Otieno v Republic (Criminal Revision E031 of 2023)
[2025] KEHC 10173 (KLR) (16 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10173 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E031 OF 2023

RN NYAKUNDI, J

JULY 16, 2025

BETWEEN

DAVID OCHIENG OTIENO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before this court is an application dated 28th day of September 2023 seeking the following orders:

    a. That, the petitioner is seeking for orders that his sentence be declared illegal based on the fact the appellant was sentenced under an unknown law in the sexual offence act of victim aged between 11-12years.

    b. That, the applicant is seeking for orders on sentence review in accordance to article 50 (2)(p) (q) and section 362 as read with section 364 of the *Criminal Procedure Code*

    c. That, the petitioner is seeking for an order for a retrial as there are many procedural mistakes resulting to a miscarriage of justice in his case.

    d. That, the applicant is seeking for orders for review of sentence on time spent on remand custody pursuant to section 333 (2) of the *Criminal Procedure Code* cap 75 LOK, sentence to commence from date of arrest.

2. It is further annexed by an affidavit sworn by the Applicant which states as follows:-

    1. That, I am a male adult Kenyan citizen and competent to swear this affidavit.

    2. That, I was arrested, charged, convicted and sentenced to 30 years imprisonment by the trial magistrate court for the offence of defilement c/sec 8(1)(2) of the *SOA* 2006 on 3rd June 2022 by Hon. Kigen.

3. That, the applicant was aggrieved with the trial court decision and filed an appeal no. E075/2022 which was dismissed on 8th January 2023.

4. That, the applicants is today 28th September 2023 filing this criminal review on the decision of Hon. Kigen by the under listed grounds:-

    i. That during the sentencing on 3rd June 2022 the period spent in remand custody for the applicant was not factored in, hence section 333(2) of the CPC was not complied with.

    ii. That during the trial of the applicant there were many procedural impropriety committed which prejudiced the appellant due to a miscarriage of justice in the following instance:

        a. That, the charge was defective as the charge was not amended accordingly to reflect the correct age of the complainant as assessed of between 11-12 years. The charge sheet was defective in form and substance

        b. That, he was charged by Trial court magistrate Hon. Kigen convicted and sentenced the applicant using a law not recognized by the sexual offence act 8(1) (11-12) & article 50 (2) (n) (i)

        c. That, the applicant is faulting the procedure applied on the testimony of PW-1 (complainant) where she gave unsworn evidence which was subjected to cross examination contrary to the Law.

        d. That the trial court did not make an adverse presumptions drawn from the failure of crucial witnesses not testifying in the case hence weakening the prosecution case such as

            1. Ephrahim

            2. Mama lavender

            3. Mama Brenda

            4. Teacher Susan

            5. Arresting officer and I am relying on the principle established in Bukenya v Uganda (1972) E.A 544.

        e. That, the trial magistrate disregarded the testimony of the medical doctor when she waived the corroboration of the witness and relied on the complainants evidence hence not complying with section 124 of the *Evidence Act*.

        f. That, the trial magistrate relied on the evidence of the medical doctor which was not conclusive and contradictory where it was stated for instance that The hymen was healing, hymen had injuries, hymen was widened. In this case the medical evidence had relatively little correlation with the sentencing contrary to established principles. A broken hymen is not necessarily a pointer to defilement.

        g. That the right to a fair trial was not accorded to the applicant he was implicated in almost all the offences against his two children from sodomy, incest and

defilement. This is indicative of poor investigation or lack of evidence and only charged him based on suspicion. I am relying on the authority of *Sawe v Republic* (2003) eKLR 354 where it was held that it was not proper to infer guilt from mere suspicion but from adduced evidence beyond reasonable doubt.

h. That the prosecution was faltering and created doubt on the applicant as the perpetrator of the crime as there were no physical evidence such as soiled or torn clothes furthermore the child turned out negative contrary to the status of applicant.

i. That the trial magistrate never gave an explanation which he was entitled to for the stiff and excessive sentence of 30 years and the court was obligated to give reasons for the sentence.

j. That the burden of proof never shifts to the accused it remains with the prosecution, court wanted him to prove his innocence.

5. That, for the interest of justice may this honorable court be pleased and allow my application to revise the decision and come to a favourable outcome as prayed on this 28th day of September 2023.

6. That, I believe my application has high chances of success and therefore wish to be present at the hearing of this application.

7. That, what is herein deponed is true to the best of my knowledge, information and belief.

Decision

1. The question to be answered by this court is whether the applicant has demonstrated sufficient cause for a consideration of new and compelling evidence as per Art 50 (6) (a) (b) of the *Constitution*. The said Art 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 has become available

2. The "new and compelling evidence" must be evidence that was not available at the time of the original trial, despite due diligence, and it must be of high probative value, capable of belief, and likely to have resulted in a different verdict.

