Keya v Republic (Criminal Petition E065 of 2023)
[2024] KEHC 16997 (KLR) (9 August 2024) (Judgment)

Neutral citation: [2024] KEHC 16997 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E065 OF 2023

RN NYAKUNDI, J

AUGUST 9, 2024

BETWEEN

ANTHONY AGESA KEYA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

(Being a petition on sentence review from the judgment of Hon.Odenyo SPM; in Eldoret Cr. Case No. E296 of 2016)

JUDGMENT

1. The Petitioner was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Penal Code*, was convicted and sentenced to 30 years imprisonment. Being aggrieved by the sentence meted out against him by the trial court, he filed an appeal at the Eldoret High Court, appeal no. E069 of 2021 which was heard and determined on the merits. The session Judge dismissed both the findings on conviction and sentence as founded in the appeal by the appellant.

2. Being aggrieved with the decision, the Petitioner once again has invoked the jurisdiction of this court on re-sentencing, relying on the principles the in Francis Muruatetu case 2017 eKlr as a second bite of the cherry before this same court. Apparently, the responded elected not to file any submissions or grounds of opposition to the application.

   Decision

   This question is to be determined by the provisions of Article 50 (6)(a) and(b) of *the Constitution* which provides that;

   (6) 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;

(b) New and compelling evidence has become available.

3. As to what constitutes new compelling evidence is clearly articulated in the case of Tom Martins Kibisu vs Republic, Supreme Court Petition No.3 of 2014 (eKlr), where the learned Judges of Appeal expressed themselves as follows;

(a) "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. (emphasis mine) 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'.

(b) 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".

4. It is trite that a public body may act within its legal powers or use its discretion reasonably and according to the law. But in adherence to the findings of fact or law, to ensure accuracy, there might be some gaps which do not impeach the final decision of that Court. In the instant petition, in resolving the questions of fact, the Appeals Court conclusively dealt with the matters before it. To that end, the evidence generated in the current application does not constitute new and compelling evidence to review the decision on sentence.

5. What is new evidence for purpose of this Article? The basic definitions provide a starting point. First, evidence is "something (including testimony, documents and tangible objects) that tends to prove or disprove existence of an alleged fact". In turn, a fact is "something that actually exists; an aspect of reality". For purposes of this piece, new evidence is information regarding "an aspect of reality" that was not presented to the trial court, but that is presented to the appellate court.

6. So defined, there are some categories of new evidence that are intentionally excluded from the discussion below. The focus of this Article is on evidence that could have been but was not submitted to the trial court. This focus therefore excludes information regarding facts that may have changed in the period between the trial court's judgment and the appellate court's consideration; for instance, allegations that a case is moot on appeal will often require an appellate court to consider what is technically new evidence. Because the trial court could never have considered that information, however, such evidence presents a different problem than is true for information that could have been, but was not presented the trial court. While there is some new evidence that is truly new – in the sense that it could not have been presented to the trial court because it was unavailable for legitimate reasons – the problem of exchanged evidence is not the problem of this Article.

7. In perhaps the most controversial use of contextual application to date of Article 50(5) & (6) of *the Constitution*, is the extent to which the doctrine of Res judicata is applicable to criminal cases. The court in William Koross v Hezekiah Kiptoo Komen & 4 others (2015) eKLR ,it was stated;

> The philosophy behind the principles of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.
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> Speaking for the bench on the principles that underline res judicata, Y.V.Chandrachud J in the Indian Supreme Court case of Lal Chand v Radha Kishan, AIR 1977 SC 789 stated, and we agree;
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> The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also found in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the issue.

8. It is well accepted that a party whether in a civil case or in a criminal prosecution, should not re-litigate similar facts ad infinitum unless on review or appeal to a superior court. The instant case was initially tried and determined before the trial court and thereafter an appeal was preferred on the specific issues defined in the memorandum of appeal. The court in the fullness of time determined the appeal on the merits based on the impugned judgement, and regrettably, the petitioner lost. The debate surrounding sentence cannot be raised again unless there is new and compelling evidence presented by the petitioner. On my part, looking at the scale of gravity of the particular offence and having noted that the trial court identified a proportionate sentence, there are no grounds to interfere with the sentence determined both at the primary court and on appeal. This Petition fails and stands dismissed, save for a minor variation on the 6 months spent in the pre-trial detention, which ought to be discounted as credit from the custodial sentence imposed by the trial court as confirmed on appeal.

9. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF

AUGUST 2024

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R. NYAKUNDI

JUDGE