



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CONSTITUTIONAL PETITION NO. 4 OF 2014**

**EDWARD THUKU MONJO.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was convicted of the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act No. 3 of 2006**. He was sentenced to life imprisonment. His appeals against both the conviction and the sentence were dismissed both by this Court and the Court of Appeal. By undated petition filed on 15<sup>th</sup> August, 2014 the petitioner asked this court, as far as I understand him, to find that his rights to a fair trial were breached. He invoked **section 25(c)** of the Constitution in this regard; I reckon that he must have meant article 25 (c) rather than section 25(c) of the Constitution.

He did not say much in the affidavit he swore in support of the petition save to lament, without demonstrating how, that his appeals to this Court and the Court of Appeal were not determined procedurally.

He filed hand written submissions which he relied upon at the hearing of his petition. In these submissions, he appeared to abandon what he cited as **section 25 (c)** of the Constitution and largely dwelt on **article 50 (6)** of the Constitution arguing that he now has new and compelling evidence which apparently calls for a retrial of his case. I will proceed on that assumption that his petition is based on **article 50(6)** of the Constitution for I cannot find any other basis upon which this court can entertain his grievances, real or perceived, after his appeals to this court and the Court of Appeal were dismissed.

Counsel for the state opposed the applicant's petition and briefly submitted that the petitioner has not demonstrated that there is any new and compelling evidence that would warrant a retrial.

**Article 50(6)** of the Constitution states as follows: -

50. (1)...

(2)...

(3)...

(4)...

(5)...

**(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.**

The appellant’s appeals, as noted, were heard and dismissed both by this Court and the Court of Appeal; unless there arose a constitutional issue from the judgment of the Court of Appeal and which would have entitled the petitioner to proceed to the Supreme Court as of right under **article 163(4) (a) of the Constitution** or the Supreme Court was seized of jurisdiction of the appellant’s appeal against the judgment of the Court of Appeal because the Supreme Court itself or the Court of Appeal had under article 163(4) (b) certified the appeal as raising a matter of general public importance, it can be safely concluded that the appellant’s appeal to the Court of Appeal was dismissed by the highest court which the appellant could appeal to. If that is the case, then the petitioner has satisfied the first of the two conditions precedent for an order for a retrial.

What appears to be in doubt is whether he has been successful in persuading this court that there is now available new and compelling evidence that would probably have been to his favour if it had been brought to the attention of the trial court.

As far as I can gather from the appellant’s submissions, what he relies upon as new and compelling evidence is a long-standing family feud over land and that the charge against him was made up to get rid of him and permanently deprive him and his mother of land that was rightly theirs.

The judgment of the Court of Appeal suggests that the appellant had consistently raised this issue all the way from court in which he was tried to the Court of Appeal. At page 3 of the Court of Appeal’s judgment the Court noted as follows:

***The appellant submitted that there was a grudge between him and the complainant’s mother PW2 involving a land dispute which led to the charge against him. The appellant urged us to re-evaluate the evidence and allow the appeal.***

This statement removes any lingering doubt that what the appellant is raising as new and compelling evidence is an issue that was raised at some stage during his trial or at the hearing of his appeals. The trial court must have considered this issue before convicting the appellant and the appellate courts must have also considered it when upholding the trial court’s conviction and sentence. In a nutshell, this is not an issue that can be said to amount to new and compelling evidence and therefore the petitioner has fallen short of meeting the second condition for an order for a retrial.

As I have said elsewhere in my previous decisions on this issue, **article 50 (6) of the Constitution**, is not a carte blanche for this court to regurgitate issues that have been conclusively determined either by itself or by the court above it because if that were the case, litigation on criminal cases would never come to an end.

It has always been my humble view that **article 50(6)** of the Constitution provides a limited window of opportunity for a retrial whereupon conviction or appeal **“new and compelling evidence has become available.”** As I have noted in my decisions on this question what amounts to **“new and compelling evidence”** is a question of fact and would largely depend on the circumstances of each particular case. However, regardless of the circumstances, the evidence that fits the description of “new and compelling evidence” must necessarily be the kind of evidence that is likely to have influenced the decision of the trial court or, where an appeal has been lodged, the appellate court, had it been brought to either court’s attention in time. To be compelling, the evidence must be sufficient enough to alter, in a material way, the trial or the appellate courts’ opinion if it had been brought to these courts’ attention prior to their

respective decisions.

Apart from the evidence's sufficiency, it is also up to the applicant or a petitioner to demonstrate that he could not access or produce the evidence in issue despite his reasonable efforts to do so or that he would still have failed in this endeavour even after his exercise of due diligence.

For the reasons I have given, I am satisfied the applicant's application falls far below the threshold set by **article 50(6)** for a retrial. It is not merited and it is hereby dismissed. It is so ordered.

**Signed, dated and delivered this 30<sup>th</sup> January, 2017**

**Ngaah Jairus**

**JUDGE**