



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CRIMINAL APPL. NO. 67 OF 2018

FAPPYTON MUTUKU NGUI..... APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The applicant was charged and convicted of the offence of defilement contrary to Section 8(1) and (2) of the Sexual Offences Act at Kithimani Senior Resident Magistrate's Court. He was sentenced to life imprisonment and he appealed to this court, which appeal was dismissed His subsequent appeal to the Court of Appeal was dismissed and his conviction and sentence upheld.

2. He then filed the instant application under Article 50(6) of the Constitution. The application was disposed of by way of oral submissions. The applicant submitted that the mother of the complainant did not participate in the matter and that there was no DNA test conducted to establish the alleged crime. He further submitted in his written submissions that the exhibits were not produced by the authors and this was in contravention of Section 77(2) of the Evidence Act.

3. Mr. Cliff Machogu, prosecution Counsel, opposed the application and submitted that the applicant ought to demonstrate that there is new and compelling evidence to warrant a retrial and since the same is lacking as the applicant is bringing in evidence that is already captured in the proceedings, the application ought to be dismissed for lack of merit. Learned counsel submitted that the applicant has not brought out any new and compelling evidence to warrant for a retrial. He cited the case of **Philip Mueke Maingi v R (2017) eKLR**.

4. In rejoinder, the applicant submitted that the new evidence is that the mother of the complainant should have testified.

5. The issue for determination is whether the applicant has established the requisite threshold for review so as to warrant an order for a retrial.

6. The applicant has argued in his submissions that it was wrong for the mother of the appellant not to testify while on the other hand the respondent submits that the record bears witness that this is not new evidence for consideration.

7. Article 50 (6) of the Constitution under which the application has been brought provides that a person who is convicted of a criminal offence may petition the high court for a new trial if:

a) The person's appeal ...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; and

b) New and compelling evidence has become available.

8. The conjunctive nature of the provisions means that the applicant ought to have approached the highest court and proceed to show that the said court has dismissed his appeal and that new and compelling evidence has become available. It is clear from the record that he does not meet the first requirement. With regard to the second requirement, this court would need to assess whether or not new and compelling evidence has become available.

9. In the case of **Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343:-**

“In general a re-trial will be ordered only when the original trial was illegal or defective. .. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

10. In addressing the question of prejudice to be suffered by an appellant when a matter is to be referred for a re-trial, in the case of **Joseph Ndungu Kagiri v Republic [2016] eKLR**, Mativo J had the following to say:-

“As held above under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial..”

11. Similarly, Justice Mativo in addressing the issue of new and compelling evidence in the case of **Philip Mueke Maingi v R (2017) eKLR** observed that firstly, the new evidence is that which must not have been available to the petitioner during trial and Secondly, the same ought to be admissible, credible and not merely impeaching, cumulative and the same would result in a new outcome if a new trial is granted. In the present case, the applicant has not demonstrated that there is new evidence, but has asserted that the mother of the complainant did not testify. He has not set out the new evidence that the complainant’s mother shall introduce to the case so as to result in a different outcome if the matter is tried afresh. The applicant was under obligation to demonstrate that there is new and compelling evidence that justifies a retrial. He must also go ahead to demonstrate that such evidence was not available to him at the time of the trial and that it could not have been obtained with reasonable diligence at the trial and in the course of the appeals.

12. It is noted that the issue of the mother of the complainant was obviously a matter within the knowledge of the applicant and ought to have raised it during the trial and even in the appeals. The applicant has not demonstrated that the evidence of that particular person would have been strong and compelling enough to tilt the scales in favour of the applicant. Even if that particular witness was not called, the nature of the offence was one whereby even the evidence of the victim could have been sufficient as long as the trial court believed that the victim was telling the truth. In any event it is highly unlikely that the mother of the victim if called would have exonerated the applicant. Therefore I find that the new evidence sought is not significant enough that it would likely result in a different outcome if a new trial is granted.

13. In the circumstances, I am not persuaded that the petitioner has met the criteria set out in Article 50(6)(a)&(b) of the Constitution. Accordingly, I find the petitioner’s application lacks merit. The same is dismissed.

It is so ordered.

Dated, Signed and Delivered at Machakos this 10th day of June, 2019

D. K. KEMEI

JUDGE