



REPUBLIC OF KENYA



**Abdi v Republic (Constitutional Petition E02 of 2023)
[2024] KEHC 5854 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CONSTITUTIONAL PETITION E02 OF 2023**

RN NYAKUNDI, J

MAY 22, 2024

BETWEEN

MOHAMMED EKAI ABDI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was charged with the offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No.3 of 2006. He was tried, convicted and sentenced to 20 years imprisonment. Vide Lodwar HCCRA No. 44 of 2016 he appealed against the judgment but the same was dismissed. The petitioner again filed Lodwar petition No. E002 of 2018 wherein he sought a rehearing of his sentence. The petition was found without merit hence dismissed. He later filed Lodwar HCCR. Misc. Application No. 19 of 2023 complaining of violation of his fundamental rights during the trial, which petition he withdrew.
2. He has now brought this petition in terms of Article 10, 19(3)(A), 19(3)(A), 19(3)(C); 25 & 50(2)(G) of *the Constitution* of Kenya. The petition is predicated on the following grounds:
 - a. That the petitioner was arraigned and charged before Lodwar Principal Magistrate Court (Hon. H.O Barasa) in Criminal Case No 444 of 2013 on 13th June 203 for the offence of defilement
 - b. That the petitioner was convicted and sentenced to 20 years imprisonment after being found guilty of the offense of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offenses.
 - c. That throughout the trial at the trial court the court did not inform the petitioner of his right to legal representation under article 50(2) of *the Constitution* of Kenya 2010.



- d. That the petitioner was taken through the entire trial process without the benefit of being supplied with witness statements and prosecution exhibits. This compromised the accused person's constitutional right as espoused under Article 50(2) (j) of *the Constitution* of Kenya.
- e. That the petitioner subsequently filed a petition to have his sentence reduced in light of the now famous "muruatetu decision" by the Supreme Court. The petition did not equally see the light of day and was dismissed on 3rd December 2019.
- f. That at both the trial and the appellate courts, the Petitioner never had the benefit of legal counsel and was at all material times self-represented.

That in the cause of my trial, a total of four magistrates conducted the trial and save for the transition to the 2nd magistrate, there was no compliance with section 200(3) of the Criminal Procedure Code. Hon. H.O Barasa (P.M) took down the testimony of the 1st and 2nd prosecution witnesses. Hon. W Wachira (SRM) took down the testimony of the PW3. Hon. I.O Odhiambo (R.M) took down the testimony of PW4, the medical doctor. Finally, Hon. R.W Washika (PM) who never participated in the prosecution's case heard my testimony and mitigation and wrote the judgement. The above occasioned a miscarriage of justice upon myself as the convicting magistrate did not have an opportunity to examine the demeanor of the prosecution's witnesses and a thorough evaluation of the weight of their testimony. The manifest non-compliance with Section 200 of the CPC was a grave error on the face of the record which occasioned great injustice upon myself.

The petitioner pleaded the nature of the violations of *the constitution* and the law demanding this court to exercise its jurisdiction in a manner to make declarations under Article 23 of *the Constitution*. The grievances by the petitioner as couched in the pleadings presented before court is reflective of the following circumstances. In the first instance the petitioner took issue with the right on legal representation in Article 50 (2) (g) & (h) of *the constitution*. As a consequence of which grave miscarriage of justice occurred before the trial court which briefly are captured in the petition to wit:

- a. There was a discrepancy in the complainant's date of birth, PW3, a police constable based in Lokitung, produced a clinic card with the complainant's date of birth indicated as 30th December, 1999. On the hand, PW2 the complainant's mother said on cross-examination that "all documents that would prove the complainants age were burnt." The petitioner (the accused at trial,) was unable to identify and raise this glaring inconsistency in defence both at the trial as well as before this Honourable Court.
- b. While PW4 (A clinical Officer based at Lokiatung District Hospital) confirmed in Examination-in Chief that the complainant's hymen was intact and that there was no penetration, the petitioner did not appreciate the significance of "Penetration or lack of it. In sexual offences, including the one he was alleged to have committed.
- c. While the petitioner conceded in cross-examination that he was indeed in a relationship with the complainant, the same did not imply or translate to sexual intercourse, indeed PW4 did confirm that there was no penetration and the Medical Examination Report (P3) corroborated that evidence. The petitioner herein, due to lack of legal representation did not raise this in his defence both at trial and on Appeal
- d. Throughout the trial, there was manifest non-compliance with the provisions of Section 200(3) of the CPC. The trial of the accused was done by a total of four different magistrates and only one of them complied with the mandatory provisions of this legal provisions.



