



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CRIMINAL APPLN. NO. 23 OF 2015

FRANCIS SUSA WESONGAAPPLICANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

1. **FRANCIS SUSA WESONGA**, the Applicant herein, was charged, tried and convicted of the offence of defilement contrary to **Section 8(1)(4)** of the **Sexual Offences Act** No. 3 of 2006. He was subsequently sentenced to 15 years imprisonment. That was in Migori Chief Magistrate's Criminal Case No. 354 of 2012. (hereinafter referred to as '***the criminal case***').

2. The Applicant then lodged an appeal before this Court. It was Criminal Appeal No. 91 of 2014. The appeal was heard and dismissed by **Majanja, J.** on 13/02/2014. From the record before me, it appears that the Applicant did not prefer any appeal to the Court of Appeal.

3. The Applicant instead opted to exercise his right under **Article 50(6)** of the **Constitution** in seeking for a retrial of the criminal case. That was vide the Notice of Motion dated 14/09/2015 which was supported by the Applicant's Affidavit.

4. At the hearing of the application the Applicant appeared in person while **Mr. Okaka** Learned State Counsel appeared for the State. The Applicant relied on his written and filed submissions in urging this Court to allow his application whereas the State opposed the application orally. From the material before Court it appears that the thrust of the application is the Applicant's need to recall and examine the complainant on her age as well as the maker of the Certificate of Birth from the Republic of Tanzania which was produced in the criminal case. The Applicant further contended that he is now in possession of evidence revealing that the complainant in the criminal case was not a minor but well above 18 years old, married and with children.

5. Having said so, I will now look at the application in light of the said **Article 50(6)** of the Constitution. The said provision of the Constitution states 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."

6. For the Applicant to benefit from the above provisions, he must positively demonstrate the following two principles namely that: -

(a) The Applicant's appeal was dismissed by the highest court to which the Applicant was entitled to appeal to or that the Applicant did not appeal within the time allowed for such an appeal; ***and***

(b) The Applicant has new and compelling evidence relating to the criminal case.

7. Applying the said principles to this case, there is no evidence that the Applicant appealed the dismissal of his appeal to the Court of Appeal or even beyond. This Court can therefore only presume that the Applicant did not appeal the judgment of the appellate Court as provided for in law. That being so, the application is competently before this Court.

8. Having said so, the Applicant must now demonstrate that indeed new and compelling evidence has become available and which evidence ought to be considered by the trial court.

9. What is new and compelling evidence was considered by the highest Court of this land in the case of **Col. Tom Martins Kibisu vs. Republic Sp. Ct. Petition No. 3 of 2014 (2014) eKLR** when the Supreme Court presented itself thus:-

"[42] We are in agreement with the Court of Appeal that under Article 50(6), "new and compelling evidence" means "evidence which was not available at 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, a 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 the accused person." (emphasis added).

10. The Applicant is therefore required to demonstrate that the evidence intended to be adduced **was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial** and that the said evidence **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.**

11. It however has to be remembered that ***"new and compelling evidence"*** does not involve the rehearing of the appeal. I will now deal with the first limb as to whether the evidence was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial. I have carefully perused the proceedings before the trial court in the criminal case. The Certificate of Birth in issue was produced as an exhibit by the investigation officer who testified as PW6. The Applicant did not object to its production and instead he was accorded an opportunity to examine PW6 and he so did. The Applicant's contention is hence lacking in basis and is hereby rejected.

12. On the other side there is the issue of the alleged evidence that the complainant in the criminal case was not a minor. To that end the Applicant intends to avail evidence to prove that the complainant was married and had children. ***But where was that evidence during the trial?*** The Applicant happens not to address that pertinent question. There is therefore no explanation as to where that evidence was and the efforts, if any, the Applicant made in his attempt to avail such evidence before court. This Court is again not told of the number and nature of the witnesses in issue. The record further confirms that the Applicant was out on bond during the trial period. The upshot is that the Applicant has failed to satisfy that requirement.

13. For the purposes of completeness of this discourse, it is imperative to ascertain if the intended evidence would have been admissible at the trial, that it was of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict. The intended evidence would have amounted to a challenge on documentary evidence by oral evidence. In such a scenario oral evidence is admissible pursuant to **Section 98** of the Evidence Act, Chapter 80 of the Laws of Kenya. Further, even if the Applicant would have failed to disprove the contents of the document, that nature of evidence would have aided him to mount a defence under **Section 8(5)** of the **Sexual Offences Act**. The intended evidence was hence admissible in law.

14. As to whether that evidence was of high probative value and capable of belief and which, if adduced at the trial would probably have led to a different verdict, I am not in a position to satisfactorily address my mind on the issue since the Applicant did not divulge the details of such evidence. From what was laid before this Court it is almost impossible to attempt to take that route as there is nothing to aid Court do so. I therefore find that the Applicant has failed to satisfy this principle.

15. From the analysis this Court now returns the verdict that the Applicant has failed to prove the existence of 'new and compelling evidence' as to succeed in his application.

16. Consequently the Notice of Motion dated 14/09/2015 be and is hereby dismissed.

DELIVERED, DATED and SIGNED at MIGORIA this 20th day of July 2016

A. C. MRIMA

JUDGE