REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTION PETITION NO. 10 OF 2015

THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES 2013

AND

IN THE MATTER OF ARTICLES 20 (10 (2) (4), 22 (1) (3) (C) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLE 23 (1) (3), 25 (A (B) AND 22 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 258 (1) AND 259 (1) (3) OF THE GENERAL PROVISIONS OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 36 OF THE SEXUAL OFFENCES ACT

BETWEEN

ADHAN NASSIR ……..…. PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ……. RESPONDENT

JUDGEMENT

The petitioner was charged unnatural offence contrary to section 162 (a) (i) of the Penal Code. The particulars of the offence were that the petitioner, on the 8th day of June, 2010 within Kilifi County

unlawfully had carnal knowledge of R N H a girl aged 16 years. He was also charged in a second count with the offence of stealing contrary to section 275 of the Penal Code. The particulars were that on the same date the petitioner stole the complainant's mobile phone Nokia 1600 and cloth wrapper all valued at Kshs.3,850/=.

The trial court convicted the petitioner and sentenced him to serve 21 years imprisonment. The petitioner filed Criminal Appeal Number 74 of 2012 before the Malindi High Court. Meoli J dismissed the appeal in her judgement delivered on 18th December, 2013. The petitioner was unbowed by that dismissal and filed Criminal Appeal Number 91 of 2014 before the Court of Appeal in Malindi. The second Appeal suffered the same fate as it was dismissed by the Court of Appeal's judgement delivered on 26th February, 2015.

On 26th May, 2015 the petitioner filed the current petition. The petition is basically brought under Article 50 (6) of the Constitution as per the submissions by the petitioner's counsel. The state filed a replying affidavit sworn by Timothy Musyoki, a Senior Principal Prosecution Counsel, on 22nd October, 2015.

The following paragraph in the submissions by counsel for the petitioner summarizes the petition: -

> **"The petitioner's total position is that at the trial, section 36 of the Sexual Offences Act was not taken into account despite his own request for a DNA test (which was indeed done but the analyst did not/failed to match the Exhibit marked "B", which was the blood group of the petitioner with Exhibit marked "C", which was the seminal fluid inside the used condom). The seminal fluid was therefore not matched with the Blood Group of the petitioner."**

The state's position is that the petition is defective and incompetent. There is no new and compelling evidence and that the petitioner's rights were not violated.

Article 50 of the Constitution provides for the tenets of fair hearing. The entire Article explains the attributes of a fair hearing. Article 50 (6) states as follows:

> **"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 filed two appeals before the High Court and the Court of Appeal. The provisions of Article 50 (6) (a) do not apply. Reliance is made to the provisions of Article 50 (6) (b). Under Article 50 (6) (b), what is required is new and compelling evidence. The evidence must not only be new but should also be compelling. By "new" it is meant such evidence that was not available during the hearing. The provision is a safe guard measure meant tore-open up cases where it is found that there is new evidence which could have changed the outcome of the case.

The main issue being raised by the petitioner is that had the DNA test been made to compare the seminal fluids in the used condom and the appellant's blood, the results could have proved that the seminal fluids in the condom did not belong to the petitioner. Can we say then that this is new and compelling evidence? My position is that what is being put forward is a possibility. It is submitted that that possibility raises doubt and should benefit the petitioner. If the court were to find in favour of the petitioner, how will the seminal fluids be tested after a period of over six (6) years? The curt cannot simply presume that indeed what the petitioner is proposing is the truth. The proposal has to be subjected to scientific testing.

I have read the proceedings before the trial court as well as all the three judgements which found against

the petit9ioner. The issue of DNA was considered by Justice Meoli in her judgement. Paragraph 17 of the judgement reads as follows:

> **"That the seminal fluid in the used condom was not analysed for comparison with the appellant's blood samples etc, is deplorable. It seems that PW7 carried out a routine examination of the samples without much care after noting that there was no semen on the biker/underwear. There could not be if the condom was used. However, the fact that the used condom was not directly connected to the appellant cannot be a basis for rejecting or dismissing the rest of the prosecution evidence. It would have been different if the used condom and the appellant's samples were examined and confirmed not to be related. In this case, no such examination was done."**

The Court of Appeal at page 8 of its judgment made the following observations: -

> **"…. Contrary to the appellant's assertion that there was need to carry out a DNA to establish that the spermatozoa in the condom was his, we do not think much turns on this. The appellant having ascertained that PW1's mother was away from home; he took the opportunity to call PW1 to the place where he molested her. PW1 knew the caller, the appellant, who was her teacher. PW3 too did see the appellant leave the *locus in quo* after directing his spotlight on him. This was sufficient evidence to link the appellant to the commission of the offence and it is immaterial that the spermatozoa in the condom was not established to have been the appellant's."**

The petitioner was charged under the Penal Code and not the Sexual Offences Act. However, sections 1 and (2) of the 1st schedule to the sexual Offences Act provides that the Act shall apply to all Sexual related offences. The effect of this is that section 36 of the Sexual Offences Act can be applied. Section 36 (1) of the Sexual Offences Act states as follows: -

> **"Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court m ay direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."**

The above section is not mandatory. The evidence shows that samples were taken for DNA testing. The conviction is not based on the DNA results. There is the evidence of the complainant who was 16 years old. The trial court in its judgement observed that she was a credible witness. There is the evidence of PW 3 Yussuf Mohamed Soma who saw the petitioner running away from the scene. PW1 talked to the petitioner twice on phone beseeching her to go and see him. K The petitioner could not control his lust and was already wearing a condom ready to defile his own student. Immediately PW1 appeared, she was held by the hands and throat and pulled to the bush and sodomised. The evidence before the triail court clearly shows what happens. The DNA testing does not alter the outcome of the case. PW1 knew the petitioner as he was her teacher.

I do find that the petition is frivolous and an abuse of the court process. It was filed exactly two months after the Court of Appeal had dismissed the petitioner's second appeal. Where did the new and compelling evidence come from within a period of two months. The proliferation of constitutional petitions abased on Article 50 (6) of the Constitution makes Judicial Officers to spend more time on unnecessary litigation. This cannot be justified as pursuit of constitutional rights. There is no violation of the petitioner's constitutional rights. The only avenue convictees have is Article 50 (6) of the Constitution and it should be utilized upon the discovery of new and compelling evidence. Merely throwing applications to the High Court in the hope that the court will favour the petitioners is abuse of the court process. It has now become normal for an accused to exhaust the appeal process and thereafter file a petition under Article 50 or other Articles of the Constitution alleging breach of their rights.

I do find that the petition lacks merit, is uncalled for and was filed for dismissal. It is hereby dismissed.

Dated and delivered in Malindi this 17th day of November, 2016.

S.J. CHITEMBWE

JUDGE