3. It is therefore an essential primary task of this court empowered under Art 50 (1) of the constitution in adversarial trial process to determine the relevance of any piece of evidence. In relation to much of the information that will be offered for the fact-finder to consider, "mere" relevance will not be an issue worthy of any debate. However, even when it is clear that the evidence is relevant, the basis of its relevance may require the application of a specific admissibility rule. Where there is no specific admissibility rule that applies, the evidence may nevertheless be excluded if it is not sufficiently probative, given the time it will take to consider it, or with regard to its prejudicial effect.

4. The *Evidence Act* contains the test for relevance to prove or disapprove existence or non-existence of a fact in issue. The legal relevance rule which is of significance to the new and compelling evidence under

Art 50(6) (a) (b) is more apparent in the extract of persuasive authority in *R v Baker* [1989] 1 NZLR 738 (HC) at 711. in which the court held;

> " [L] of relevance can be used to exclude evidence not because it has absolutely no bearing upon the likelihood or unlikelihood of a fact in issue but because the connection is considered to be too remote. Once it is regarded as a matter of degree, competing policy considerations can be taken into account. These include the desirability of shortening trials, avoiding emotive distractions of marginal significance, protecting the reputations of those not represented before the courts and respecting the feelings of a deceased's family. None of these matters would be determinative if the evidence in question were of significant probative value."

5. The doctrine of "new evidence" in criminal cases known as newly discovered evidence, generally allows for a new trial or appeal if a party can demonstrate that they have discovered evidence that was not available at the of the original trial and that this new evidence could have reasonably change the outcome of the case. This doctrine is a safeguard against potential injustices arising from previously unknown information.

6. Although Art 50(6) (a) (b) of the *Constitution* does not define what are the elements of compelling evidence. The courts have interpreted the maxim to give it meaning so as to exercise discretion to grant a new trial. In my view the newly discovered evidence should not act as a gateway for an accused person to re-litigate the same subject matter over and over again expecting to receive a different verdict. The threshold under this provision as a constitutional imperative is basically very high given the fact of a trial by a competent court and thereafter the appeal process duly complied with the law. I hold a strong view that new trial motions grounded on newly discovered evidence must rest on evidence of innocence or evidence that prosecution violated its constitutional duty. The court in *Berry v Georgia* 10 Ga At 527-28 held as follows:

> That the party who asks for a new trial on the ground of newly discovered evidence is required to show the following:
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> a. That the evidence has come to his knowledge since the trial
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> b. That it was not owing to the want of due diligence that it did not come sooner
>
> c. That it is so material that it would probably produce a different verdict, if the new trial were granted
>
> d. That it is not cumulative only ..., e) That the affidavit of the witness himself should be produced, or is absence accounted for; and f) A new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.

7. The only challenge with this provisions is that the motion for a new trial has no time limit for filing such an application grounded in Art 50(6) (a) (b) of the constitution. It is suggestive of this court that there should be a definite time limit within which such motions for a new trial based on newly discovered compelling evidence.

8. In our own jurisdiction the superior courts have pronounced themselves on this subject matter as can be appreciated by the following case in *Ramathan Juma Abdalla & 2 others v Republic* (2012) eKLR in which Lenaola, J noted that:

> 'Black Law Dictionary, 8th edition defines 'new' as 'recently discovered, recently come into being' and the concise oxford dictionary defines compelling as 'powerful evoking attention

or admiration'. It follows therefore that the evidence must have been recently discovered or has just come into being and is evidence that will evoke attention and arouse a great deal of interest'.

In *Jona Ngala Kilimbi v. Republic* [2016] eKLR held as follow:

> "In so far as there is no evidence that the applicant ever appealed against the Judgment on appeal dated by M.Odero J, we are of the view that we could conveniently treat this petition as one falling under Article 50(6)...we say so noting that one is entitled to invoke the provision provided his appeal to the last ultimate court has been dismissed or he never filed an appeal within time. Having taken the position that no appeal was filed to the court of appeal, the 1st prerequisite under Article 50(6) 1 a has thus been met."

In *Lawrence Nditu & 600 others v. Kenya Breweries Limited and Another* Petition 2013 No 3 of 2012 eKLR held as follows:

> "This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the constitution can be entertained by the supreme court...Towards this end, it is not the mere allegation in leadings by a party that clothes an appeal with the attributes of the constitutional interpretation or application...the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the constitution. In other words, an appellant must be challenging the interpretation or application of the constitution which the court of appeal used to dispose of the matter in that forum. Such a party must be faulting the court of appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the constitution, it cannot support a further appeal to the supreme court under the provisions of article 163[4] (a)." [Emphasis provided].

9. In view of the above case law and the provisions of the constitution there is nothing in the affidavit on the kind of new compelling evidence to convince this court to grant the application. It is therefore dismissed for want of merit.

DATED, SIGNED AND PUBLISHED AT ELDORET THIS 16TH DAY OF JULY 2025

.....

R. NYAKUNDI

JUDGE