



**Rotich v Republic (Criminal Revision E229 of 2024)
[2025] KEHC 10172 (KLR) (15 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E229 OF 2024
RN NYAKUNDI, J
JULY 15, 2025**

BETWEEN

ALPHONCE KOSGEI ROTICH APPLICANT

AND

REPUBLIC PROSECUTION

RULING

1. What is pending before this court for determination is an application dated 31st May 2025. The Application is supported by the annexed affidavit sworn by the Applicant who avers as follows: -
 - a. That I am the applicant herein seeking for sentence revision in criminal case number SO 2786 of 2011 at CM's court Eldoret for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* no. 3 of 2006 where I was sentenced to serve life imprisonment.
 - b. That my appeal to the high court was dismissed at its entirety.
 - c. That my appeal to the court of appeal was dismissed at its entirety.
 - d. That I have no pending appeal at any court thus my application for sentence review.
 - e. That under *the constitution* of Kenya under article 50(20) (p) (q) an Applicant has a right to benefit from the least severe sentence and have his sentence reviewed.
 - f. That under the provisions of *the constitution* of Kenya 2010 and Practice and Procedure Rules 2010 this court has power to hear and determine infringements of fundamental rights and award remedies.
 - g. That I am a pauper who cannot incur any costs for preparation of this application thus pray that such costs be waived.



Background

2. The applicant was charged with the offence of defilement contrary to section 8(1) (2) of the [sexual offences Act](#) no. 3 of 2006. The Particulars of the offence were that on the 8th day of August 2011 at Sukunanga village, Ngeria location in Wareng district within Rift Valley Province, intentionally and unlawfully caused his penis to penetrate the vagina of Esther Nyambura a child aged 8 years.

Decision

3. The applicant was tried in Criminal Case No 26 of 2011 and thereafter convicted and sentenced to life imprisonment on 22nd November 2012. He thereafter appealed to the High Court in criminal appeal No 188. of 2012 in which the session judge pronounce himself as follows:
 - a. I am alive that the legal burden of proof lay throughout with the prosecution. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A 332, *Abdalla Bin Wendo and Another v Republic* (1953) EACA 166. But from my analysis and re-evaluation of all the evidence, I am satisfied that the charge and all its elements were proved beyond reasonable doubt. I cannot say that the burden of proof was shifted to the appellant at any point. It is also not true that the defence proffered by the appellant was not taken into account. The truth of the matter is that the defence was feeble and a sham. It follows as a corollary that the conviction was safe.
 - b. Under section 8(2) of the Sexual Offence Act, defilement of a child of eleven years or below attracts imprisonment for life. The sentence is mandatory. The complainant was eight years at the time of the offence. Having found the conviction was safe; I am unable to disturb the sentence.
 - c. The upshot is that the entire appeal is devoid of merit. It is hereby dismissed
4. The applicant was further aggrieved with decision of the High court and sought leave to be heard by the court of Appeal in criminal case No. 13 of 2017. True to the mandate of the 2nd appeal's court No. 25th day of July 2019 the learned Justices' pronounced themselves as follows:
 - a. We come to the conclusion that all elements of the offence of defilement were established against the appellant to the required standards and that the evidence was sufficient to sustain his conviction. The learned judge did not find it appropriate to disturb the sentence. It is clear to us from the proceedings that the trial magistrate deliberately exercised her discretion in imposing the sentence against the appellant. We therefore equally have no reason to interfere.
 - b. The upshot of the above is that we find no merit in this appeal and do therefore dismiss it in its entirety
5. With this the jurisdiction of the court is only exercisable under Art 50 (6) (a) (b) of [the constitution](#) which states as follows:

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.
6. [The constitution](#) has not defined as to what constitutes new and compelling evidence and maybe it is strategic that a codified definition could have been limiting in circumstances given the nature and spirit



of the provisions. Generally speaking the language in Art 50(6) (a) (b) of *the constitution* is broad and covers the outer layer context of a party who has exhausted or almost at the verge of being heard by the Kenya's legal system as constitutionally established. There is emphasis of a new trial and not a necessary a re-trial as known in law. Therefore in my considered view the Article seems to have borrowed heavily with some modifications section 80 of the CPA and Order 45 Rule 1 of the Civil Procedure Rules.

7. Section 80 of the *Civil Procedure Act* provides as follows: - Any person who considers himself aggrieved-
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner:- Any person considering himself aggrieved

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
8. The Court of Appeal in line with these provisions had this to say in *National Bank of Kenya v Ndungu Njau CA No. 2111 of 1996*. Thus:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."

9. In addition, the court in *Yani Haryanto v E.D. & F. Man. (Sugar) Limited CA No. 122 of 1992*.

"The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review."

