THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 3 OF 2017

SHIKARI CHISIWA NYOKA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Justice R. Nyakundi

Ms Sombo for the State

Shikari Chisiwa Nyoka

JUDGMENT

1. The Petitioner was charged with the offence of Defilement of a child aged 11 years contrary to **section 8(2)** of the Sexual Offences Act No.3 of 2006. He was tried, convicted and sentenced to life imprisonment. He has now brought this petition in terms of **Article 35(2), 50(2) (b) & (50, 157 (6) (1) & (9) and 11** of the Constitution of Kenya.

2. The petition is predicated upon grounds of appeal couched on the face of it. The said grounds are that the both the trial court failed to take into account the fact that the charge sheet was defective, the evidence of the minor was improperly admitted, the P3 form did not support the charge of defilement, there was evidence of previous sexual encounter and that his defense was not considered.

3. This court takes judicial notice of the fact that the Supreme Court of Kenya in **Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 & 16 of (2017) eKLR** declared the mandatory nature of the deaths sentence and the commutation of that sentence by an administration fiat to life imprisonment unconstitutional and therefore null and void. The rationale is that the mandatory nature of death sentence as provided for under **section 204** of the penal code deprived trial courts judicial discretion to consider aggravating and mitigating circumstances to enable the court to impose an appropriate sentence based on the peculiar circumstances of each case. Thus, a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25** of the Constitution**.**

The Petitioner's Case

4. The Appellant filed submissions in support of the instant petition. The Counsel for the Petitioner cited Article 50(6) (b) of the constitution 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 ,if any has been dismissed by the highest court to which is entitled to appeal or the person did not appeal within the time allowed for appeal AND***
>
> ***b. A new and compelling evidence has become available.***

5. The Petitioner therefore submitted that the article of the above cited article has given unfettered discretion to the high court to hear petitions filed by the affected petitioners. Counsel states that this court has a constitutional obligation to hear and determine this petition filed by the petitioners who meet the conditions laid down by the constitution.

6. According for the counsel for the Petitioner, it would be a breach of the constitutionally enshrined provision of **Article 50** of the constitution of Kenya 2010 if the high court rules out hearing of an application/petition filed by the convicted persons on account of jurisdictions when the constitution has provided the powers to the high court to entertain the petition. The high court has both original and appellant jurisdiction to hear all petitions. Further that, is at this stage the high court by its original and appellate jurisdiction would call and examine the record of the trial court and see whether the trial was done fairly and legally as per the law. In this way the court would ensure fair trial is done. Counsel's submission is that the high court would not be sitting on appeal on issues already dealt with and determined by the court of appeal. The matters that are referred to the court of appeal is deals essentially with issues of law and not facts. It is only this court

that has the powers to deal with issues of revision as contained at Article 50 of the constitution of Kenya.

7. It is indicated that the petitioner herein was arrested and charged in Criminal Case No. 1721 of 2008 in Malindi law court and eventually convicted to serve life imprisonment ***(see judgment pages 37-43 of the record of appeal).*** The appellant filed an appeal **(see pages 44-45 of the record of appeal)** the case was heard by the high court and judgment was delivered herein dated 14th February 2011 **(see pages 61-68 of the record of appeal).** The appellant appealed to the court of appeal against the judgment of the high court **(see a notice of appeal at page 690).** The appeal was heard and determined **(see the judgment on pages 70-75 of the record of appeal).** It's the Petitioner's submission that **Article 50(6) (a)** has been fully met by the applicant/petitioner in this case to enable the court to exercise its constitutional authority to hear and determine the petition. It is also submitted that what is remaining is the issue of new and compelling evidence as provided by **Article 50(6)(b).**

8. Counsel pointed out that the entire record as contained does not reveal clearly as to when the accused was arrested, in which court he was arraigned, for what period of time he attended the court and what happened in Criminal Case No. 56 of 2007. In this respect, it is noted that the prosecution at page 9-10 of the record presented the appellant/accused to court and the charge sheet was read to the appellant then accused as per the law and the appellant /accused denied the charges and plea of not guilty was entered.

