



**DWG v Director of Public Prosecution (Constitutional Petition 8 of 2020) [2024] KEHC 14545 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14545 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CONSTITUTIONAL PETITION 8 OF 2020**

**DO CHEPKWONY, J  
NOVEMBER 6, 2024**

**IN THE MATTER OF: PROVISIONS OF ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 50 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: AN APPLICATION SEEKING FOR NEW TRIAL FOR DANIEL WANYEKI GACHOKA IN ACCORDANCE WITH ARTICLE 50 (6) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**DWG ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner, DWG, filed this Constitution Petition dated 22<sup>nd</sup> January, 2020, invoking this Court’s jurisdiction under Articles 19, 20, 21, 22, 23, 24, 25, 27, and 50 of *the Constitution* of Kenya. The Petitioner seeks, inter alia, orders for a new trial under Article 50(6) of *the Constitution*, a constitution provision that allows a convicted person to seek a new trial where “new and compelling evidence” emerges after the appeal process has been exhausted. The Petition also rests upon the assertion that his rights to a fair hearing and due process have been compromised.
2. The Petitioner’s plea is for the following specific orders:-
  - a. That the proceedings, conviction and sentence in Thika Criminal Case No. 5165 of 2007 Nairobi High Court Criminal Appeal Case Number 371 of 2008 and Nairobi Court of Appeal Criminal Case Number 276 of 2011 be set aside and/or quashed and the Petitioner be afforded a new trial.



- b. That such other orders as you are just, expeditious and affords the Petitioner the proper enjoyment of his rights be afforded to the Petitioner.
  - c. Such further or other orders as this Honourable court may deem fit to grant.
3. A brief background of the facts leading to this case are that the Petitioner was charged in Thika Chief Magistrate's Court in Criminal Case No.5165 of 2007 on two Counts of Incest contrary to Section 20(1) of the *Sexual Offences Act*. He was further charged with an Alternative Charge of Committing an Indecent Act with a Child contrary to Section 6(a) as read with Section 11(1) of the *Sexual Offences Act*. The prosecution alleged that the Petitioner committed incest with his daughters, aged nine (9) and seven (7) years.
  4. The trial court acquitted the Petitioner on the first Count but convicted him on the second Count, whereby he was sentenced to serve twenty (20) years imprisonment. The Petitioner unsuccessfully appealed to the High Court, which upheld the conviction and sentence. His second appeal to the Court of Appeal resulted in a substituted sentence of life imprisonment.
  5. The petitioner claims he has been in custody since November, 27, 2007 and urges the court to allow the Petition so that justice could be seen to have been done in his case.
  6. In particular, the Petitioner alleges that the complainant in the case of Criminal Case No.5165 of 2007 has now sworn evidence stating that she was forced by her grandmother and the Officer Commanding Police Station at Ruiru to give false evidence against the Petitioner threatening to shoot her and he wishes the trial court to consider this evidence.
  7. The Director of Public Prosecutions (DPP), through a Replying Affidavit by Stephen Syano Kasyoka sworn on 15<sup>th</sup> April, 2021, opposes the Petition. The DPP characterizes the Petition as frivolous, vexatious, and an abuse of the court process, arguing that the claims of coercion lack credibility, as they were never raised during the trial or appeal stages.
  8. Furthermore, the DPP asserts that Article 50(6) of *the Constitution* was not intended to allow litigants to re-open cases indefinitely, emphasizing the principle that litigation must come to an end. The DPP argues that allowing this Petition would prejudice the administration of justice as it would be difficult to trace prosecution witnesses or secure evidence, given the time elapsed since the alleged incidents.
  9. In a further Replying Affidavit sworn on 30<sup>th</sup> April, 2021, the Petitioner reiterates that the main complainant who was the prosecution's primary witness, recanted her testimony in a sworn affidavit on 22<sup>nd</sup> January, 2020, stating that she was coerced into testifying falsely against him. The Petitioner maintains that the doctrine of finality in litigation should not infringe upon his right to a new trial, a right enshrined in Article 50 of *the Constitution* of Kenya, 2010.
  10. The Petitioner also asserts that the main witness is available and willing to testify, which would not adversely affect the proceedings. He emphasizes that he was unable to access the new evidence during the original trial and appeal as these circumstances were beyond his control.

