REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. CRIMINAL APP. NO. 69 OF 2019

FRANCIS MUENDO JOHN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was charged and convicted with the offence of defilement contrary to 8(1) as read with Section 8(4) of the Sexual Offences Act. He was sentenced to fifteen years of imprisonment by the Chief Magistrates Court at Machakos and appealed to this court which appeal was unsuccessful. The record indicates that he has filed a second appeal to the court of appeal but has withdrawn the same vide letter dated 29.5.2019.

2. He then filed the instant application under Article 22, 23, 25, 35, 48, 50(6), 51,165,159 and 258 of the Constitution. The application was disposed of by way of oral submissions. The applicant submitted that the medical records dated 1st July, 2013 from Machakos Level 5 Hospital ought to be admitted as new and compelling evidence and further submitted that the period he spent in custody should be considered.

3. Mr. Cliff Machogu, prosecution counsel filed a replying affidavit and grounds of opposition to the application and submitted that the applicant ought to demonstrate that there is new and compelling evidence to warrant a retrial that the purported new evidence had been ready and available and within the knowledge of the applicant hence the application ought to be dismissed for lack of merit. He submitted that the cited case of **Jared Koita Njiri v Republic (2019) eKLR** is not applicable because it related to the substitution of the death sentence for an imprisonment term. The state did not oppose the request that the period spent in custody of two months be considered.

4. The issue for determination is whether the court may order a retrial and whether the court may review the sentence.

5. Article 50 (6) of the Constitution under which the application is brought provides that a person who is convicted of a criminal offence may petition the high court for new trial if:

> ***a) The person's appeal …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.***

6. The conjunctive nature of the provisions means that the applicant ought to have approached the highest court that has dismissed his appeal and new and compelling evidence has become available. It is clear from the record that he does not meet the first requirement because he has not exhausted his appeal to the Court Of Appeal. With regard to the second requirement this court would need to assess whether or not new and compelling evidence has become available.

7. In the case of **Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

> **"In general a re-trial will be ordered only when the original trial was illegal or defective. .. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."**

8. In addressing the question of prejudice to be suffered by an appellant when a matter is to be referred for a re-trial, in the case of **Joseph**

Ndungu Kagiri v Republic [2016] eKLR, Mativo J had the following to say:-

> **"As held above under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial.."**

9. Similarly, Justice Mativo in addressing the issue of new and compelling evidence in the case of **Philip Mueke Maingi v R (2017) eKLR** observed that firstly, the new evidence is that which must not have been available to the petitioner during trial and Secondly, the same ought to be admissible, credible and not merely impeaching, cumulative and the same would result in a new outcome if a new trial is granted. In the present case, the applicant has not demonstrated that there is new evidence that would result in a different outcome if the matter is tried afresh. Looking at all the issues I find that the purported new evidence would not have an important influence on the result of the case. It is the considered opinion of this court that a re-trial would not be a meritorious order in the circumstances. In the end, the application for retrial lacks merit and is dismissed. The conviction having been upheld earlier by this court remains and that the applicant has to continue serving the sentence imposed.

10. With regard to the submission that his time in custody should be considered, Sections 333 (2) of the Criminal Procedure Code that states:

> ***"(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."***

11. It is the considered opinion of this court having had due regard to Section 333 (2) of the Criminal Procedure Code that the request by the applicant has merit. Accordingly, this court finds that the computation of fifteen (15) years that the applicant was sentenced to be inclusive of the two months that he was in custody before posting bail.

12. Save to the extent aforesaid the applicant's application is dismissed.

It is so ordered.

Dated and delivered at **Machakos** this **28th** day of **October, 2019.**

D. K. Kemei

Judge