9. Further that, the prosecution very casually told the court that the earlier case was withdrawn under section 87(a) Criminal Procedure Code and the court held that the bond terms for Criminal Case 56 of 2007 to apply. It is the Petitioner's submission that the court was deeply misguided by the prosecutor. The court was not told that the accused was taken to court in Kilifi Law Court which is far away from Malindi in Criminal Cases No. 56 of 2007 which case the court alleged terminated under Section 82(a) of the Criminal Procedure Code, before taking plea so that the court to decide on the way forward. The court was not told whether the accused was given the bond or not before the court confirmed the bond terms that never existed. The court was not given a record of Criminal Case No. 56 of 2007 to confirm the prosecution claims that the case was withdrawn under 87A of the Criminal Procedure Code. As a result of this, the case proceeded for hearing without the record of the Criminal Case No. 56 of 2007. Further that, the appellant/accused was not asked whether he was given bond or not in Criminal Case No. 56 of 2007.

10. According to the Counsel for the Petitioner, the petitioner was arrested and charged at kilifi law court with the offence of defilement, he remained in the cells and kept attending court in 2007 to 2008 when the court dismissed the case for non-attendant of the witness. The appellant was legally set free by the court and there was no way a new trial was to be conducted by the court unless an application for review was to be done by the high court. The only way the trial would have informed the correct position was by asking the file in criminal Case No. 56 of 2007 Republic v the petitioner herein.

11. It is indicated that the court had treated the Criminal Case No. 1721of 2008 as it was a full continuation of Criminal Case No 56 of 2007 by adopting bond terms therein, when the Court had not seen the file and did not know the ruling of the court. If the Appellant was truly set free due to non-attendance of the witness, the whole trial was and is indeed a travesty of justice as it amounts to double jeopardy.

12. It is Counsel's submission that the Petitioner according to the record form the lower court to the court of appeal was acting in person and could not know anything about the principal of double jeopardy in the trial both in the lower and in the high court. The records in the proceedings in Criminal Case No. 1721 of 2008 are extremely silent about the time when the Petitioner was arrested and arraigned in court. It is not clear as to whether anything ever happened in the 2 years the accused was in the cell doing the trial of criminal no. 56 of 2007. It would have been prudent if the proceedings in criminal case no. 56 of 2007 is part of the record since it is a reference in the 2nd trial in Criminal No. 1721 of 2008.

13. It is submitted that the prosecution was jumping the gun, when they choose to arraign the accused in a different court away from Kilifi law court as if the prosecution had an issue with Kilifi law court. it is contended that the prosecution knew very well that the Criminal Case No. 56 of 2007 against the Petitioner had been terminated in his favour. It is also submitted that in the Appeal to the high court, the Petitioner, who was acting in person did not raise the issue that the case no. 56 of 2007 was determined in his favour. A further contention is that it is possible that as an illiterate person who indeed conducted his entire proceedings in the lower court through a GIRIAMA interpreter did not know that if the court had indeed determined the Criminal Case No. 56 of 2007 in his favour. The principal of double jeopardy will operate in his favour.

14. It is Counsel's submission that this issue was never raised or conversed in the Court of appeal. On the basis of this, it is urged that the court to finds prosecution to have been under duty to reveal to the lower court in the Criminal Case No. 1721 of 2008 the following.

a) That the prosecution had obtained leave from the A.G and withdrawn the case against the accused under section 87(a).

b) That the accused was out on bond / was given bond of a certain value.

c) That the accused was re-arrested and brought to this court for trial and not kilifi law court.

15. In the Counsel's view, this would have helped the court to make an informed decision and also give a chance to the accused to respond. The case was done without due care of the constitutional rights of the fair trial. Further, the issues of new evidence has been dealt with in the case of **Bofance Nugendi Kinyua Vs Republic** in which the court referred itself to the case of **Rogders Ondieki Nyakundi vs Republic (2012)Klr** as follows

a) There is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of the hearing of the two appeals.

b) The evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or impeaching.

Such evidence must not only be favorable to the petitioner but it must be such evidence as is likely to persuade this court to reach an entirely different decision form the decision already reached by the two appellate court.

16. It is indicated that matters of record of the court are safely kept by the criminal registry of the court and are easily retrieved by a court. The prosecution stood in a better chance to avail the file of criminal Case No. 56 of 2007 to prove that what it told the court was true. The court also acted falsely by believing the mere allegations of the prosecution and proceeded to try the appellant without following the due process of the law.

