



**REPUBLIC OF KENYA**

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

**HCCR CON. PET NO. 3 OF 2018**

**JNN..... PETITIONER**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Petition dated 26/02/2018 was filed under Certificate of Urgency pursuant to Article 50(6) (a) & (b), Article 50(2)(g) & (h). Articles 20, 21, 22, 23 & 165 of the Constitution of Kenya 2010 and all other enabling provisions of the law. It seeks the following orders:-

***a) That the Proceedings, Conviction and Sentence in Tawa Criminal Case No. 133 of 2011 be set aside and/or quashed and the Petitioner be afforded a new trial.***

***b) That such other orders as are just, expeditious and affords the Petitioner the proper enjoyment of his rights be afforded to the Petitioner .***

2. It is premised on the grounds on the face thereof and the Affidavit of FNN sworn on the same day.

3. The gist of the Petition is that the key witness in the case, FNN, has retracted her evidence by categorically stating that the accused never defiled her.

4. The state did not file any response.

5. Directions were given that the petition be canvassed by way of *viva voce* evidence.

6. PW1 was FNN. She stated that the Petitioner is her grandfather and that she was the Complainant in Tawa Criminal case No. 133 of 2011. It was her evidence that she was never raped by her grandfather and that it was just a village rumor.

7. That their neighbor known as M was the one who told her to say that she had been raped failure to which she (PW1) would be arrested. She went to M's place for 30 minutes and the chief visited her in school two days later.

8. She was then taken to Mbumbuni Police station where she recorded her statement. She was then taken to the hospital and examined but was never told the examination result.

9. Further, she said that she was sexually active as she was in a relationship with one PM.

10. That she had been coached on how to testify by the police. She denied having been influenced to say that she was never raped.

11. PW1 further testified that there was a land dispute between Miriam and the Petitioner and that she proceeded to live with her maternal grandmother after the story came out. She adopted her Supporting Affidavit as her evidence and maintained that she was never defiled by the Petitioner.

12. On cross-examination, she said her age was 21 years and had studied up to form four. That in 2011, she was 12 years old. She has 2 sisters and 2 brothers who are younger than her. That she testified in the presence of other people and her father lives in Nairobi.

13. That she had taken long to come clean because she was afraid of coming to Court. She denied having been influenced by the Petitioner

and said that she never visited him in prison.

14. In re-examination, she said that she has been agonizing as to why the Petitioner was jailed yet he did nothing wrong.

15. PW2 was the Petitioner, he said that he was convicted of defilement which he never committed and never admitted having committed. That he was framed and never understood the weight of the offence otherwise he would have hired an Advocate.

16. That he was never supplied with witness statements. That in the Trial Court, he said that he had been framed because of a land dispute with Miriam. He had refused to sell land to her and she got aggrieved.

17. Further, he said that F had visited him in Kamiti prison but he never influenced her to change the story. He adopted his affidavit sworn on 09/10/2018 as his evidence.

18. On cross-examination, he said that F's father (his son) was in Court but was not his witness and had never been. That he visited him in prison and knew about the current matter. That they talked in April 2018 and he (son) was aware of the appeal and the results thereof.

19. He was not sure whether he had a relationship with his son but said that they had reconciled and that's why he was in court to save him. That the accusation was not true and that's why he filed the appeal.

20. The prosecution Counsel did not cross-examine him but relied on the trial Court's proceedings and the High Court record.

### **ANALYSIS**

21. The petition is hinged on several articles of the Constitution but from the prayers sought and grounds relied on, the relevant provision is Article 50 (6) (a) & (b) of the Constitution which provides that: -

***(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; and***

***(b) New and compelling evidence has become available.***

22. The issue for consideration by this court is whether the petition has met the threshold as provided for in the aforementioned article to warrant the court order for a new trial of the Petitioner who has already been convicted and sentenced to life imprisonment.

23. In **Tom Martins Kibisu -Vs- Republic, Supreme Court Petition No. 3 of 2014 (eKLR)**, the learned Judges of appeal expressed themselves as follows;

***“Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence.***

***The window of opportunity for such a new trial is subject to two conditions. (emphasis mine) First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be ‘new and compelling evidence.***

***We are in agreement with the Court of Appeal that under 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.” 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, the criminal trial process, the conviction entered, or the sentence passed against an accused person.”***

24. After being convicted and sentenced by the trial Court, the Petitioner filed an appeal at the High Court in Machakos to wit Criminal Appeal No. 142 of 2011 which was dismissed on 15/10/2012.

25. He did not proceed to the Court of Appeal within the time allowed. Consequently, the first limb of Article 50(6) has been satisfied.

26. On whether new and compelling evidence has become available, the key witness in the matter has retracted her evidence. She has sworn an affidavit stating that she was never defiled.

27. This evidence was obviously not available at the time of trial otherwise there would never have been the need to charge the Petitioner. Needless to say, it will certainly lead to a different verdict.

28. It is my considered view that the second limb of **Article 50(6) (a) and para (b)** which states that;

(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; has also been satisfied.

**CONCLUSION**

29. The court finds that, the Petition has merit and thus makes the following orders:-

*i. That the proceedings, conviction and sentence in Tawa Criminal Case No. 133 of 2011 are hereby set aside and/or quashed and the Petitioner is to be afforded a new trial.*

*ii. New trial shall be conducted in the Law courts via Tawa SRM CR Case file No. 133 of 2011.*

*iii. Meanwhile accused is admitted to a cash bail of Kshs.20,000/= or personal bond of Kshs.50,000/= with one surety pending trial as aforesaid.*

SIGNED, DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF FEBRUARY 2019, IN OPEN COURT.

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HON. C. KARIUKI

JUDGE