



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 9 OF 2017**

**WAYU OMAR DOLOLO.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Before me is a petition filed by Wayu Omar Dololo under Article 50 (2) (q) of the Constitution of Kenya, 2010. It arises from Garissa High Court Criminal Appeal No. 145 of 2013 which was an appeal from Hola Senior Resident Magistrate Criminal Case No. 12 of 2013, wherein the petitioner was convicted of defilement and sentenced to serve twenty (20) years imprisonment and his appeal to the High Court at Garissa was dismissed on 18<sup>th</sup> September, 2014.

2. The petitioner then decided to come to this court through the petition on the following grounds –

**1. That the learned High Court judge erred in law by failing to consider a defective plea taking procedure in that the coram lacked an interpreter and no language was used when the accused now petitioner was taking plea during the trial rendering the resultant trial a nullity.**

**2. The learned judge erred in law in upholding the petitioner’s conviction and by failing to consider non-disclosure of evidential materials the prosecution was intending to rely upon during the trial in breach of Article 50 (2) (j) (k) of the Constitution.**

**3. The learned judge erred in law in upholding his conviction and by failing to consider that no *voire dire* examination was conducted to the minor PW1 in breach of section 19 (1) of the Oaths and Statutory Declaration Act Cap. 15.**

**4. Learned judge erred in law in upholding his conviction and by failing to consider that there were no cogent reasons to connect the petitioner to the commission of the alleged offence.**

3. The petitioner also filed written submissions. At the hearing of the petition, the petitioner relied on the written submissions and elected not to make oral submissions. I have perused and considered the written submissions of the petitioner, in which he referred to a number of court cases.

4. Mr. Okemwa learned Principal Prosecuting Counsel in response, submitted that though the petition herein was brought under Article 50 of the Constitution of Kenya 2010, which related to discovery of new and compelling evidence, his perusal of the petition and documents filed did not disclose any new and compelling evidence. Counsel submitted that if new and compelling evidence is disclosed to the satisfaction of this court, then the High Court had power to order a new trial.

5. I have considered the petition, documents filed and the submissions of the petitioner and the state. The petition has been brought under Article 50 of the Constitution which relates to fair hearing. This matter having been determined by the High Court on appeal, no complaint can be brought again in the High Court to review or vary the High Court judgment. Appeal if any lies to the Court of Appeal, as this court has no power to review or sit on appeal in a decision made by another judge of the High Court.

6. Article 50 (6) of the Constitution however provides an avenue for those who have been convicted and appealed to the highest court available, or who failed to appeal, to approach the High Court where there is discovery of new and compelling evidence. The relevant part of Article 50 provides as follows –

**“50 (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.”**

7. It follows from the above provisions of the Constitution, that a petition under Article 50 (6) of the Constitution can be entertained by High Court only where it is based on the discovery or availability of new and compelling evidence. All the grounds of the petition herein as well as the written submissions; do not refer to or mention the discovery of new evidence. Instead, the petitioner seems to challenge the decision of the High Court in dismissing his appeal as if this court should now sit on appeal to the decision already made by another

High Court judge. That is not possible, and this petition is thus misplaced and is for dismissal, as this court has no jurisdiction to question and sit on appeal to a decision made by another High Court judge.

8. In determining this petition also, I must clarify that, the new and compelling evidence envisaged under Article 50 (6), has to be new to the evidence which was tendered in the trial court, which should not have been available to him or her at the trial. The petitioner therefore should have come to this court and demonstrated the new and compelling evidence that had now become available to him over and above the evidence which was tendered in the trial court. He has not done so, and the petition has consequently to fail.

9. The Constitutional powers conferred on this court in a petition under Article 50 (6) of the Constitution is that, if the High Court is satisfied that new and compelling evidence had now become available, it can only order for a new trial, which will be conducted by the trial court or a court of similar jurisdiction.

10. The petitioner herein, not having satisfied the requirements under Article 50 (6) of the Constitution, no new trial can be ordered and this petition has to be dismissed.

11. I thus find no merits in the petition, and I hereby dismiss the same.

**Dated, Signed and Delivered in open court at Garissa this 26<sup>th</sup> day of June, 2018.**

.....

**George Dulu**

**JUDGE**