- e. The petitioner was taken through the entire trial process without the benefit of being supplied with witness statements and prosecution exhibits. This comprised the accused person's constitutional right as espoused under Article 50(2) (j) of the Constitution of Kenya.

The Petitioner's Case

3. The Petitioner filed submissions in support of the instant petition. The Counsel for the Petitioner cited Article 50(2) (g) of the constitution wherein he argued that the petitioner was not informed of his right to legal representation. He further submitted that the petitioner was taken through the entire trial process without the benefit of being supplied with witness statements and prosecution exhibits. This compromised the accused person's constitutional right as espoused under Article 50(2) (j) of the Constitution of Kenya.
4. The petitioner's counsel couched three issues for determination as follows:
 - i. Whether the petition meets the threshold of a constitutional petition
 - ii. Whether the petitioner was afforded a fair trial pursuant to Article 50(2)(g), (h) and (j) of the Constitution.
 - iii. Whether the petitioner is entitled to the reliefs sought.
5. On the first issue, it was submitted for the petitioner that through the petition and its supporting affidavit, the petitioner has set out what he complains. First, the petitioner contends that the trial court failed to inform him of his right to choose and to be represented by an advocate. Secondly, the petitioner was not supplied with witness statements and prosecution exhibits. Lastly, the trial at the lower court was conducted by a total of four magistrates who did not endeavor to inform the petitioner of his right to have any witnesses re-summoned or reheard as required under section 200(3) of the Criminal Procedure Code.
6. Counsel submitted that the petition has been set within the principles set out by the Anarita case and prayed that this court makes the necessary findings. On the second issue, it was submitted for the petitioner that his guaranteed rights under Article 50(2)(g) were violated by the trial court as the trial record does not indicate whether it informed him of his right to choose to be represented by an advocate.
7. Further that the trial magistrates failed to observe that the petitioner was a layperson and not well conversant with legal matters and ought to have been represented by an advocate or be informed of that right. The petitioner cited the provisions of section 43(1) of the Legal Aid Act, 2016. Counsel equally relied on this court's decision in *Joseph Kiema Philip v Republic* (2019) eKLR.
8. In counsel's view, despite the petitioner having been before this Honorable court twice (and this being the third time), the locus of any trial is at the trial court where any accused person first interacts with the criminal justice system. While it may be argued that what the petitioner is raising before this court is akin to a forgotten ground of appeal – which argument counsel disagrees with, it would be necessary to ask in the circumstances, then, why the petitioner herein did not raise it on appeal.
9. According to the petitioner, looking at the instant petition it is evident that as a result of the breach of his rights under the constitution, the Petitioner was unable to raise the various discrepancies evident from his trial on appeal. The petitioner gave an example of the element of age and medical examination.



In sum, counsel submitted that the petitioner has been in prison since 24th April, 2015 and such a period is enough for him to learn his lessons. According to counsel, a re-trial should be ordered or the petitioner released on the aforementioned grounds.

The Respondent's Case

10. The respondent's counsel filed submissions dated 10th July, 2023 in opposition to the petition. He indicated that the court is functus officio as regards issues emanating from Lodwar PMCCR. No. 444 of 2013. He stated that the issue raised ought to have been raised in Lodwar HCCRA No. 44 of 2016.
11. According to counsel, the issues are disguised as constitutional issues whereas they are additional grounds of appeal which were never raised in the appeal and subsequent application for sentence rehearing. On this Counsel relied on the decision in [*Katana & another v Republic \(Criminal Appeal 8 of 2019\)*](#).
12. It was counsel's position that the appellant having failed to raise the above issues in the first appeal, the court cannot entertain them through a petition. That it is too late to raise such issues now. It was submitted for the respondent that the petitioner has not demonstrated that he was in any way prejudiced with the failure by the court to be informed of the right to be represented by an advocate of his choice. That the appellant fully participated in the trial by cross examining the prosecution witnesses and adducing his evidence in defence.
13. It was counsel's view that at page 5 of the proceedings, the appellant indicated that he was ready to proceed. He cannot now be heard to say that he was not ready with his case. On this, counsels relied on the decisions in [*Katana & another v Republic \(Criminal Appeal 8 of 2019\)*](#) (2022) KECA (KLR)
14. On the question of section 200(3) of the Criminal Procedure Code, it was submitted for the respondent that it is a statutory issue not a constitutional issue. It ought to have been part of the grounds of appeal not a constitutional petition.
15. In concluding, it was submitted for the respondent that given the history of this matter, the petition fails the threshold of what a constitutional petition is as set out in the case of Anarita Karimi Njeru.

