



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

PETITION NO.8 OF 2019

PETER NJOROGE KIMANI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Peter Njoroge Kimani**, the petitioner, was charged with the offence of defilement of a girl under the age of eleven years old contrary to section 8(2) of the Sexual Offences Act, 2006 in the Senior Resident Magistrate's court at Kajiado, in criminal case No. 894 of 2007. He was convicted on his own plea of guilty sentenced to life imprisonment on 23rd July, 2007.

2. He lodged an appeal to this court at Machakos being Criminal Appeal No. 91 of 2012 against the conviction and sentence. That appeal was dismissed, conviction upheld and sentence affirmed. The petitioner did not lodge a second appeal.

3. The petitioner has invoked the jurisdiction of this court for a new trial under Article 50(6) of the Constitution, on grounds of discovery of new and compelling evidence.

4. The petition is dated 2nd May, 2019 and filed on 3rd May, 2019. It is supported by an affidavit sworn on 3rd May, 2019. In the petition, the petitioner seeks a new trial on grounds of insanity and new and compelling evidence. On insanity, the petitioner avers that by letter dated 4th August, 2007 by Timothy Mureithi, a psychiatric nurse based at Loitokitok District Hospital, the nurse confirmed that he was treating him for acute confusion state. However, the petitioner abandoned treatment thus his condition worsened.

5. The petitioner states that the nurse recommended that he undergoes mental status assessment and observation at Mathari Mental Hospital. It is the petitioner's case that the said letter was neither brought to the trial court's attention nor was it raised on appeal, thus prejudiced his case.

6. The petitioner averred that the plea of insanity was never brought to the court's attention and the trial court did not have the advantage of the letter indicating his state of mind which if it had, it could have sought a mental assessment before accepting the plea of guilt.

7. Regarding the ground of new and compelling evidence, the petitioner stated that there were two exhibits produced to the trial court, that is; the complainant's P3 form produced as Exhibit 1 and the petitioner's P3 form produced as Exhibit 2. The petitioner relied on the contents of exhibit 1, section C, paragraph 2(a) and paragraph 6. In paragraph 2 (a), the medical attendant observed that there were no injuries to the complainant's genitalia and that it was moist. In paragraph 6 the conclusion was that there was no penetration. Based on the foregoing, the petitioner argues that the charge of defilement is unsustainable.

8. The petitioner further contended that the prosecution and trial court violated his right to a fair trial and liberty. He stated that the prosecution preferred baseless charges and the trial court failed to perform its duty of perusing the evidence adduced and taking into account the fact that he was unrepresented. He also complained on the severity of gravity of the sentence.

9. Based on the above grounds, the petition sought the following reliefs;

1) That in light of the new and compelling evidence adduced, the petitioner do undergo a new trial on the charge of defilement as contained in the charge sheet presented on 23.07.2007 at the principal magistrate's court at Kajiado in criminal case no. 894/07.

2) That the petitioner be referred to Mathare mental hospital for the determination of the status of his mental health.

3) Any other relief as this Honorable court may deem appropriate

10. Mr. Githuka, learned counsel for the petitioner, relied on the petition with regard to the facts of the case. Counsel reiterated that the petition is brought under Article 50(6) of the Constitution. Counsel however abandoned the issue of insanity leaving that of new and compelling evidence.

11. With regard to new and compelling evidence, counsel submitted relying on the P3 forms exhibit “TGN4” and “TGN5” on the complainant and petitioner respectively and the trial court’s proceedings marked “TGN3”. He submitted that the two P3 forms were produced at the trial. On examining the P3 form, it is shown that there was no penetration and, therefore, the petitioner did not commit the offence of defilement.

12. This, counsel argued, was buttressed by the doctor’s conclusion that the victim’s genitalia was well. In counsel’s view, once the trial court saw the P3 forms it should have preceded under section 207(2) the Criminal Procedure Code but it failed to do so. Counsel maintained that the evidence relied on by the petitioner is new and compelling as stipulated under Article 50(6) of the Constitution.

13. He argued that in the petitioner’s case no trial that took place contrary to the authorities relied on by the respondent where the trial process had taken place. Counsel urged the court to find that the petitioner did not get justice and therefore make appropriate orders.

14. Mr. Meroka, learned counsel for the respondent, opposed the petition through written submissions filed on 11th October, 2019 and highlights. Counsel submitted that the petitioner had not shown any new and compelling evidence in terms of Article 50(6).

15. He argued that the petitioner confirmed that the P3 form was produced during trial and that it did not indicate penetration. He referred to section 2 of the Sexual Offences Act which is clear that penetration is partial or complete immersion. Reliance was placed on ***Philip Mueke Mainji v Republic***, [2017 eKLR, where it was held that, “***New evidence must be generally unknown to the defence during trial, could not have been reasonably possible to discover before or during trial and can be capable of causing the court to reach a different verdict.***”

16. It was submitted that the prayers sought for a retrial is unwarranted as the petitioner has not exhausted the mechanism of appeal where the appellate court has the jurisdiction as the trial court to hand down an appropriate sentence. He referred to Rule 29 of the Court of Appeal Rules where the petitioner has an opportunity to file an appeal out of time and seek court permission to introduce new evidence, and upon satisfaction; the court can summon the author for cross examination.

17. On the retrospective application of the Constitution, it was submitted that the carry-over of the retired constitution into the current constitution is pursuant to Articles 263 and 264; hence the right being sought by the petitioner under Article 50(6) of the Constitution is not obtaining to him.