10. In Art 50(6) (a) (b) of *the constitution* there is emphasis that the evidence to be presented by an applicant for a new trial to be permitted, it must be both new meaning it wasn't available or reasonably discoverable during the original trial and compelling meaning it has a high probability of changing the



outcome. The courts in various cases have laid down as to what has come to be known as the standard for new and compelling evidence:

New: (The evidence must not have been available at the time of the original trial, despite the exercise of due diligence.

Compelling: (The evidence must be of high probative value, capable of belief, and likely to lead to a different verdict if presented at trial.

Materiality: (The evidence must be relevant to the charges, the trial process, the conviction, or the sentence. See James Mwaniki Kamau v Republic Makueni High Court MSC. Application No. 179 of 2014, Philip Mueke Maingi v R [2017] eKLR,

11. Whereas in Tom Martins v Republic Supreme Court Petition No. 3 of 2014 pronounced itself as follows on this constitutional issue:

“Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be ‘new and compelling evidence’.

“We are in agreement with the Court of Appeal that under Article 50(6), “new evidence” means “evidence which was not available at the time of 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 an accused person”. [Emphasis added].

12. What does that the court says in James Macharia Anumbi v Republic [2017] eKLR on the criteria to determine the dimensional definition of new and compelling evidence. That:

1. The evidence is newly discovered and the petitioner did not know about it prior to, or during the trial;
2. The evidence must be material and not merely cumulative;
3. The petitioners’ failure to learn about the evidence before the verdict was not because of lack of diligence; and
4. The new evidence is significant enough that it would likely result in a different outcome if a new trial is granted.

13. Based on the foregoing conclusively so there are no fundamental rights and freedoms which have been violated or infringed by any state organ leave alone the judiciary to warrant a declaration by this court under Art 50(6) (a) (b) of *the constitution* in favor of the applicant. From the record also there were no errors of law or principles committed by the trial court in its primary findings that the prosecution had presented a case proven beyond reasonable doubt. This same decision was affirmed by both the High Court and Court of Appeal in accordance with our own constitutional requirements.



It is not the letter or the spirit of Art 50(6) (a) (b) of the constitution to deal with minor discrepancies or untrustworthiness of witnesses at the primary trial court or as viewed from the lens of the superior courts on appeal.

14. If one considers the standards of review in our legal system only few cases will meet the test outlined in Article 50(6) (a) (b) of the constitution. Generally speaking, in our jurisdiction standards of review are drawn from the limited role of the appellate court in a multi-tiered judicial system. Trial court judges generally resolve relevant factual disputes and make credibility determinations regarding the witnesses' testimony because they see and hear the witness testify. Whereas, appellate judges primarily correct legal errors made by lower courts, develop the law, and set forth precedent that will guide future cases. Appellate courts also sit in panels on the theory that three or more judges, acting as a unit, are less likely to make an error in judgment than one judge sitting alone. Structurally, it means that it takes at least two court of appeals judges to overturn a decision of a lower court, signifying that a single court of appeals judge does not have the power to reverse a single trial court judge.
15. The Appeals courts in our legal system are primarily concerned with enunciating the law. For example, Article 50(6) (a) (b) of the constitution which is a subject matter if this application is mainly concerned with a question of constitutional interpretation and in this case the characterization of the entire impugned trial so as to convince the review court that an applicant has reason then to start with a clean slate. It is very difficult to overturn a trial court's factual determination, so if the application under Article 50 (6) (a) (b) of the constitution rest solely on a challenge to a finding of fact without new compelling evidence the likely of success will be so low unless the circumstances are egregious. In substantial evidence review, the review encompasses the agency's assessment of the evidence in the record and its application of that evidence in reaching a decision. In arbitrary and capricious review, the focus is on the agency's explanation or justification of its decision and whether that decision can be reasoned from the body of evidence.
16. In each stage of the litigation more so in a criminal justice adjudication judges are faced with a number of decisions that requires an exercise of judicial discretion. It demands of them to apply the constitutional principles, the guidelines in the governing statute and many different factors which often weigh heavily in the balancing process of judicial discretion. It will be therefore be a rare case where the review court under Art 50 (6) (a) (b) would reverse a decision of concurrent jurisdiction or that of a superior Court of Appeal. Unfortunately, in this Country though be governed by the constitution and the general maxim of the rule of law many litigants do not easily label definitively questions of law or facts or discretionary orders or rulings.
17. In sum when dealing with questions of law and fact one just need to look at the constitution petitions taking a sample size the approached used by petitioners is not precise and most of the time does not offer any litmus test by which a court in session can neatly categorize the real dispute aligned with the remedy under Art 23 of the constitution. As illustrated by this discussion above nothing has been presented by an applicant in support of the questions of constitutional interpretation in furthering the argument for a judicial review remedy within the prerogative writ of certiorari to quash all the previous proceedings and decisions for a de novo trial. This application is lost with no orders as to costs to the State.

DATED SIGNED AND PUBLISHED AT ELDORET THIS 15TH DAY OF JULY 2025.

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R. NYAKUNDI

JUDGE