Analysis And Determination.

16. The instant petition is heavily anchored on Article 50 (2) (g) of [*the Constitution*](#) which provides that: -
 - (2) Every accused person has the right to a fair trial, which includes the right--
 - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - (h) to have an advocate assigned to the accused person by the state and at State expense. If substantial injustice would otherwise result, and to be informed of this right promptly.
17. In my considered view, of utmost importance is to establish if this court is functus officio given the history of this matter. I have had a chance to peruse through the grounds of appeal raised by the petitioner in the first appeal. The Petitioner raised the following grounds of appeal in Lodwar Appeal No. 44 of 2016;
 - i. That the prosecution side did not have first report
 - ii. That the prosecution departed from original case of assault to defilement
 - iii. That the prosecution had many contradictions and uncorroborated evidences.



- iv. That the prosecution side failed to avail the key witnesses especially his wife
 - v. That the learned magistrate convicted him on single evidence of relative.
 - vi. That the prosecution case did not have special document that showed the real age and age assessment report to ascertain the proper age of PW1.
 - vii. That his chief defence was merely rejected
 - viii. That the trial magistrate erred in law to affirm a conviction without noticing contravention of article 50 (e) of *the constitution* of Kenya.
18. I take note that at the first appeal, the petitioner cited the provisions of Article 50(e) but the provisions of 50(2)(g) were never raised at this early stage. Besides, the grounds clearly speak to the manner in which the trial was conducted. Given that the he did not succeed in various occasions when he made attempts to have a second bite at the cherry, he has now morphed it into the instant constitutional petition.
19. In addressing a similar issue, the court in *Katana & another v Republic (Criminal Appeal 8 of 2019)* [2022] KECA 1160 (KLR) (21 October 2022) stated as follows:
- “The issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore could not be the basis for vitiating the High Court’s decision. Be that as it may, the record of the trial court showed that the appellants indicated they were ready to proceed with the trial, actively participated in the trial and cross-examined all the witnesses, and it was not evident that they suffered any or any substantial injustice. There was no merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and (h) of *the Constitution* were violated.”
20. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves. I would have entertained the instant petition if it was purely predicated on the provisions of Article 50(6) of *the Constitution* of Kenya, which gives the high court to order a re-trial when new and compelling evidence has become available.
21. In *Samuel Kamau Macharia & Another –vs- KCB & 2 Others App. No. 2/2011*, the Supreme Court of Kenya made it clear that a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law and cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. And as it is trite, a court of law ought to down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
22. In the instant petition, the petitioner filed an appeal before this court which was dismissed. He subsequently filed a petition seeking rehearing of the sentence, which was equally dismissed. He again filed a miscellaneous application complaining of violation of his fundamental rights and he opted to withdraw it.
23. Given this background the petitioners Locus Standi to canvass the instant application can only flow from Article 50 (6) (a) &(b) of *the Constitution* which reads 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

In my view, unless the petition by the petitioner is within the ambit of this provisions it will be construed as res-judicata. This doctrine is more common in the realm of Civil Law but on examination of the elements governing the doctrine it can also be invoked in the administration of criminal justice. Whatever the difference might be with this application in the area of criminal law it cannot be denied that it can work towards the attainment of the same result which is to put an end to litigation in the interest of justice. From the comparative jurisprudence in *Badar Bee v Habib Merican Noordin and Others* (1909) AC 615, 623 the court held that “ it is not competent for the court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time.” On this same aspect the court in *Hoystead v Commissioner of Taxation* (1925) AC 155, in Particular the dictum of Lord Shaw had this to say: “In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle— namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.”

