REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 16 OF 2016

BETWEEN

SS……..……...….PETITIONER

VERSUS

REPUBLIC ……RESPONDENT

JUDGEMENT

1. The Petitioner, SS is serving a life sentence having been convicted for indecently assaulting his daughter in contravention of Section 20(1) of the Sexual Offences Act, 2006. The Respondent is the Director of Public Prosecutions.

2. A perusal of the file discloses that there is no formal petition filed by the Petitioner. I will proceed on the understanding that the Petitioner bases his case on his undated Notice of Motion filed in court on 7th November, 2016. The application is brought under Articles 22(1), and 22(3)(c) and 23(1) of the Constitution. Inside the application the Petitioner also cites Articles 20(1), 50(6)(a), and 159(1) and (2) (c) of the Constitution. It is deemed that he also relies on these provisions in support of his case.

3. Although the application before me is jumbled up, I will endeavour to make sense of it as much as practicable. The prayer I glean is that he seeks that this court summons Shindo Chai Nzaro, Dickson Charo Mele and Kazungu katana Chai who he alleges grabbed his parcel of land and conspired to have him imprisoned for life. He does not state what the court should do after summoning the named persons. The Petitioner, basing his claim on the already cited provisions of the Constitution, urges the court to make such orders and give directions as it may consider just and appropriate for the enforcement of the cited constitutional provisions.

4. The application is supported by grounds on its face and an affidavit sworn by the Petitioner. The Petitioner also addressed the court at the hearing of his application. The Petitioner's case is that on 18th February, 2007, his father SC gave him 1 ¾ hectares of land. His brothers, FS and TS were each given the same size of land. Later his father, without his consent, took away the land that he had given to him and sold it to one Dickson Charo Mele. It is his case that on 23rd August, 2012 he filed a civil suit in regard to the land but to date he has not been called to court to testify. He urges this court to give him an opportunity to prove that he was framed. In order to do this, he requests that the court summons D.S.S. who was the complainant in his trial, SCKK the mother of D.S.S. and FSC. It is his averment that at his trial it had been alleged that the mother of D.S.S. was deceased.

5. The Respondent opposed the application through grounds of opposition dated 10th October, 2017. It is the Respondent's case that the Petitioner does not disclose new and compelling evidence in his petition to warrant a fresh examination of the same by the court. The Respondent contends that the petition is *res judicata*. Further, that no sufficient grounds have been established to warrant the issuance of the orders sought.

6. The Respondent asserts that the application is misconceived, bad in law and an abuse of the process of the court because the first appellate court and the Court of Appeal dealt exhaustively with the issues raised in the application. According to the Respondent the issues raised herein were within the knowledge of the Petitioner during the trial and the said facts are not new.

7. The Respondent therefore urges this court to find that the only avenue open to the Petitioner is the Supreme Court and his petition is an attempt to circumvent well established jurisprudence in criminal law.

8. The Respondent has dealt with the instant petition as if it is one brought under Article 50(6) of the Constitution. A perusal of the petition confirms that this is indeed an application under Article 50(6) of the Constitution. One may also say it is an application to adduce additional evidence. In the circumstances, the question in this matter is whether the Petitioner has met the conditions set by Article 50(6) of the Constitution to warrant the grant of the orders he seeks.

9. A perusal of the file discloses that the Petitioner was charged and convicted by the Chief Magistrate's Court at Malindi in Sexual Offence Case No. 2 of 2010 for the offence of indecent assault contrary to Section 20(1) of the Sexual Offences Act, 2006. He was sentenced to life imprisonment. His appeal to this court vide Criminal Appeal No. 113 of 2010 was dismissed on 20th June, 2012. There is an indication that the Petitioner moved to the Court of Appeal. The Respondent's Notice of Preliminary Objection appear to suggest that the Court of Appeal has rendered its decision. During submissions Mr. Fedha for the Respondent posed the question as to why the Petitioner has not gone to the Court of Appeal. The Petitioner did not disclose in his pleadings that he filed an appeal in the Court of Appeal. It is therefore not known whether the Petitioner's appeal has been determined by the Court of Appeal or whether there is even a pending appeal. I will nevertheless proceed to render my decision based on the material placed before me by the parties.

10. Article 50(6) of the Constitution states:

> **"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."**

11. In **Kennedy Ochieng Achieng v Republic [2017] eKLR; Busia High Court Constitutional Petition No. 1 of 2016**, I interpreted Article 50(6) as follows:

> **"5. The question of jurisdiction having been raised, I need to address it before turning to the petition itself. A reading of the already cited Article 50(6) of the Constitution shows that for a petition to be allowed under the provision the mover must meet two conditions. Firstly, the petitioner should show that he/she has exhausted the appellate system or that the time of appealing has lapsed. Secondly it must be demonstrated that new and compelling evidence has become available. Another requirement is that the petition can only arise where the petitioner has been convicted of a criminal offence. Above all, the court clothed with jurisdiction to entertain such a petition is the High Court."**

12. In such an application therefore, it is upon a petitioner to disclose whether he has exhausted the appellate process or if the petition is being brought after the time for appealing has lapsed. It is the responsibility of a petitioner to satisfy the court that the petition meets the requirements of Article 50(6) (a) of the Constitution. The Petitioner herein has failed to do so and his petition should fail at this stage.

13. However, in order to do substantive justice in this matter, I will consider the petition. It is not clear why the Petitioner wants certain people to be summoned to court. If he wanted to be given an opportunity to adduce additional evidence in accordance with Section 358 of the Criminal Procedure Code, Cap. 75 then he ought to have made his application during the hearing of his appeal by this court. An application for production of further evidence is therefore not tenable at this stage.

14. That leaves the Petitioner with the ground of new and compelling evidence. In **Kibisu v Republic [2014] KLR – SCK 151; Petition No. 3 of 2014**, the Supreme Court at paragraph 42 of its judgement defined new and compelling evidence as follows:

> **"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 the 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."**

15. Looking at the material placed before me by the Petitioner, I find that he talks of a civil case he filed on 23rd August, 2012. That cannot be said to be new and compelling evidence. It is evidence that was created by the Petitioner after the trial and the first appeal. It is noted that the judgement of this Court (C.W. Meoli, J) was delivered on 20th June, 2012. The civil case is therefore not relevant to the Petitioner's trial.

16. Nevertheless, the issue of the land dispute was addressed by C.W. Meoli, J thus:

> **"This appellant appears to suggest that all these persons had something against him and framed him. That is ludicrous. It is not even clear who was the pastor with whom he alleged a land dispute as that issue was also advanced against the neighbours, PW3 and PW4 and even the chief (PW6). It is not possible that he had a land dispute with all these persons. Besides as the trial magistrate observed, DS had nothing to do with the dispute."**

17. It is thus clear that the issue of the land dispute is not new. The Petitioner has also not established that he has evidence that was not available to him at the time of the trial. What the Petitioner is trying to do is to ask this court to review the judgement of another Judge of this court. That power is not available to this court.

18. Upon review of the material placed before me, I find the Petitioner's case without merit. The same is rejected and dismissed.

Dated, signed and delivered at Malindi this 30th day of November, 2017.

W. KORIR,

JUDGE OF THE HIGHCOURT