



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENTA AT KISII

MISC CRIMINAL APPLICATION NO 4 OF 2020

MONEI KIPSHAN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant filed this instant application seeking an order for retrial (resentencing) in the Kilgoris SPM’S sexual offence case No 676 of 2015. The applicant contends that as a party serving sentence upon conviction, he has the right to invoke **Article 50 (6) (a) and (b) of the Constitution of Kenya 2010**.

2. The applicant was charged with incest contrary to **section 20(1) of the Sexual Offences Act**. He was also charged with an alternative charge of Indecent Act contrary to **section 11 (1) of the Sexual Offences Act**. The applicant was found culpable and convicted by the trial court and sentenced to 20 years imprisonment. The applicant appealed on both conviction and sentence at this court and his conviction was upheld while the sentence was enhanced to life imprisonment. Following the judgment by this court, the applicant filed an appeal before the Court of Appeal. His appeal was considered and found to be meritorious on the issue of sentence and consequently the sentence by the High Court was set aside and they restored the 20 years sentence imposed by trial court.

3. At the hearing Mr. Onyancha, counsel for the applicant submitted that the applicant is an old man with over 20 dependents. It was also submitted that the applicant regrets committing the offence. Mr. Onyancha urged the court to note that the applicant who was 61 years old had already served 8 years out of the 20 years sentence.

4. The application was opposed by the state counsel, Mr Otieno, who submitted that in essence the application was a petition. The application was based on **Article 50 (6) (a) and (b) of the Constitution** and thus the applicant was to avail new evidence but the petition has failed to disclose any such evidence. He also pointed out that the offence of incest has a maximum sentence of life imprisonment with no minimum and thus opposed the applicant’s prayer seeking reduction of sentence.

5. I have considered the application before me and the arguments by the opposing parties. **Article 50 (6) of the Constitution of Kenya** provides as follows;

(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 for appeal; and

(b) new and compelling evidence has become available.

6. In **Tom Martins Kibisu -vs- Republic, Supreme Court Petition No. 3 of 2014 (eKLR)**, the court observed that;

(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”.

7. Although the applicant has proved that his appeal to the Court of Appeal has been dismissed, he has failed to avail new evidence that was not available at the time of trial. The applicant has simply cited the provisions but did not support his case with any new evidence as required by **Article 50 (6) of the Constitution**. The applicant also failed to file a petition as provided by **Article 50 (6) of the Constitution** but instead filed a notice of motion application.

8. In **Jackson Juma Kenga v Republic [2019] eKLR** the court stated;

“My reading of Article 50 (6) specifically requires the court to consider the petition or an application for that matter which has satisfied the threshold issue of prima facie evidence on new and compelling evidence persuading the court to direct its need to alter or vary or review the impugned order at the review stage of the trial. Its purpose is to prevent vexatious and frivolous petitions or applications being filed under the guise of a constitutional infringement. In our local jurisdiction, courts are now spending more of their judicial time and resources to determine filed petitions premised and purposed as constitutional petitions.

The triangular situation of an individual entangled in an ever ending criminal mitigation even after exhausting all his constitutional right of appeal is a fundamental and essential question which must be answered now in the context of the largely relied upon Supreme Law of the Land. I must say that the jurisdictional issue, in the subject at hand for the High Court after the doctrine of exhaustion to give a right to an aggrieved party complaining of infringement has to be considered, holistically otherwise it would conflict with the provisions under Article 162 of the constitution on system of courts. The respective jurisdictions for the Supreme court in Article 163, Article 164 for the Court of Appeal and Article 165 in regard to the High Court. The Court of Appeal under Article 164 is the ultimate judicial authority to exercise powers on the appellate jurisdiction of invoking criminal trials.

As a matter of policy by the Court of Appeal exercising jurisdiction of the appeal from the petitioner in accordance with the enabling statute and its purposes, a person who has no sufficient reason in the concluded matter has no recourse to the High Court for a review or rehearing of the case on the same set of facts. The current approach associated with applications, and petitions one after another in a highly charged judicial environment with busy dockets calls for new measures relating to standing and a cause of action.

Properly confined every petition/application subsequent after exhaustion of his right of appeal to the Court of Appeal should subject to Article 50 (6) of the Constitution render in admissible of the evidence on matters arising on the same of subject matter under the doctrine of res judicata and estoppel.”

9. Considering the application as a whole, I find that the applicant herein has not met the conditions of **Article 50 (6) of the Constitution** to warrant the grant of the orders and his application is accordingly dismissed.

DATED AND DELIVERED AT KISII THIS 11TH DAY OF MARCH, 2021.

R. E. OUGO

JUDGE

In the presence of;

Mr. Onyancha For the Applicant

Applicant Present

Mr. Otieno Senior State Counsel Office of the DPP