17. It is the Petitioner's submission that the matter of law are of extremely important, the law presumes that all parties must be aware of the law and procedures but there are several cases where even the most vocal law experts find themselves in the receiving end. Though the appellant would be presumed to know the law and even his rights the truth is that the entire proceedings in the law court we done vide a GIRIAMA interpreter this is indeed a clear case where the court can stand up and give the appellant a benefit of doubt, a reason why the appellant failed to raise and know that there is a principal of double jeopardy in the trial he was facing in the Criminal Case No. 1721 of 2008 in Malindi law court since he had been acquitted in criminal case no. 56 of 2007 in Kilifi law court. The petitioner did not apply for the record of Criminal No. 56 of 2007. What is only appearing in his statement of defence is that the Petitioner told the trial court that he had been acquitted by the court in Criminal Case No. 56/ of 2007 but did not know that the court did not have the record of the said case. Hence the court did not pronounce any findings in the allegations raised by the Petitioner.

18. A further submission was made that the court of appeal is the highest court on matters of law that emanates from the decisions of the high court in criminal matters. Counsel referred this Court to page 75 of the record and contended that the judgment of the court of appeal did not provide leave for appeal to the appellant this was because the issues were settled and sealed by the decision of the court of appeal.

19. According to the counsel for the Petitioner, the Constitution under **Article 50(6)** has only opened a window for revision where there is new and compelling evidence. Further that the Supreme Court had a chance to make its findings. Counsel urged this court to go through Petition **No. 3 of 2014 It Col.Tom Martins Kibisu vs Republic**. The appellant judge held evidence that was not available at the time of the trial or could not have been availed upon exercise of due diligence sufficiently weight that if it was available to the trial or the appellant courts the conviction would probably not have been sustained.

20. It is the Petitioner's submission that if the record of Criminal Case No. 56 of 2007 at Kilifi law court was availed the court could have quashed the hearing of Criminal Case No. 1721 of 2008 since the court had dismissed that case and acquitted the appellant for non-attendance of the witness. The prosecution's averment that the case was withdrawn under **Section 87(a)** of Civil Procedure Act was false and indeed unconfirmed. It was submitted that the Supreme Court in terms of **Article 163(3)** of the Constitution of Kenya 2010 has clear provisions of the powers of the Supreme Court. Article 163(4) appeals from the high court to the Supreme Court shall:

a) As a right in any case involving interpretation or application of the constitution and

b) In any other case in which the Supreme Court or court of appeal certifies the matter of public importance is involved. It's our submission that on criminal matters the court of appeal is final and revision from under article 50(6) shall lie to the high court.

21. In addition, Counsel cited several authorities which include **Election Petition No.3 Of 2014 Lt.Col.Tom Martins Kibisu V Republic; Petition No. 23 Of 2015 Kevin Murerwa V Republic And Misc Appl.No 66a Of 2011 And 66b Of 2011 Mohamed Abdulrahman Said. & another Vs Republic**.

Respondent's Case

22. The Respondent filed submissions on 10th June 2010 petition through its counsel Mr. Vincent Monda. He indicated that the petition does not meet the criteria set in terms of **Article 50(6)(b)** of the Constitution. According to the Counsel for the state, this petition is anchored on whether there is new and compelling evidence available to warrant to order for a new trial. Counsel holds the view that the Honourable Attorney General was well within his prosecutorial powers as per the old constitution to direct the arraignment and trial of the Petitioner on the same facts in Criminal Case No. 1721 of 2008 at Malindi law Courts. The Petitioner had been previously arrested and charged in Criminal Case 56/2007 and subsequently he was acquitted at Kilifi Law Courts. On the 2nd occasion, the petitioner was tried, convicted and sentenced to life imprisonment in terms of **section 8(1)** of the Sexual Offences Act. Sentence was entered on 22/10/2009.

23. Counsel for the state contended further that his perusal of the trial record shows that throughout the trial there was a giriama interpreter in court. Thus the petitioner was allowed to proceed as he was made to understand the nature of charges and evidence adduced and be able to extensively cross-examine witnesses. It is also his contention that Justice J.A Omondi which is a court of concurrent jurisdiction delved on issues of law and facts and dismissed the same on the 14th February 2011. The same cannot be dealt with by this court in form of a petition as that fissure is closed.

