



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**(CORAM: CHERERE-J)**  
**CRIMINAL PETITION NO. 23 OF 2019**  
**IN THE MATTER OF ARTICLES 22(1) AS READ WITH ARTICLE 50 (6) (a)**  
**and (b) OF THE CONSTITUTION OF KENYA, 2010**  
**BETWEEN**  
**DAVID OCHAMI ODINGA.....APPLICANT**  
**AND**  
**REPUBLIC.....RESPONDENT**

**RULING**

**Introduction**

1. The petitioner, **DAVID OCHAMI ODINGA**, (*hereinafter the petitioner*) was convicted and sentenced to serve 20 years for the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act in **Maseno Criminal Case No. 49 of 2015**. He lodged an appeal in the High Court, being **Kisumu High Court Criminal Appeal No. 88 of 2005** and the conviction and sentence were upheld.

**The Petitioner's Case**

2. The Petitioner's case is contained in the Petition filed on 20<sup>th</sup> March, 2019 supported by his affidavit sworn on 06<sup>th</sup> March, 2019. Together with the Petition, Petitioner filed what he alleges to be the complainant's certificate of birth in the name of FO who was allegedly born on 20<sup>th</sup> December, 1996. On that ground, the Petitioner argues that the complainant was 19 years old at the time he is alleged to have defiled her.

**The Respondent's Case**

3. Ms. Gathu for the state opposed the Petition on the ground that the age of the complainant FOL was proved at the trial by way of a Notification of Birth which shows that she was born on 13<sup>th</sup> May, 2000 and was a 14 years as at 2015 when she was defiled.

**Analysis and Determination**

4. I have considered the Petition and the issue that falls for determination is whether the petitioner has met the threshold for ordering a new trial under Article 50 (6) of the Constitution.

5. **Article 50** of the **Constitution** 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 for appeal; and**

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

6. The issue of the circumstances in which the provisions of Article 50(6) will apply has been considered in several decisions. The Supreme Court approved the Court of Appeal definition of new and compelling evidence in the case of **Tom Martins Kibisuvs Republic [2014] eKLR** as: –

**“Evidence that was not available at the time of the trial or could not have been available upon exercise of due diligence, and evidence sufficiently weighty that if it was available to the trial or the appellate court, the conviction would probably not have been sustained.”**

7. As stated herein above, Petitioner has appealed against his sentence to the High Court but did not appeal to the Court of Appeal within the time allowed for appeal. In the circumstances, therefore, I am satisfied that the petitioner has met the first criteria set in Article 50(6) as he has exhausted the appeal mechanism open to him.

8. The second questions whether the Petitioner has met the second, and in my view, more critical criteria under Article 50(6).

9. The core of the Petitioner’s case is that he has obtained what he alleges to be the complainant’s certificate of birth in the name of FO who was allegedly born on 20<sup>th</sup> December, 1996. On that ground, the Petitioner argues that the complainant was 19 years old at the time he is alleged to have defiled her.

10. The operative words in the Constitution are **“new and compelling evidence”** if a petitioner’s case is to warrant a retrial. So what does the phrase **“new and compelling evidence”** mean? Black’s **Law Dictionary, 8th Edition**, defines **“new”** as: **“recently discovered, recently come into being.”** **Taxmann’s Law Dictionary** states that the word **“new”** must be construed as meaning **“not existing before, newly made, or brought into existence for the first time.”** The **Concise Oxford English Dictionary 9<sup>th</sup> Edition** defines **compelling** as **“powerfully evoking attention or admiration.”**

11. It is worthy to note that the name on the Certificate of Birth tendered by the Petitioner and the Notification of Birth that the court relied upon in convicting the Petitioner bear different names except for the name Florence. The Certificate of Birth is dated 16<sup>th</sup> February, 2012. It therefore follows that the certificate if at all it is genuine, was available at the time of the Petitioner’s arrest, conviction and also at the time of dismissal of his appeal.

12. In my considered view, **new and compelling evidence”** implies that the evidence said to be new and compelling must have been recently discovered or has just come into being and is evidence that will evoke attention and rouse a great deal of interest.

13. Records from the trial court and this court clearly demonstrate that the issue of complainant’s age was addressed. The Petitioner does not state when he discovered what he now refers to as new evidence.

14. From the foregoing analysis, I am not persuaded that the Certificate of Birth presented by the Petitioner refers to the complainant whom he was convicted of defiling. And even it referred to the same complainant, the same is not new evidence having been issued on 12<sup>th</sup> February, 2012 which was 3 years before the Petitioner was arrested, charged and convicted.

15. The totality of this Petition leads me to the conclusion that the Certificate of Birth presented by the Petitioner was intentionally made for the purpose of this Petition. This court will not allow itself to be duped that there is new and compelling evidence worthy of consideration on retrial.

16. In light of my findings on the issues set out above, I find that the Petition has no merit it is hereby dismissed with no order as to costs.

**DATED AND DELIVERED IN KISUMU THIS 31<sup>st</sup> DAY OF July, 2019**

**T.W. CHERERE**

**JUDGE**

**Delivered in open court in the presence of-**

**Court Assistant            -Felix & Okodoi**

**For the Petitioner        - Present in person**

**For the Respondent      -Ms. Gathu**