



**Sheikh v Office of the Director of Public Prosecutions (Petition  
E049 of 2025) [2025] KEHC 19187 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19187 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E049 OF 2025  
WM KAGENDO., J  
DECEMBER 19, 2025**

**BETWEEN**

**HUSSEIN SHEIKH ..... PETITIONER**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(Arising from Sexual Offence Case No. 326 of 2017, Republic v Mohamed  
Mohamud & 2 Others, before the Chief Magistrate's Court at Mombasa)*

**JUDGMENT**

**Introduction**

1. The Petitioner, Hussein Sheikh, moved this Court by way of a Constitutional Petition brought principally under Articles 23, 50(6), and 51 of *the Constitution* of Kenya, seeking a new trial on the basis of alleged new and compelling evidence that became available after his conviction.
2. The Petition arises from Sexual Offence Case No. 326 of 2017, Republic v Mohamed Mohamud & 2 Others, before the Chief Magistrate's Court at Mombasa, wherein the Petitioner was convicted and sentenced to fifteen (15) years' imprisonment on 12th January 2024.
3. The Petition is supported by sworn affidavits of: The Petitioner himself; Nuzla Abdalla, the complainant; Swabrina Abdalla, the complainant's sister and intermediary; Mohamed Abdi, the Petitioner's employer; and Abdinasir Sheikh, the Petitioner's brother.
4. The Respondent, through the Office of the Director of Public Prosecutions, did not file a Replying Affidavit and expressly indicated that it does not oppose the Petition.

**Reliefs Sought**

5. The Petitioner seeks the following orders:



- a. A declaration that he is entitled to a new trial under Article 50(6) of *the Constitution*.
- b. An order quashing the proceedings, conviction, and sentence in Sexual Offence Case No. 326 of 2017.
- c. An order directing the Chief Magistrate’s Court at Mombasa to conduct a new trial.
- d. An order directing the Magistrate’s Court to consider the Petitioner’s eligibility for bail or bond within seven (7) days.
- e. Any other relief this Honourable Court may deem fit.

### **Issues for Determination**

6. Having considered the pleadings and submissions, the Court identifies the following issues for determination:
  - i. Whether the evidence presented constitutes new and compelling evidence within the meaning of Article 50(6) of *the Constitution*.
  - ii. Whether the Petitioner is entitled to the reliefs sought.

### **Applicable Law**

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

“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.”

8. The jurisdiction of this Court to grant appropriate reliefs flows from Article 23(3) of *the Constitution*.

### **Analysis**

#### **a. Whether the Evidence is “New”**

9. The Petitioner relies on several categories of evidence that were not placed before the trial court:
  - i. CCTV footage showing the Petitioner at his place of work in Shimanzi at the material time. The footage is produced in an electronic flash disk (Exhibit M-1), with screenshots annexed at pages 140–146 (Annexure M-2).
  - ii. The Initial Report Entry (OB 56/23/02/2017) from Central Police Station, which indicates that the complaint of defilement was made against a person other than the Petitioner and that the suspect was still at large at the time of reporting.
  - iii. Affidavits sworn by the complainant and her sister, both confirming that the complainant did not accuse the Petitioner of defilement and that her testimony during trial was misrecorded.
10. There is no evidence that this material was available to the Petitioner at the time of trial, nor that he was aware of the alleged misrecording of testimony. The Court is satisfied that the evidence was not reasonably available despite due diligence.



11. In *DWG v Director of Public Prosecutions* [2024] KENSC 14545 (KLR), the High Court held:

“For evidence to be considered new, it must not have been available during the trial, despite diligent efforts to discover it.”

12. This Court finds that the threshold of “newness” has been met.

### **b. Whether the Evidence is “Compelling”**

13. The test of whether evidence is compelling goes beyond novelty. It must be credible, material, and capable of influencing the outcome of the trial.

14. The CCTV footage constitutes alibi evidence placing the Petitioner at a different location at the time the offence was allegedly committed. If admitted and tested, such evidence has the potential to completely displace the prosecution’s case on identity.

15. The Initial Report Entry is the first report, a category of evidence long regarded as crucial in assessing the credibility of sexual offence complaints. It materially contradicts the prosecution narrative that implicated the Petitioner.

16. Most significantly, the sworn affidavits of the complainant and her sister directly challenge the accuracy of the trial record and raise serious questions regarding the integrity of the conviction.

17. In *DNN v Republic* [2024] KENSC 13398 (KLR), the Court held:

“New evidence is compelling if it is significant enough that it would likely result in a different outcome if a new trial is granted.”

18. This Court is persuaded that the evidence presented is not merely corroborative or cumulative, but goes to the root of the conviction.

### **c. Effect of the Respondent’s Non-Opposition**

19. The Respondent did not controvert the factual depositions in the supporting affidavits.

20. It is settled law that uncontroverted evidence is deemed admitted.

In *Andrian Kithinji Mungania v Japhet R. Nkonge Auctioneers & Another* [2013] eKLR, the Court held:

“Any statement of fact which is not controverted by the opponent is deemed to be admitted.”

21. Similarly, in *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited* [2010] eKLR, the Court observed that unrebutted affidavit evidence must be taken as true.

22. The Respondent’s position further strengthens the Petitioner’s case.

### **Interests of Justice**

23. Article 50(6) is designed to safeguard against miscarriages of justice. Where credible evidence emerges after conviction that casts doubt on the correctness of the verdict, the Court must intervene.

24. Given the seriousness of the offence, the length of the sentence imposed, and the nature of the new evidence, this Court finds that the interests of justice demand a retrial, rather than allowing the conviction to stand unexamined.



25. A retrial will allow the evidence to be tested through the adversarial process while protecting the constitutional rights of the Petitioner and the public interest in the proper administration of justice.

### **Disposition**

26. In the result, the Court finds that the Petition has merit and allows it.

### **Final Orders**

27. Accordingly, the Court makes the following orders:

28. The Petition is hereby allowed.

29. The proceedings, conviction, and sentence imposed upon the Petitioner in Sexual Offence Case No. 326 of 2017 at the Chief Magistrate's Court, Mombasa, are hereby quashed.

30. A retrial is hereby ordered, to be conducted before a magistrate of competent jurisdiction other than Hon. F. Kyambia.

31. The order and file be placed before the chief magistrate for directions on retrial on 23/12/2025.

32. The Petitioner shall remain in lawful custody pending the determination of bail or bond unless otherwise lawfully released.

33. A production order for 23/12/2025 is hereby issued.

34. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS ...19TH... DAY OF DECEMBER..... 2025.**

Present

Mr Ndegwa For The Petitioner Mr Ngiri For The Respondent Bebora Court Assistant

**SIGNED BY/FOR:**

**HON. LADY JUSTICE WENDY MICHENI**