24. Counsel also believes that the Petitioner has belatedly raising the issue of having been acquitted on account of the same facts. In his view, the same does not amount to new and compelling reasons. The Respondent further contents as follows:

a) The Petitioner did not raise the plea of autrefois acquit as stated in section 138 of the Criminal Procedure Code. Further that this defence was never raised by the Petitioner before plea taking.

b) He referred the court to page 32 of the record, line 4 where the Learned Magistrate states that "A discharge under section 87(a) of the CPC of the earlier case would not come to the aid of the accused".

c) It is contended that the petition of about appeal filed in the high court had no ground of appeal relating to section 138 of the

Criminal Procedure Code raised.

d) The Memorandum of appeal filed in the court of Appeal did not raise the issue of autrefois acquit pursuant to section 138 of the CPC.

e) Lastly, both the petition of appeal and memorandum of Appeal respectively did not challenge the findings by the learned trial magistrate that that the petitioner was discharged under section 87(a) of the Criminal Procedure Code.

The Law, Analysis and Determination.

25. The instant petition is heavily anchored on **Article 50 (6) (a) & (b)** of the Constitution which provides that: -

(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; and

(b) New and compelling evidence has become available.

26. What is of utmost importance is to consider whether the petition has met the threshold as provided for in the above-mentioned article to warrant the court order for a new trial of the Petitioner who has already been convicted and sentenced to life imprisonment. He has also appealed to this court as well as in the court of appeal and his appeal was dismissed on both occasions. In **Tom Martins Kibisu -Vs- Republic, Supreme Court Petition No. 3 of 2014 (eKLR),** the learned Judges of appeal expressed themselves as follows;

"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.***

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."

27. In view of the foregoing decision, the Petitioner herein appealed to the High Court against the trial court decision as well as to the Court of Appeal against the High Court Judgement. He has exhausted the available appeal mechanism open to him, thus the first requirement has met the test.

28. On the 2nd limb, main ground in support of the orders sought was that he had found new and compelling evidence *to wit,* that the entire record of proceedings does not show that the Petitioner was once arrested and charged in Criminal Case 56/2007 and subsequently acquitted at Kilifi Law Courts.

29. The principles enshrined in the **Muruatetu Case** have now been adopted in the sentencing of defilement cases. The Court of Appeal in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** considered legality of minimum mandatory sentences under the Sexual Offences Act.

30. In **Christopher Ochieng – v- R** *(supra***)** the Court of Appeal sitting at Kisumu, stated that:

"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

31. In the instant matter, the Petitioner was charged with defilement contrary to **section 8(2)** of the sexual offences Act in the year 2007 and he was convicted and sentenced to life imprisonment on the 22nd October 2009. This was before the declaration of the said provision to be unconstitutional in **Muruatetu Case.** Thus, the Petitioner stands to benefit from the recent jurisprudential development of the law which has benefit myriads of convicts who had fallen in the trap of mandatory death and life imprisonment sentences.

32. I take the view that sentencing ought to take into account the individual circumstances of the accused as well as possibility of reform and re-habilitation, public interest and the interests of the victim and her relations. Of course the courts should exercise a measure of mercy. The ages of the accused person and the victim are relevant in determining an appropriate sentence. The younger with victim the harsher the sentence. The starting point of sentencing in defilement cases is not less than 15 years which may only increase according to the aggravating and mitigating factors. (see the Malawian Case of **Republic v Bright Jamali C.C No. 321 of 2013**).

33. In this case the Appellant was approximately 67 years of age while the victim was 11 years. Before the new dispensation on sentencing of offences committed contrary to **section 8(1),** the appellant was liable to life imprisonment. One would say that sentences in defilement cases may vary depending on the peculiar circumstances of each case. The aggravating factors herein are that the Petitioner is an elderly offender who defiled his granddaughter. Also the fact that the Petitioner repeatedly violated the minor for almost a year. I agree with the Respondent that the appellant may be elderly, but the circumstances of the case are horrible. He is now 79 years.

34. I shall also take into account the period he has already served in prison by the Petitioner pursuant to section 333 of the Criminal procedure Code, which is approximately 12 years from the date of arrest. Considering all the circumstances of this case and the guidelines set out in the **Muruatetu Case and Jared Koita Injiri v The Republic Criminal Appeal No. 93 of 2014.** I hereby substitute the sentence of life imprisonment with one of 14 years imprisonment from the date of his arrest.

He has 14 days right of Appeal.

Dated, signed and delivered in open court at Malindi this 4th day of July, 2019.

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REUBEN NYAKUNDI

JUDGE