24. The power of the court is to subject the facts to scrupulous examination of the facts and circumstances to establish the earlier facts constituting the issues for determination and the current ones being pursued as if it is a new cause of action in the criminal litigation. I find it imperative for me to say that the doctrine of res-judicata is also fortified in our domestic jurisprudence as demonstrated in the following authorities: *Abdul Kassin Hassanali Gulamhusein Khala v Southern Credit Banking Corporation Ltd*, Mombasa High Court Civil Case Number 270 of 2005 (Sergon J on 23 May 2006) *Benjoh Amalgamated Limited and Another v Kenya Commercial Bank Limited* Civil Appeal Number 239 of 2004 (Omolo waki and Deverell JJA on 31 March 2006, *Samuel Kiiru Gitau*, Nairobi High Court Civil Case Number 1249 of 1998(Visram on 27 March, 2001)
25. Having taken into account the various views expressed on the subject in the authorities under consideration the issue as to whether there are fundamental issues in the petition filed in court on 2.5.2023 by the petitioner which are solemnly and with certainty distinct on the issues in High Court Criminal Appeal No. 44 of 2016 and High Court Cr. Petition No. 2 of 2018 is moot. In all those cases, adjudicated by this court but with different session judges the specific issues are all about the primary judgement from the Principal Magistrate's Court at Lodwar in Cr. Case No. 444/2013. In the circumstances of this case I will hold in the light of the law as understand it to be that the plea of res-judicata applies.



26. However, there is a wider sense in which this court must address the instant petition within the dictates of constitution. In giving meaning to the violation of rights complained of by the petitioner, one has to look at the rubric of the principals in constitutional interpretation. Extensive attention was devoted in our constitution to the special requirements of constitutional interpretation and to the physiological and jurisprudential basis of Human Rights. The court must therefore accord due recognition to the supremacy of *the constitution* on the interpretation of the Bill of Rights to protect and guarantee any given rights in favour of the citizens of Kenya. The drafters of *the Constitution* in Article 20 (3) & (4) expressly provided as follows:

In applying a provision of the Bill of Rights, a court shall:

- a. Develop the law to the extent that it does not give effect to a right or fundamental freedom, and
 - b. Adopt the interpretation that most favors the enforcement of a right or fundamental freedom
- In interpreting the Bill of Right, a court, tribunal or other authority shall promote:-

- a. The value that underline an open and democratic society based on the human dignity, equality and freedom
- b. The spirit purport and objects of the Bill of Rights

In this context Article 24 of the same constitution, specifies inter-alia that the rights in the Bill of Rights may be limited only in terms of law in general application in the extent that the intention is reasonable and justifiable taking into account all relevant factors including:

- a. The nature of the right or fundamental freedom
- b. The importance of the purpose of the limitation
- c. The nature and extent of the limitation
- d. The deed to ensue tht the enjoyment of rights and fundamental freedoms by any individual does not prejudice the right and fundamental freedoms of others

It is clear from Article 259 that for the growth of jurisprudence to meet the new Social Political and historical realities as projected by the framers of *the constitution* the task of the court which is never an easy one in the interpretation of *the constitution* must mirror Article 259 which states that:

- a. Promotes its purposes, value and principles
- b. Advances the Rule of Law and the Human Right and Fundamental Freedom in the Bill of Rights
- c. Permits the development of the law and
- d. Contributes to good governance

27. It is important to note however that while *the constitution* did give courts a more influential role in interpreting *the constitution* it did not elevate them over and above the executive and Parliament. Running through the decisions on constitutional interpretation, one sees a thread of a particular value as Mohamed J put it in *Acbeson AC-813* “ *The constitution* of a nation is not simply a statute which mechanically defines the structures of government and other relations between the government and the government. It is a mirror reflecting the national soul.” The identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of *the Constitution* must therefore preside and permeate the processes of judicial interpretation and judicial discretion.



