
- [7] The applicant submitted that he has benefited from rehabilitative programs and course offered at the prison facility which he now wishes this court to take into account.
- [8] The applicant prayed that this court in the interest of justice and equality allow his application to redress the injustice.

Respondent's submission.

- [9] The respondent submitted that the applicant has sought to disguise his application under Article 50(2) (q) of *the constitution*. The right to appeal had already been exercised by the applicant in HCCRA No. 14 of 2016 where he raised the issue of birth certificate. The appellate court considered the issue of age and made a determination.
- [10] The respondent submitted that this court cannot review its decision rendered while exercising its appellate jurisdiction.
- [11] The respondent submitted that for an applicant to enjoy the rights provided under Section 358 of the CPC, he must have filed an appeal. The application herein is not an appeal therefore does not meet the criteria. The respondent relied in the cases of *Republic v Ali Babitu Kololo* [2017] eKLR, *Elgood v Regina* [1968] E.A. 274 Which Adopted the Summary Enunciated by Lord Parker C.J In *R v Parks* [1969] ALLER at Page 364.
- [12] The respondent submitted that the issue of birth certificate was raised by the applicant during his defence hearing.
- [13] The respondent submitted that this court is functus officio after having considered the applicants appeal, the court must down its tools. That the applicant should exhaust his appeal options at the court of appeal and supreme court.
14. The respondent prayed that this court finds that this application has no merit and dismiss it in its entirety.

Analysis And Determination

- [15] From the outset, I do note that, the application herein is a request for a new trial under Article 50(6) of *the Constitution*.



Of new trial

16. Under Article 50(6) of *the Constitution*: -

- (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 for appeal; and
 - (b) new and compelling evidence has become available.

[17] Such petition is only made where new and compelling evidence has become available. The phrase “new and compelling evidence has become available” denotes evidence which was not available or could not have been adduced at the trial or in the appeal even after due diligence. The evidence must also be relevant, credible and capable of belief, and one capable of creating a doubt as to the guilt of the accused. The test of admitting new evidence under the article should follow after the test stated in the case of *Elgood v Regina [1968] E.A. 274*, to wit: -

- a. That the evidence that is sought to be called must be evidence which was not available at the trial.
- b. That it is evidence that is relevant to the issues.
- c. That it is evidence that is credible in the sense that it is capable of belief.
- d. That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.”

[18] Thus, the decision to come under this article should be a conscientious one and backed by appropriate and credible evidence thereto.

[19] The applicant raised the issue of the birth certificate serial number xxxx during his defence. He requested the court to compel PW1 to produce the birth certificate. It is incumbent upon the person seeking to have a new trial to give cogent and credible reasons showing that the evidence relied upon in the petition was not available or could not have been adduced at the trial even after due diligence, and that the evidence is credible and capable of belief, and is capable of creating doubt as to his guilt. The applicant raised the same issue in his appeal and the appellate court addressed the question of the different age of the complainant stated, reconciled the difference from the evidence adduced and settled the age of the complainant. Noteworthy, PW5 assessed the age of the complainant to be approximately 15 years old. The age assessment report indicated that the complainant was below 18 years while the treatment notes indicated she was 15 years old. The charge sheet indicated that she was 13 years old. The appellate court found the evidence of the complainant and her father to be true that she was 15 years old. Needless to state as was stated in the case of *Fappyton Mutuku Ngui v Republic [2012] eKLR*: -

... That “conclusive” proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

[21] The issue of age or necessity of the birth certificate was therefore settled. The request for a new trial on the basis of the birth certificate as ‘new and compelling evidence’ is pure camouflage to look like an honest quest for justice, yet, it is an abuse of the court process. I reject the bid for a new trial.



[22] The upshot is that the application is hereby dismissed. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 31ST DAY OF MAY 2022**

F. GIKONYO M

JUDGE

In the Presence of :

The Applicant

Ms. Torosi for Respondent

Mr. Kasaso - CA