18. On the issue of insanity, counsel invoked Section 11 of the Penal Code which stipulates that every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved. According to counsel, the petitioner had the burden of proving insanity.

19. Referring to the proceedings of 23rd July 2007, counsel submitted that the petitioner was sound and appeared so before the trial court to warrant continuing of the proceedings. In counsel’s view, the petitioner is barred from pleading ignorance of his actions. He relied on section 7 of the Penal Code.

20. With regards to the letter dated 4th August, 2008, counsel argued that this court is being called upon to interrogate the veracity, accuracy and propriety of the said letter at this time which is not possible. He urged the court to dismiss the petition.

21. I have considered this petition; submissions and the authorities relied on. The petitioner has moved this court for a new trial under Article 50(6) of the Constitution on grounds of discovery of new and compelling evidence. the Article provides:

(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

22. For a retrial to be ordered, the Article sets two conditions, namely; the petitioner must have been convicted for a criminal offence and must have either appealed to the highest court allowed by law and his appeal dismissed, or time for lodging appeal had lapsed. The second requirement is that there must be new and compelling evidence.

23. According to the record, the petitioner was convicted for the offence of defilement. He appealed to this Court sitting at Machakos but his appeal was dismissed. He did not appeal to the Court of Appeal which is the last appellate court in cases like the one the petitioner faced. Time for lodging a second appeal had lapsed by the time he filed this petition. That being the factual position, it satisfied the first condition for one to petition for a retrial under *Article 50(6)* of the Constitution.

24. The question that I have to decide is whether the petitioner has satisfied the second limb, that is if there is “***new and compelling evidence***” for purposes of ordering a new trial. The petitioner stated that the P3 form indicated that there was no penetration and therefore, the charge of defilement at the trial court was untenable.

25. According to the petitioner, the doctor who examined the minor on that day found no injuries on the minor’s genitalia and found no

evidence of penetration. It is the petitioner's contention that the prosecution failed to bring charges backed by prima facie evidence and the trial court failed to consider that evidence and arrive at its own conclusion. It is on that basis that the petitioner moved this court arguing that he had new and compelling evidence and he should be tried a fresh.

26. Dealing with the issue of new and compelling evidence in Tom Martins Kibisu v Republic [2014] eKLR, the Supreme Court stated as follows:-

“[U]nder 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.” (emphasis)

27. The petitioner relied on the PP3 form in which the doctor concluded that there was no penetration as the new evidence. That cannot be new evidence as defined by the Supreme Court in the above decision. That evidence was before the trial court and even before the appellate court. It was not discovered after the petitioner had been tried and convicted. The fact that the trial court or the appellate court did not realise the doctor's conclusion cannot fit the definition of new evidence as contemplated by Article 50(6) and defined by the Court of Appeal with approval of the Supreme Court.

28. As this court observed in Suleman Osundwa v Republic [2015] eKLR:

A petition under Article 50(6) is not about re-hearing of the appeal or re-evaluating evidence afresh. It is about some independent evidence that brings out a completely new dimension to the case such that a tribunal, properly directing its mind on that “new evidence,” would find itself legally obliged to re-open the case for a fresh trial.”

29. The above position notwithstanding, the petitioner has argued that the P3 showed that there were no injuries in the victim's private organ. The conclusion the doctor arrived at was that there was no penetration. The petitioner was charged with defilement, an offence that is proved where there is evidence of partial or complete insertion of one's genital organ into the other person's genital organ.

30. The petitioner was convicted for defilement which presupposed that there was penetration partial or complete. The evidence did not show that there was penetration, the petitioner was unrepresented and pleaded guilty to the charge, he was not warned the dangers of pleading guilty to a serious offence carrying an equally serious sentence. This violated the petitioner's right to fair trial.

31. The fact that the medical evidence did not support the charge, is clear that that amounts to compelling evidence. The appellant could have appealed to the court of appeal which would have considered that evidence and made a determination on it. Had that happened, the result would have perhaps been different. In my view, that scenario fits the definition of compelling evidence more so when it affects the right to fair trial of the petitioner.

32. As the Supreme Court observed in Tom Martins Kibisu (supra):

“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, committal trial process, the conviction entered or the sentence passed against the accused person.”

33. Taking into account the above legal position and after a careful examination of the whole matter, I have come to the inescapable conclusion that the fact that the P3 form is not new evidence since the document was before the trial court at the time the petitioner was pleading to the charge. It does not fall within the Article 50(6) of the Constitution as expounded by the Court of Appeal with the approval of the Supreme Court to warrant this court to order a re-trial.

34. I have however considered this petition and the fact that it is grounded on the constitution and the Bill of Rights. I further take note that the sentence that was imposed against the appellant was the maximum sentence provided for under the statute.

35. In Francis Karioko Muruatetu & Others Supreme Court Petition No. 15 of 2015,[2017] eKLR, the Supreme Court held with regard to section 204 which provides for a mandatory sentence:

“[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.”

36. The fact that the trial court imposed the maximum sentence, that sentence was harsh, unjust and unfair in the circumstances of the petitioner's case. It denied him the benefit of the court's exercise of discretion to impose a sentence that was commensurate with the offence.

37. The petitioner was sentenced to life imprisonment on 23rd July, 2007 which means he has served sentence for thirteen years up to now. That being the case and taking into account the principle in the Muruatetu case, the sentence imposed against the petitioner in criminal case No. 894 of 2007, is hereby reduced to the period already served. The petitioner is hereby set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Kajiado this 23rd day of April, 2020

E. C. MWITA

JUDGE