



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**Miscellaneous Civil Case 156 of 2011**

**E O A ..... APPLICANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**RULING**

Before me is a petition for retrial filed under Article 50 (6) (b) of the Constitution. The petitioner **E O A**, was first charged with the offence of incest contrary to section 20(1) of the **Sexual Offences Act** 2006. He was convicted and sentenced to 20 years imprisonment. Judgment was delivered on 18<sup>th</sup> March, 2010. Dissatisfied with the judgment, the applicant appealed to the high court against both conviction and sentence. His petition of appeal which was filed on 29<sup>th</sup> March, 2010 was heard by **Makhandia J.** on 23<sup>rd</sup> November, 2010. It was subsequently dismissed. The court however found that the subordinate court had imposed the wrong sentence considering that the complainant was aged 11 years. The court therefore corrected the sentence to life imprisonment. Judgment was delivered on 17<sup>th</sup> January, 2011.

The applicant has now petitioned this court for a retrial. In his home made petition filed on 28<sup>th</sup> December, 2011 he states that he was not furnished with witness statements at the trial and that the proceedings were conducted in a language he did not understand. He further states that provisions of Article 50 (2) (g) was not explained to him, while Article 50 (2) P was not complied with by the court.

The application came before me on 23<sup>rd</sup> May, 2012. During the hearing the petitioner submitted that the court used a language he did not understand and that he was not supplied with witness statements.

The respondent through learned state counsel, **Mr. Mutai**, opposed the petition. He submitted that the petitioner had not met the two conditions provided under Article 50 (6). He asked that the petition be dismissed.

The issue before me for determination is whether the petitioner is entitled to a retrial. Article 50 (6) provides that:

*“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 became available.*

The petitioner stated before court that he has not appealed to the Court of Appeal. This means that his

appeal has not been dismissed by the highest court. Further the appellant has not demonstrated to this court any new and/or compelling evidence which has become available. He has only complained that he did not understand the language used in the trial court.

I have perused the record of the trial court. The translation is indicated as English and Dholuo. In the instant proceedings the petitioner indicated to this court that his preferred language was Dholuo. The same is indicated on the record. It cannot therefore be true that the petitioner did not understand the language used in the lower court. Besides, the petitioner did not raise the issue of language in his appeal at the superior court. I therefore find that allegation to be untrue.

In sum, I find that the petitioner has not satisfied the requirements for a retrial under Article 50 (6). The petition is dismissed.

**Ruling dated, signed and delivered** at Kisii this 25<sup>th</sup> day of **September**, 2012.

**R. LAGAT-KORIR**  
**JUDGE**

**In the presence of:**

Elijah Ochieng Anangwa:      applicant (present/absent)

.....                                      for respondent (present/absent)

.....                                      court clerk

**R. LAGAT-KORIR**  
**JUDGE**