



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**MISC. CRIMINAL APPL. NO. 80 OF 2016**

**CYRUS OGORO NYAKERI.....APPLICANT**

**=VERSUS=**

**THE STATE.....RESPONDENT**

**JUDGEMENT**

The petitioner has applied for a fresh trial pursuant to his rights under Article 50 (6) (a) and (b) of the Constitution. The petition is brought under Article 23 (1) of the Constitution. From the proceedings of the lower court the petitioner was charged with defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act. After hearing and evaluating evidence from both sides the trial magistrate found him guilty, convicted him and sentenced him to life imprisonment. He appealed to the High Court and Makhandia, J, as he then was heard the appeal and finding no merit in the appeal he dismissed it and upheld the judgement, conviction and sentence imposed by the lower court. The judgement of the High Court is in the record. The petitioner then appealed to the Court of Appeal but that appeal was also dismissed.

In his petition which was brought by way of a Notice of Motion he states that he now has new and compelling evidence which would entitle him to a new trial. The said new and compelling evidence is set out in grounds 3 and 4 found in the face of the Notice of Motion (undated). In summary at ground 3 he avers that he shall be requesting that the OB (first report) be produced to test the accuracy of what transpired on the day it was alleged he committed the offence; that he shall argue that the prosecution tendered evidence of bad character which they did not prove through production of fingerprints, his baptism card or identity card; that he was not informed why he was arrested; that he was not issued with the statements of the witnesses and other evidence that the prosecution relied on at the trial and that therefore his right to a fair trial was violated. Further, that he was not assigned an Advocate by the State at its expense yet substantial justice was likely to result and neither was he informed of that right. Further that substantial justice indeed resulted.

In ground 4, he avers that he deserves a new trial because the first and second appellate court judges jumped into conclusion and merely confirmed the findings of the lower court without evaluating the evidence themselves.

In the supporting affidavit sworn on 30<sup>th</sup> April 2014 before a Resident Magistrate in Kisumu he deposes that his rights under Article 49 (a) (1), 50 (2) (J), 50 (2) (h), 50 (2) (0) and 50 (4) of the Constitution were violated.

At the hearing of the petition, the petitioner told the court that he is sick; that he suffers from Hepatitis B. He contended that he did not commit the offence and is asking for a fresh trial. He stated that he was arrested by the chief yet it was he who had gone to report an assault. He stated that his sister could come to testify to that effect. He further stated that the complainant in his case testified that he was arrested for stealing her father's phone; that date of the alleged offence charged and that although the investigating officers testified clothes were seen no such clothes were seen. He further stated that after he was released the complainant's family followed him up saying he had committed another offence. He contended that it was suspicious that only the complainant and her parents testified and wondered why those who allegedly beat him were not called. He contended further that he has been in jail for nine years for an offence he did not commit. He told the court that he could not have committed this offence after his arrest and stated that his sister's testimony was not an issue in the appeal.

Principal Prosecution Counsel William Ochieng opposed the petition. He submitted that no new and compelling evidence has been demonstrated and that the issues raised were raised in the appeal. He urged this court to dismiss the petition.

I have considered this petition carefully. Article 50 (6) (a) & (b) of the Constitution bestows a convicted person with a right to a new trial on condition that he can demonstrate that he has new and compelling evidence. I have perused the proceedings and judgement of the Lower Court, the petitioner's petition of appeal filed in the High Court at Kisii on 6<sup>th</sup> September 2010, his supplementary grounds, his submissions during the appeal and the judgement of the High Court. All the issues raised in the petition were raised during the appeal. The allegation that he was framed for stealing a TV belonging to the father of the victim was raised in supplementary grounds No. 3, 11, 12 and in paragraphs 1 and 2 of his submissions. That is therefore not a new issue. Neither is the issue of only the victim and her parents testifying as that too was a ground for appeal just like the allegation that he was arrested by the chief when he went to report an assault which was the subject of supplementary ground No. 12 where he averred: -

***“12. That the learned trial magistrate failed to see that I was arrested while I went to the chief to report the assault against me by Pw3 claiming that I stole TV and battery.”***

The issue was considered by Makhandia J, as he then was and he stated: -

***“Finally, I do not think that the complainant’s parents will be such beasts as to cause those serious injuries on their daughter that required reconstructive surgery so as to frame the appellant for merely stealing a TV and battery belonging to their parents. His own sister would not have called the Assistant Chief to arrest the appellant on that basis....”***

The allegation that he was not told the reason for his arrest was considered by the Court of Appeal which found there was no substance in the complaint. The court stated: -

***“The appellant did not complain before the trial magistrate that he had not been informed of the reason for his arrest. In any event the record shows that the appellant took a plea where particulars of the charge were read out to him in Ekegusii language which he understands. He duly pleaded not guilty. There then followed a full trial where the appellant who was unrepresented cross examined witnesses fairly robustly. He understood very well why he had been charged and participated fully in the trial. He raised no complaint relating to the ground of appeal before us now. There is no substance to that complaint at all.”***

Related to that was his allegation that certain of his constitutional rights were violated. That too was considered by the Court of Appeal which pointed out that ***“an accused person who desires to raise issues of constitutional breaches of rights has a duty to do so at the very first opportunity to enable such allegations to be investigated and findings made.”*** The court stated that the trial court was the best suited to deal with such a complaint. Therefore, that too is not a new issue.

As for the contention that he can call his sister to give evidence that he was arrested for stealing a TV that is something he could have done at the trial. He has given no explanation for not calling her as a witness. The record shows that when he was put on his defence he was clear that he did not wish to call a witness. As stated by the two appellate courts, the proceedings were conducted in a language he understood and he therefore had no excuse for not calling witnesses if he intended or wished to. Sickness is not a ground for a new trial and neither is the apprehension by a petitioner that the appellate courts merely adopted the judgement of a lower court without considering or evaluating the evidence themselves. To hold that the latter is a good ground to order a new trial would amount to sitting on appeal over the decisions of those courts which this court cannot do. This petition has no merit and it is dismissed.

**Signed, dated and delivered at Nyamira this 24<sup>th</sup> day of January 2019.**

**E. N. MAINA**

**JUDGE**