



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Miscellaneous Application 116 of 2012

JULIUS KIPKEMBOI KORIR ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

R U L I N G

Before me is a Notice of Motion dated 8<sup>th</sup> August 2012 brought by the applicant **JULLIUS KIPKEMBOI KORIR** under **Article 50 (6)** of the **Constitution**. The application seeks one order that –

***“there be a retrial in favour of the applicant against VIHIGA CRIMINAL CASE NO. 1912 OF 2003 and subsequent Judgment of the KAKAMEGA HIGH COURT CRIMINAL APPEAL NO. 157 OF 2011.”***

The application has grounds on the face of the Notice of Motion. The grounds are that the applicant was charged with rape and convicted of defilement; that the investigating officer failed to attend court to prove the charge; that the trial took an abnormal duration which made the applicant suffer prejudice on the defective charge; that the delay attracted new and compelling evidence which called for a retrial; and finally that the High Court failed to realise that the material facts warranted an acquittal.

A supporting affidavit was also filed with the application. The affidavit amplifies the grounds and in particular, it was deponed that the amendment of the charge to one of defilement contrary to **Section 3 (2)** of the **Sexual Offences Act** amounted to a wave of new evidence under the Evidence Act and that the prosecution was duty bound to read to the accused the charge afresh, and that the applicant had three witnesses who were willing to give evidence in connection to the offence of defilement.

At the hearing of the application, the applicant emphasized that the magistrate who took over the case

from a previous magistrate did not comply with **Section 200** of the **Criminal Procedure Code (Cap.75)**. He submitted that the investigating officer did not come to court to testify in proof of the charge. He stated that he chose not to appeal to the Court of Appeal because the Constitution allowed him to make this application to the High Court. He further asked for a copy of the High Court decision which was made on the Appeal herein.

Mr. Oroni, learned State Counsel opposed the application. Counsel relied on **Article 50 (6) (a)** of the Constitution 2010 which required that such an application only be made after an appeal to the highest court had been made. Counsel argued that the appellant had not appealed to the Court of Appeal from the High Court, nor had he demonstrated the reasons why he had not so appealed. In addition, the applicant had not demonstrated the existence of new and compelling evidence that had now come to his knowledge, to justify the application

This is a Constitutional application for a retrial. **Article 50 (6)** of the Constitution of Kenya 2010 provides that a person who has been convicted in a criminal case can petition the High Court for a new trial on the same matter, provided he satisfied certain requirements. It states –

***“50 (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if***  
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***(a)The persons 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.”***

In my view, the above provisions of the Constitution require that for an applicant to be successful in such an application, he or she has either to have appealed to the highest court to which he is entitled to appeal, or to demonstrate to the High Court the reasons that prevented him from appealing within the time allowed by law for appeal. In addition, he also has to demonstrate the new and compelling evidence that has become available after the trial and appeal, if an appeal has been filed. The evidence has to be both new and compelling and has to become available after the trial or appeal as the case may be.

Considering the facts and arguments put across by the applicant herein, he has not appealed to the highest Court, which is the Supreme Court, since his appeal to the High Court was decided on 11<sup>th</sup> July 2012. He has not demonstrated any attempt to so appeal to the Court of Appeal and to the Supreme Court, nor has he shown any reason that prevented him from so appealing. In my view therefore, he has not satisfied the first Constitutional requirement for the present application for a new trial. The application will fail on this account.

On the second requirement of availability of new and compelling evidence, he has stated that the

Investigating Officer did not testify at the trial. In my view, that is no ground for claiming that there is now new and compelling evidence that has emerged. The failure of the investigating officer to testify could only perhaps weaken the prosecution case. It did not create new and compelling evidence. In my view, what an applicant is required to do in such an application is to demonstrate and describe the actual evidence that has now come to his knowledge, when and how it came to his knowledge. He is also required to demonstrate the compelling relevance of the new evidence to his case. He has failed to satisfy any of these Constitutional requirements. On that account also the application will fail.

I will emphasize that in such an application, this court is not exercising appellate jurisdiction. It cannot therefore look at the merits, of decisions made at the trial or on appeal. Therefore, in dismissing the application, I am not delving into the merits of the trial or the appeal. Lastly, since the applicant has requested that he be supplied with copy of the High Court Judgment on appeal, I will order that he be so supplied.

In the result, I find no merits in the application and dismiss the application. I however order that the applicant be provided with a certified copy of the High Court's Judgment in Kakamega H.C. Criminal Appeal No. 157 of 2011, delivered on 11<sup>th</sup> July, 2011.

It so ordered.

***Dated and delivered at Kakamega this 18<sup>th</sup> day of April, 2013***

**George Dulu**

**JUDGE**