



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

MISC. CRIMINAL APPLICATION NO. 4 OF 2015

BETWEEN

ANTONY ODHIAMBO OJWANG APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant **ANTONY ODHIAMBO OJWANG** also known as **CLINTON ODHIAMBO ODONDI** was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the *Sexual Offences Act, 2006*. The particulars of the charge were that on 3rd May 2010 at [Particulars Withheld] sub-location in Rongo District, he caused the penetration with his genital organs to a child named C A M aged 15 years. He also faced an alternative charge of an indecent act with a child contrary to **section 11(1)** of the *Sexual Offences Act* grounded on the same facts.
2. He was tried, convicted and sentenced to 20 years imprisonment on 10th December 2010 in **Rongo Senior Resident Magistrates Criminal Case No. 403 of 2010**. His appeal to the High Court at Kisii, **Criminal Appeal No. 112 of 2011** was heard and dismissed on 19th December 2012 by Sitati J. The applicant did not pursue a second appeal to the Court of Appeal.
3. The applicant now seeks a new trial under the provisions of **Article 50(6)** of the Constitution which provides as follows;

(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.
4. Although the application is threadbare and does not clearly set out the grounds for the application, the applicant relied on written submissions to prosecute his case. The first ground of argument is that his trial proceeded for hearing without him being supplied with witness statements as provided for under **Article 50(2)(c)** and **(j)** of the Constitution which entitle him to adequate time and facilities to prepare his defence.

5. In regard to the substance of the trial, the applicant contends that the prosecution failed to prove the elements of the offence of defilement. He submitted that the testimony of the complainant was insufficient and unreliable and did not establish that he was the perpetrator of the offence. He also contended that the prosecution failed to call key material witnesses to prove that he defiled the complainant. He further contended that he was not the person identified and alleged to have been arrested by the arresting officer.
6. The applicant's case must be considered alongside the provisions of **Article 50(6)** of the Constitution which I have set out above. The applicant has clearly complied with the first limb. The issue for determination here is whether he has established new and compelling evidence to warrant a new trial. What is new and compelling evidence was considered by the Supreme Court in *Lt Col. Tom Martins Kibisu v Republic Sp. Ct. Petition No. 3 of 2014 [2014]eKLR* where it stated as follows;

[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, 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.

7. It is clear from the guidance given by the Apex Court that '**new and compelling**' evidence does not involve rehearing the appeal. I understood the applicant to be contending that the prosecution did not prove its case. The issues of proof of the offence were dealt by the first appellate court which, after evaluating the evidence, concluded that the offence had been proved. Nothing in the applicant's submissions has emerged to suggest that there is new and compelling evidence.
8. The applicant assailed the trial on the grounds he was not furnished with the charge sheet or the witness statements. This is a procedural issue which ought to have been raised at the trial or on appeal. As regards the witness statements, the trial record shows that the court made an order directing the applicant to be furnished with the statements. The applicant did not raise the issue further during the trial or on appeal. In my view, procedural issues that affect the trial cannot, at least in this case, fall within the definition of new and compelling evidence.
9. The application is dismissed.

DATED and DELIVERED at MIGORI this 22nd day of July 2015.

D.S. MAJANJA

JUDGE

Applicant in person.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.