



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 169 OF 2010

BETWEEN

K M M APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. Loice Komingoi, Principal Magistrate in original

Nyamira PM's Criminal Case No.540 of 2009 delivered on 26th August, 2010)

RULING

1. The applicant herein K M M was convicted by the Senior Principal Magistrate's Court at Nyamira of Defilement contrary to **Section 8 (1) (2) of the Sexual Offences Act No.3 of 2006 Laws of Kenya**. The particulars of the charge were that on the 29th day of August 2009 at [particulars withheld] sub location in Nyamira District within Nyanza Province he intentionally and unlawfully by use of his genital organ namely penis caused penetration to genital organ namely vagina of I N A a girl aged 8 years old.
2. He also faced an alternative charge of indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No.3 of 2006 Laws of Kenya**. The particulars of the charge were that on the 29th day of August 2009, at [particulars withheld] sub location in Nyamira District within Nyanza Province he unlawfully and indecently assaulted I N A by touching her private parts namely vagina.
3. After the trial the applicant was sentenced to life imprisonment. He was dissatisfied with the trial court's conviction and sentence and preferred an appeal to this court in **Criminal Appeal No.169 of 2010**. The applicant has now filed a Notice of Motion under certificate of urgency through his advocate M/s C.A. Okenye & Co. Advocates pegged on **Article 50 (6) (b) and 23 (3) (e) of the Constitution** seeking orders:-
 1. *That this matter be certified urgent.*
 2. *That this Honourable Court be pleased to order for a new trial of the Nyamira SPM Criminal case No.540 of 2009.*
 3. *That in the alternative this court do make a finding that there was miscarriage of justice and forthwith acquit the accused on account of the new and compelling evidence and or order compensation to the accused person.*
 4. *That pending the hearing and determination of this application, the appellant/applicant be released on bond of reasonable conditions.*

4. The application was supported by an affidavit solely grounded on the fact that the applicant was 17 years old when he was sentenced by the trial court. In support of this contention, counsel attached a copy of the applicant's birth certificate which shows that he was born on 1st September 1992.
5. When the matter came before me on 6th November 2013, Mr. Okenye for the appellant submitted that there is new and compelling evidence regarding the age of the applicant; that such evidence was not available during the hearing of the case before the trial court, hence the instant application to have the trial in the lower court started afresh.
6. He further submitted that in the alternative and since applicant is sickly, he be acquitted altogether. Counsel referred the court to the annexure marked **KMM1** to the application which is a copy of the applicant's birth certificate.
7. Lastly, Mr. Okenye submitted that the only person who saw appellant and victim was one Joseph and yet that Joseph was not called to testify, hence identification was problematic. That dock identification was not sufficient and in the instant case an identification parade should have been conducted.
8. The application was opposed by Mr. Shabola learned counsel for the State. He submitted that **Article 50** of the **Constitution** allows for a retrial when there is new and compelling evidence. That the fact that the applicant was 17 years at the time of commission of the alleged offence is not new and compelling evidence. He also submitted that the fact that the applicant is not contesting evidence adduced before trial court shows that the applicant accepts that the evidence adduced against him was true.
9. Counsel further submitted that **Section 8 (2)** of the **Sexual Offences Act** does not specify the age of the person who commits the offence. That **Section 8 (7)** provides that where a person charged is below 18 years the court may upon conviction and sentence, sentence such person in accordance with **Borstal Institution Act** and the **Children's Act**.
10. He further submitted that the applicant herein ought to have challenged the conviction and sentence based on his age and not an order for retrial. That the applicant is now 18 years and is therefore eligible for the term of imprisonment as meted out by both the trial court and appeal court.
11. Mr. Shabola therefore urged the court to hold that the application herein has been overtaken by events and the same should be dismissed.
12. **Article 50** of the **Constitution** deals with fair hearing of a dispute or criminal case. Under **Article 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.**
13. The **Black's Law Dictionary, 8th Edition** defines "new" as "recently discovered, recently come into being" and the Concise Oxford English Dictionary defines "compelling" as "powerfully evoking attention or admiration". It follows therefore that any alleged new evidence must have been recently discovered or has just come into being and is evidence that will evoke attention and rouse a great deal of interest.
14. In **Ramadhan Juma Abdalla & 2 others -vs- Republic [2013] e KLR** Lenaola J. held that rights under **Article 50 (6)** of the **Constitution** are not to be used as a camouflage for an appeal or a review, but they are intended to be granted when there is new and compelling evidence that has come to light after orders adverse to an applicant have been made upon conviction and/or disposal of an appeal. Where there is no proof of compelling evidence, no retrial will be ordered.
15. Similar sentiments were made in **Mohammed Abdurrahman Said and Another -vs- Republic - Misc. Criminal Application Nos.66A and 66B of 2011** (unreported) that:-

"The right to a new trial is not an avenue for a further appeal. This court has no jurisdiction to consider and determine matters which have already been decided upon by the Court of Appeal."

16. In **William Okungu Kilinga –vs- Republic [2013] e KLR** Muchelule J said that:-

“For the avoidance of doubt, where an applicant petitions the court under Article 50 (6) (b) for afresh trial he has to demonstrate that he has come by new evidence which was unknown to him at the time of the trial, that he could not have known, or come by the evidence, by the exercise of due diligence, and that such evidence is so material that had it been known at the time of the trial it could have changed the result of the case (see Wilson Mirimba Mwangi – vs- DPP, HC Misc. Application No.271 of 2011 at Nairobi.”

17. In the instant matter, what counsel has termed as new and compelling evidence is the applicant’s birth certificate by which the applicant now wishes to show that by the time the applicant was sentenced to life imprisonment in 2010, he was only 17 years of age. Though that fact has not been disputed by the state, it is however my considered view, that the fact that the applicant was 17 years of age in 2009 or 2010 does not constitute new and compelling evidence for the reasons:-

- a. *The applicant had always been represented by counsel during his trial and also on appeal and his counsel should have brought the said fact to the attention of the courts since it was always known that the applicant was born on 1st September 1992.*
- b. *The evidence of his age was not something that was hidden and needed discovery. The whole time he underwent trial and even during appeal this fact of his age was always within reach.*
- c. *As counsel for the State has correctly submitted and upon perusal of the proceedings during applicant’s trial and appeal, his conviction was proper.*
- d. *An order for re-trial is not an appeal or review therefore this court is not the proper channel to address the applicant’s grievances since he has not demonstrated that the fact of his birth on 1st September 1992 is new and compelling evidence which has recently come onto his possession.*

18. I also find that from the submissions by applicant’s counsel, there is an attempt to reopen Cr. Appeal Number 169 of 2010. That chapter is closed and the appellant can only re-open the appeal by going to the Court of Appeal.

19. For the above reasons this application lacks merit and it is hereby dismissed.

Dated and delivered at Kisii this 27th day of February, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. C.A. Okenye (present) for the Appellant/Applicant

Mr. P.O. Ochieng for the Respondent

Mr. Bibu - Court Clerk