REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL MISC. APPLICATION NO. 11 OF 2015

JOHN NDWIGA MACHAKI…….....…..….PETITIONER/APPLICANT

VERSUS

REPUBLIC……. RESPONDENT

R U L I N G

This is a ruling on the undated application filed on 3/3/2015 seeking for orders of retrial on the basis that new and compelling evidence is now available.

The petitioner was charged and convicted by Siakago Principal Magistrate Mr. S.M. Mokua for the offence of defilement contrary to Section 8 (1) & (2) of the Sexual Offences Act. He was sentenced to twenty (20) years imprisonment on 7/8/2010. He appealed against the said judgment in Embu HCRA No. 203 of 2010 where Ong'udi J. dismissed the appeal for lack of merit on 14/6/2012.

The petitioner lodged a second appeal in the Court of Appeal Nyeri CRA No. 350 of 2012. The appeal was heard and determined by Justices A. Visram, M. Koome, J. Otieno-Odek and it was dismissed on 17/12/2014.

The petition is supported by the following grounds:-

1. *New and compelling evidence has become available in that a key prosecution witness PW1 was not cross examination by petitioner thus violating section 214 of the CPC hence it was not fair hearing where article 50(2) k was denied.*
2. *The prosecution convicted the petitioner without establishing the truth from the complainant which was prejudicial cite* ***THOMAS KWANYADZOMBO VS REPUBLIC [2010] eKLR***
3. *The petitioner was not given adequate time to prepare for hearing and self defence which violated the petitioner's right under article 50(2)c.*
4. *The petitioner was forced to proceed with hearing without being given statements thus it was a judicial discretion exercise contrary to section 214 of the CPC.*

The petitioner filed written submissions in his support of the grounds. He argued that his first and second appeals against the conviction and sentence for the offence of defilement were dismissed. The petitioner argues that the birth certificate was not availed to prove the age of the complainant. He was not satisfied with the evidence of the doctor who testified for he was not the one who examined the complainant. He further states that he was not given enough time to prepare for his defence as the trial was hastily conducted. It is also argued that most of the questions directed to the prosecution were not recorded in the proceedings. Further that the language used was not interpreted to the applicant and he was not allowed to cross examine the complainant during trial.

Counsel for the respondent Ms. Nandwa, in her oral submissions stated that both appeals by the petitioner in the High Court and Court of Appeal were dismissed. The petitioner alleges that he was not given an opportunity to cross examine the complainant. The counsel relied on the case of ***LIEUTNANT MARTIN KIBISU VS REPUBLIC SUPREME COURT PETITION NO. 3 OF 2014*** where the Supreme Court upheld the finding of the Court of Appeal on definition of new and compelling evidence. It was defined as evidence which was not available during trial after exercise of due diligence.

The court further argued that the issue of failure of cross-examining the complainant has nothing to do with new or compelling evidence. The trial took place in the year 2009 and retrial would not be in the interest of justice. Such an order would defeat the interest of justice as most witnesses who testified would be unavailable to testify. It is not in doubt that there was overwhelming evidence against the petitioner. He is attempting to have a retrial on issues tried and confirmed twice by the appeal court. The petition does not meet the legal requirements set by the law and ought to be dismissed.

The applicant relies on Article 165(3) and 50(6)(b) provides that a convicted person who has exhausted all avenues of appeal may apply for an order of retrial where new and compelling evidence has become available.

The applicant claimed that he was convicted in disregard of the fact that the provisions of Article 49 (1) (b) and (d) of the Constitution had been violated. These are the right to remain silent and the right not to make any confession or admission. However, the applicant did not adduce any evidence in his affidavit to support this claim.

Article 50(6) 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 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.*

The principles that should be considered before a retrial can be allowed were restated in the following cases;

(a) TOM MARTINS KIBISU VS REPUBLIC[2014] (cited and attached by the applicant) the Supreme Court cited two conditions that must be fulfilled before a new trial can be ordered. Firstly, a person must have exhausted the course of appeal to the highest court with jurisdiction to try the matter and secondly, there must be new and compelling evidence.

The court held:-

> *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.*

(b) ***LAWRENCE MUTUKU MUSYOKA VS REPUBLIC [2010] eKLR***

> The court cited the case *of* ***FATEHALI MANJI V. R. [1966] E.A. 343*** in which Sir Clement De Lestang the then acting President of the Court of Appeal stated:

> *"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."*

In ***M'KANAKE V. REPUBLIC [1973] E.A. 67*** it was held that a re-trial should not be asked to fill gaps in the evidence or to rectify faults of the prosecution's case. And in ***MWANGI VS REPUBLIC [1983] KLR 522*** this Court said:-

> *"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result:* ***BRAGANZA V. R. (1957) EA 152 (CA) 469 PYARALA BASSAN V. R. [1960] EA 854.*** *In our view, there was evidence on record which might support the conviction of the appellant."*

The issue for determination is whether there is new and compelling evidence which has become available and which would not have procured with due diligence at the time of the trial.

The Supreme Court in the above decision was in agreement with the Court of Appeal that under Article 50(6) of the Constitution "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 would have led to a different verdict.*

The only ground in the petition which is relevant to this application is of new and compelling evidence. The court will restrict itself to only this ground.

The matters raised in ground 2, 3 and 4 are matters which were dealt with exhaustively in the appeals before the High Court and the Court of Appeal. This court has no jurisdiction to open up those issues in this application.

The petitioner in his affidavit has made no attempt to demonstrate the existence of any new and compelling evidence which ought to be the basis of an application of this nature. Neither has he annexed the affidavit of the witness who alleges that he was forced by police to give false evidence.

In addition to showing the existence of new and compelling evidence, the petitioner is required to demonstrate that the evidence was not available at the time of the trial or could not have been availed upon exercise of due diligence. It must also be shown that the evidence is sufficiently weighty and that it was available to the appellate courts, the conviction would probably not have been sustained.

It is my considered opinion that this petition has no merit and it is hereby dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF NOVEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

The Applicant/petitioner

Ms. Nandwa for the Respondent