



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

(FROM ORIGINAL FILE NO. 713/2009 KWALE)

PETITION NO. 39 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF: ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 23 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 19/20/21/22/23/24/25/27/28/48/50/258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

ABDALLA HAMADI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

The Petition

1. By a Petition dated 30th August, 2017 the Petitioner prays for a new trial of his case on the basis of new and compelling evidence pursuant to Article 50 (6) of the constitution.
2. The Petitioner subsequently changed his plea and vacated the above premise for a new trial, but now prays for a review of his case pursuant to Article 50 (2) (q). This Article provides that:

“(2) Every accused person has the right to a fair trial which includes the right –

(q) if convicted, to appeal to, or apply for review by a higher court as prescribed by law.”

3. The Petitioner was charged, tried and convicted with offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 on 15th January, 2010 in Kwale CM’s Criminal Case No. 713 of 2009. He was sentenced to serve 20 years in jail. The Petitioner appealed both to the High Court and to the Court of Appeal. Both courts dismissed his appeal.

4. The Petitioner has therefore exhausted all the appeal avenues. Now he brings this matter under the Bill of Rights in the Constitution, firstly, that there is new and compelling evidence, which ground he abandoned, and embraces a review as aforesaid.

The Response

5. The DPP opposed the petition vide grounds of opposition filed herein on 10th May, 2018. The Respondent states that the application fails to meet the threshold set by Article 50(6) of the constitution in that:

- (a) There is no any indication or the slightest hint of any new evidence placed before the court.
- (b) There is not any indication of whether such new evidence (if any) is compelling, admissible and credible and was not available before the appellate courts or trials.
- (c) That such evidence (if any) could not have been obtained even with exercise of reasonable diligence for use at trial.

6. The DPP states that the Petitioner failed to demonstrate he was not supplied with the record of proceedings in Case File No. 713 of 2009 Kwale Court during the sessions of the two appellate courts and that the record of appeal or proceedings themselves do not constitute new and compelling evidence to warrant this court to order supply at the expense of the tax payer. The DPP states that this Court's jurisdiction to proceed under Article 50(6) of the constitution has not been invoked.

Submissions and Determination

7. The Petitioner filed submissions which are undated, while Mr. Jami for the Respondent made oral submissions in court. I have considered the submissions of both parties. Although the Petitioner had abandoned the grounds of new and compelling evidence, I will nonetheless have to consider it. This is so because the alternative ground of appeal or review under Article 50 (2) (q) is not available to the Petitioner now. It is noted that the Petitioner has already exhausted his appeal avenues and can now not rely on Article 50 (2) (q).

8. As to whether there is new and compelling evidence, this Court has looked at the grounds contained in the petition and submissions. They are:

- That the charge was defective
- Petitioner was not given statements
- No arresting officer or members of the public came to give evidence
- Lack of medical evidence
- Lack of proper investigation

9. Having considered these grounds, I find that they deal with the Petitioner's perceived inadequacy of the trial. If this is so, then these are matters which he ought to have raised at the appeal stage both in the High Court and in the Court of Appeal. This Court lacks the jurisdiction to go back on those issues.

10. I also agree with Mr. Jami learned counsel for the Respondent that the petition does not raise any or any compelling evidence to warrant a trial under Article 50 (6) of the constitution. In fact there is no new evidence, leave alone compelling evidence.

11. The upshot is that the petition before the Court lacks merit and is dismissed.

Dated, Signed and Delivered in Mombasa this 13th day of May, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Isaboke for DPP

Petitioner in person

Mr. Kaunda Court Assistant