### **Hearing and Evidence**

11. This Court, presided over by Justice Kasango (Retired), issued directions on 21<sup>st</sup> February, 2021 for the Petition to proceed with oral evidence from MN (alias MW) and LN (alias MW). The matter thereafter proceeded for hearing.
12. The Petitioner, Mr. Daniel Wanyeki testified and gave court his background, the nature of the charges and the events leading to his conviction. He explained that he had no Legal Representation during



his trial and was unaware of his rights to request such representation. The Petitioner contends that a family land dispute contributed to the charges and recounted his experience in custody, during which his daughter, M confessed to fabricating her testimony against him.

13. MN (alias MW) testified under oath that she fabricated the allegations against her father due to threats from her grandmother, RW, and a Police Officer, Ms. Adhiambo. She explained that, at the time, she was threatened with harm if she refused to testify against her father. She further stated that she was too young to understand the implications of her statements and has since felt guilt for implicating her father in a crime he did not commit.

### **Analysis and Determination**

14. Having considered the application, the affidavits filed by the parties and the oral evidence that was adduced in support thereof, this Court finds the key issue for determination being whether the Petition satisfies the conditions set out under Article 50(6) of *the Constitution* to warrant a new trial. Article 50(6) established two criteria:-
  - a. The appeal process must be exhausted, or the appeal dismissed by the highest court.
  - b. New and compelling evidence must be presented.
15. The first prong of Article 50(6) requires that the Applicant's appeal must have been dismissed by the highest available court, or that no appeal was filed within the prescribed time. In this case, it is clear that the Petitioner exhausted all appellate options, including appeals to the High Court and the Court of Appeal, thereby meeting the requirement.
16. The court now turns its attention to the second requirement which requires the presence of 'new and compelling evidence'. In the case of Tom Martins Kibisu –vs- Republic, Supreme Court Petition NO.3 of 2014, the Supreme Court outlined the requirements for a new trial under Article 50(6), despite defining 'new evidence' as evidence unavailable at the time of trial despite due diligence, and 'compelling evidence' as credible, probative evidence that could alter the trial's outcome if presented.
17. Taking cue from the above case, for evidence to be considered new, it must not have been available during the trial, despite diligent efforts to discover it. Secondly, it must also be 'compelling' in the sense that it is credible, reliable, and likely to have affected the outcome of the trial.
18. In this case, complainant's/witness's recantation of her earlier testimony raises pertinent questions about the integrity of the trial proceedings. According to the affidavit, she claims that she was coerced into making false allegations against her father, the Petitioner herein, which directly impacted his conviction. This kind of evidence would, under ordinary circumstances, be highly material to a court's assessment of the guilt or innocence of an accused person. Courts have also recognised that recantations, though requiring careful scrutiny, can amount to compelling evidence if supported by credible corroboration, as emphasized in the case of Republic –vs- Erasto Mushi & 2 Others [2017]eKLR.
19. The Petitioner also provided additional affidavits from other family members who corroborate his daughter's claims of coercion by external parties. These affidavits serve to substantiate the daughter's new account, strengthening the argument that the initial testimony may have been given under duress and does not represent a truthful recollection of events. The second ground under Article 50(6) has thus been satisfied.
20. The court has also taken into consideration OPDD's argument that the recantation should not be viewed as credible given the significant passage of time since the initial conviction and asserts that



finality in judicial decisions should be respected. While the court acknowledges the importance of finality, *the Constitution*'s provisions regarding a fair trial take precedence, particularly when credible evidence suggests a miscarriage of justice.

21. After examining the arguments and evidence presented by both parties, the court concludes that the Petitioner has satisfied the requirements of Article 50(6) of *the Constitution* with regard to 'new and compelling evidence'. The recantation by the principal witness, supported by corroborative affidavits, constitute 'new and compelling evidence' likely to affect the outcome of the trial.
22. Consequently, in the interest of justice and adherence to constitutional principles, the court hereby grants the Petitioner's request for a new trial and the following orders do hereby issue:-
  - a. The conviction and sentence in Thika Criminal Case No.5165 of 2007, Nairobi High Court Criminal Appeal No.371 of 2008 and Nairobi Court of Appeal Criminal Appeal No.276 of 2011 are hereby quashed and set aside.
  - b. The matter is hereby remitted to the trial court for a new trial to be initiated based on the recanted evidence and any further evidence the parties may deem necessary to present.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Kiroko Ndegwa counsel for Petitioner

M/S Ndeda counsel for the Respondent

Court Assistant - Martin

