



**DNN v Republic (Petition E001 of 2024)  
[2024] KEHC 13398 (KLR) (4 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13398 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
PETITION E001 OF 2024  
DR KAVEDZA, J  
NOVEMBER 4, 2024**

**BETWEEN**

**DNN ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner DNN, filed the present petition dated 27<sup>th</sup> February 2024 seeking orders that the conviction and sentence delivered in Kibera Sexual Offences Case No. 67 of 2013 and the decision of the High Court upholding the same be quashed. He also prayed that the court order a new trial against the Petitioner. The petition is supported by grounds on the face thereof and an affidavit sworn by the Petitioner.
2. The averments made are that Petitioner was charged and after a full trial convicted for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment. Being dissatisfied, he filed an appeal challenging his conviction and sentence vide Nairobi Criminal Appeal No. E069 of 2021. On 30<sup>th</sup> June 2023, this court dismissed his appeal. He has not filed an appeal to the Court of Appeal.
3. The petitioner contends that at the time, the alleged offence was committed the complainant was 20 years old. The prosecution concealed material evidence on the complainant’s age. In addition, PW3 Dr. Kizzie Shako contended that the Petitioner has infected the complainant with HIV/AIDS. Pursuant to the said evidence, the court directed the parties to undergo HIV/AIDS testing. Despite several court orders, the said evidence was never availed to court.
4. On 20<sup>th</sup> July 2023, the Petitioner underwent HIV/AIDS testing at Kenyatta National Hospital. The virology tests revealed that the Petitioner was HIV-negative. This constitutes new and compelling evidence not available to the court during the trial. The evidence is on matters of fact and the Petitioner



is barred from the statutory edict of Section 361 of the Criminal Procedure Code which limits second appeals to issues of law only. The Petitioner contends that he has a right to liberty and fair trial. In the interest of justice, he urges the court to grant the orders sought.

5. The respondent conceded the petition and did not file a response. I have considered the Petition in totality, and the applicable law.
6. I have considered the issues raised in this petition. The issues herein revolve around the application and interpretation of Article 50(6) of the Constitution. The said Article provides 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.
7. Accordingly, for a party to invoke the foregoing provision, two conditions must be satisfied. The first condition requires that either:
    - (a) the Petitioner's appeal has been dismissed by the highest court to which they have a right of appeal; or
    - (b) the Petitioner has failed to appeal within the prescribed time limits.

It is my understanding that the Petitioner may only exercise this right when, as a matter of law, all avenues of appeal have been exhausted, or where statutory limitations on time preclude further appeal. Simply put, an individual with an active appeal cannot avail themselves of the rights conferred under the above provision. My position reflects that in Jona Ngala Kilimbi v. Republic [2016] eKLR, where the Court rendered itself as follows:

“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.”

8. Concerning the first limb, the Article refers to the highest court to which a person is 'entitled to appeal,' rather than the highest appellate court in the jurisdiction. In essence, the determination focuses on the appellate route that is legally accessible to the Petitioner by right, rather than any discretionary appellate path. This distinction is intentional, as evidenced by the Constitution's choice of the term 'entitled to,' as opposed to a term such as 'available.'
9. In interpreting the Constitution, the majority in Njoya & 6 Others v. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR held that the Constitution should be interpreted broadly, liberally, and purposively, to give effect to its fundamental values and principles. Consistent with that interpretive spirit, the phrase 'the highest court to which the person is entitled to appeal' must similarly be construed broadly to fulfil the Constitution's objective of advancing the rule of law, human rights, and the fundamental freedoms set out in the Bill of Rights, thereby facilitating the development of the law.



10. In the present case, the Petitioner lodged an appeal with the High Court, which was subsequently dismissed. The Petitioner's right to appeal to the Court of Appeal has since lapsed, as the statutory period within which he was required to file the appeal has expired. In light of this, I conclude that this Court has jurisdiction to entertain this Petition.
11. The Petition herein is grounded on new and compelling factual evidence that has since become available. In his appeal before this Court, the Petitioner was denied the opportunity to adduce fresh evidence. He had therefore reached a final point in his ability to present new evidence. Based on this, I find that the Petitioner has successfully met the initial requirement, demonstrating that his appeal was dismissed by the highest court to which he was entitled to appeal.
12. As regards the second criterion under Article 50(6), the question arises as to whether new and compelling evidence, previously unavailable, has now come to light. The Petitioner argues that the medical examiner, PW3, testified to the effect that he had infected the complainant with HIV/AIDS, notwithstanding the trial court's orders for HIV/AIDS testing of both the Complainant and the Petitioner, which, he asserts, was never conducted. He further states that he has since undergone an HIV/AIDS virology test, which returned a negative result. He contends that this evidence was not available during either his trial or appeal. He now seeks to present this evidence for the Court's consideration regarding its probative value in his case.
13. Where credible new and compelling evidence is brought before this Court that indicates a person may have suffered an injustice due to insufficient evidence, the Court would be failing in its constitutional duty vested by the people to ensure justice is served. However, Article 50(6) of the Constitution stipulates that the Court may only act under its authority where new and compelling evidence has indeed come to light. In James Macharia Anumbi v. Republic [2017] eKLR, the Court outlined the primary considerations for determining 'new and compelling evidence' as follows:
  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 petitioner's 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.
14. In this instance, the Petitioner asserts that evidence indicating he did not infect the Complainant with HIV/AIDS was unavailable to the court both at trial and on appeal. According to the Petitioner, this evidence could potentially have influenced the court's decision had it been presented. Moreover, he claims this evidence was not provided because the mandated HIV/AIDS tests were not conducted as directed by the court. The Petitioner contends that the prosecution withheld this evidence, making it the type of evidence that can be characterised as unavailable, but which would have been available had the prosecution exercised due diligence.
15. In my view, this evidence could qualify as compelling, in that it would have been admissible at trial, of substantial probative value, credible, and likely, if presented at trial or during the appeal, to have resulted in a different outcome. I am therefore satisfied that it meets the threshold for evidence that was not available at trial.
16. In the circumstances, as the Petitioner has met the second requirement under Article 50(6) of the Constitution, I hereby issue the following orders:



- i. The petition dated 27<sup>th</sup> February 2024 is allowed with the effect that the conviction, of the trial court, affirmed by the High Court is quashed and the sentence imposed set aside.
- ii. The file shall be placed before the Chief Magistrate Court for directions on 19<sup>th</sup> November 2024 for purposes of directions on taking a fresh plea and a re-trial.
- iii. The Petitioner is released on a cash bail of Kshs. 50,000 and in the alternative, he is released on a bond of Kshs. 200,000.
- iv. The Deputy Registrar to notify the ODPP incharge Kibera High Court to liase with the investigating officer or the relevant police station (Riruta) to charge the Petitioner afresh.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF NOVEMBER 2024.**

**D. KAVEDZA**

**JUDGE**

In the presence of:-

Mutungu for the Petitioner

Mburugu for the Respondent

Achode Court Assistant

