



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CONSTITUTIONAL PETITION NO. 9 OF 2018**

**IN THE MATTER OF CONSTITUTIONAL AND HUMAN RIGHTS**

**BETWEEN**

**JACKSON MUSYOKI MUTIE.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. **Jackson Musyoki Mutie**, the Petitioner was convicted of the offence of **Defilement** and sentenced to **fifteen (15) years imprisonment** which was the minimum prescribed sentence as he had defiled a child aged **14 years**.

2. His Application dated the **2<sup>nd</sup>** day of **July, 2018** is premised on grounds that: his first Appeal was dismissed on **18<sup>th</sup> December, 2018** and he has lodged an Appeal to the Court of Appeal but has not accessed urgent services; he was convicted on a defective and an incurable charge sheet and yet his Appeal was dismissed without due consideration; he was convicted on uncorroborated medical evidence which is clear; new and compelling reasons have become available which would change the outcome of the Petition in terms of sentence pursuant to **Article 50(6)(b)** of the **Constitution**.

3. That the Court failed to appreciate that the Prosecution did not apply the cardinal principle of Criminal Law that requires the Prosecution to prove each and every ingredient of the charges beyond reasonable doubt thus infringing on the Applicant's right to fair trial and the defence put up was not considered.

4. The Respondent through learned Counsel **Mr. Mamba** filed an affidavit in response of the Application where he deposed that the Petitioner's Appeal was dismissed on **18<sup>th</sup> February, 2018**, now he seeks to exploit the provisions of **Article 50(1)** of the **Constitution, 2010** on the ground that a new development has occurred while on conviction.

5. At the hearing the Petitioner stated that he was convicted and sentenced to **15 years imprisonment** but now he was mitigating on sentence. He urged that he has three (3) children who have scattered after being abandoned by his wife and his elderly parents need a person to care for them. That he has reformed and is equipped with upholstery grade III, a Certificate in Theology and the Court should take into consideration the seven (7) months period that he was in remand.

6. **Article 50(6)(b)** of the **Constitution** provides thus:

*“(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—*

*(b) new and compelling evidence has become available.”*

7. In the case of **Col. Tom Martins Kibisu vs. Republic SC Petition No. 3 of 2014 (2014) eKLR** the Supreme Court stated that:

*“[42] We are in agreement with the Court of Appeal that under Article 50(6), “new and compelling evidence” means “evidence which was not available at the 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 the accused person.”*

8. Mitigation on sentence cannot be viewed to be new and compelling evidence. In the Lower Court the Appellant was given an opportunity to mitigate.

9. On Appeal the Court considered what transpired before the Lower Court and upheld the decision of the trial Court.

10. Currently, the matter is pending before the Court of Appeal which means that this Court is *functus officio*. This Court's mandate having expired, it cannot purport to usurp jurisdiction that it is not seized of.

11. In the premises the Petition lacks merit. Accordingly, it is dismissed.

12. It is so ordered.

**Dated, Signed and Delivered at Kitui this 18<sup>th</sup> day of June, 2019.**

**L. N. MUTENDE**

**JUDGE**