28. At the hearing of this constitutional question, the petitioners aggrieved on avalanche of issues all traceable to the primary trial in Cr. Case No. 444/2013. One inescapable observation in this petition hinges on Article 27 of *the constitution* on the Right to equality and freedom from discrimination. In this provision (1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against directly or indirectly, and without derogating from the generality of the provisions on one of more of the following grounds in particular, race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religious, conscience, belief, culture or language.
29. The demand oriented approach in this petition is characterized with un met needs related with application of Section 200 (3) of the Criminal Procedure Code and the undressed legal need on legal presentation in Article 50 (2) (g) (h) of *the constitution*. Essentially the petitioner is alleging through the skeleton submissions and arguments that the conduct of the session magistrates was of such a nature that there was a violation of Article 50 on fair trial rights culminating in a form of discrimination which negated the remaining issues in the criminal process and were never addressed by the High Court on Appeal or in the Petition.
30. In the petitioner's quest to canvass the petition this matter had to be brought to the attention of this court for a remedy which have been so elusive from the very beginning of the trial. When one looks at the provisions of Article 27 of *the constitution*, the import of discrimination is that there has been unequal treatment of persons where one similarly situated to the other suffers detriment or is placed at a disadvantage because of an attribute that distinguishes him or her from the other person. Therefore, in this petition the petitioner is making attempts to demonstrate that for reasons of non-compliance with Section 200 (3) of the CPC and Right to Legal Representation is a manifestation of discrimination in Article 27 & Infringement of fair trial raise in constitution. In my judgement on this issue for a petition to succeed under *the constitution* the petitioner must show not only he did not receive equal treatment before the trial court or under the law but the law applied at differential impact on him in the protection or benefit of the law. In addition the petitioner must demonstrate that the criminal law in operation before the trial court was discriminatory.
31. The petitioner herein ought to have demonstrated to this court that he had been placed at a disadvantage because of some attributes that distinguish him from other suspect charged and tried for the offence of defilement contrary to Section 8 (1) as read with Section 8(3) as read with the *Sexual Offences Act*. As much as I sympathize with what might be going through in the mind of the petitioner this he has not done to meet the threshold of the petition for a declaration of remedies in Article 23 of *the Constitution*.
32. Whether or not the failure by the Lower court and the state to inform the petitioner of his constitutional right to be represented by a legal counsel in Article 50(2) (g) (h) of *the constitution* resulted in any way in a miscarriage of justice is a burden of proof to be discharged under Section 107 (1) 108 & 109 of *the constitution*. It is trite that the petitioner as an accused person is entitled to a fair trial which includes the right to be represented by a legal counsel of his or her choice or where it is required in the interests of justice to be provided with legal representation at the expense of the estate and to be informed of his rights.
33. A glance of this petition the court is generally in concurrence with the petitioner's contention that the failure by both the trial court and the state to inform him of his right to be represented by legal counsel constitute a breach of his right to a fair trial. This court however does not subscribe to the petitioner's contention that his trial in the trial court was unfair because it proceeded from a violation from his fundamental right guaranteed under *the constitution*. Taking the view purposively, by this court a trial



can be fair even though there has been a threat or infringement of the constitutional rights. In other words, the breach of the constitutional duty alone vested in the state cannot result in a miscarriage of justice or prejudice. What the petitioner was required to demonstrate by evidence was how such a breach of a constitutional duty had caused a miscarriage of justice to him. In my evaluation of the entire petition and affidavit evidence that hurdle has not been surmounted.

34. In the circumstances of this case, the petitioner is clearly engaging in abuse of the court process. Consequently, he cannot approach the High Court again in what seems to be a different version of the issues he ought to have raised in the first appeal. The available recourse is the Court of Appeal if he is not satisfied with this court's decision. It is significant to appreciate that constitution interpretation is a question of law and if the issues raised in the petition are inconsistent with *the constitution* it becomes valid for declarations to issue under Article 23 of our constitution. The onus of demonstrating a violation of fundamental rights rests with the petitioner. A more satisfactory approach to constitutional interpretation by the court particularly on review proceedings in Lower Courts should only be exercised where grave injustice has been occasioned or might otherwise result or where justice might not be attained at the end of it all. This is a power which is to be sparingly exercised by the High Court. The petitioner has failed to identify constitutional violations on which he based the entire petition at the outset of the trial in Cr. Case No. 444 of 2013, in Criminal Appeal No. 24 of 2016 and in High Court Criminal Petition No. 2 of 2018. The thread which weaves its way through out the version of the petitioner's case is one that the constitutional attack on the charge and judgement of the court below cannot succeed for even on Appeal he was not successful. I am un persuaded that the conduct of the proceedings as against the petitioner resulted in a grave injustice which would warrant a review and setting aside of the proceedings in the court a quo at this stage.

35. Based on the foregoing, I have no option but to dismiss this petition in the circumstances.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 22ND DAY OF MAY, 2024

In the Presence of

Mr. Otieno for the DPP

Appellant

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R. NYAKUNDI

JUDGE

