REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

(CORAM: R. MWONGO, J.)

CRIMINAL REVISION NO. E271 OF 2025

BENARD MUCHANGI NJAGI……………….....………………………….……APPLICANT

-VERSUS-

REPUBLIC……….....……………..………………………………………...……RESPONDENT

JUDGMENT

The Revision Application

1. Through an undated revision application, the applicant seeks that the proceedings, conviction and sentence in Embu MCSO E044 of 2020 be set aside and a new trial be ordered. In the trial court he was convicted for defilement and sentenced to 25 years imprisonment.
2. The applicant stated the he challenged the decision of the trial court before the High Court in HCCA No.E002/2022 but his appeal was dismissed. He urges that since his conviction and sentencing, new and compelling evidence has become available, and it is in the interest of justice that a retrial be ordered. It is also the applicant’s case that the prosecution failed to answer his questions during the trial and that a DNA test was not conducted to enable proper identification of the complainant’s assailant.

Grounds of Opposition

3. The respondent filed grounds of opposition stating that the application lacks merit a it does not meet the conditions set out under Article 50(6) of the Constitution.

Parties’ Submissions

4. The application was canvassed by way of written submissions.
5. The applicant relied on Articles 22, 23 and 165 of the Constitution. He submitted that he was not accorded an opportunity to cross-examine the prosecution witnesses. He also relied on the cases of **Ekuwam v Republic [2024] KEHC 3192 (KLR)** and **Machira v Republic (Criminal Appeal E018 of 2023) [2024] KEHC 2712 (KLR)** and argued that he ought to have been acquitted

of the charges. He submitted that despite there being in place laws providing that he should have been represented by legal counsel, none was provided for him in accordance with the Legal Aid Act.

6. The respondent, in its submissions, relied on Article 50(6) of the Constitution and maintained that the applicant did not meet the requirements for retrial. Reliance was placed on the cases of **Robert Tom Martins Kibisu v Republic [2014] KECA 741 (KLR)** and **Kibisu v Republic [2018] KESC 34 (KLR)** where the court defined "new evidence". It argued that the applicant has not proved that he has exhausted all the venues of appeal as provided by the constitution.

7. On the issue of whether there is new or compelling evidence, the state stated that the applicant raised the issue of DNA evidence with the prosecution which he says was not answered. It argued that the applicant was, however, given adequate time to cross-examine the prosecution witnesses and he did so, and that DNA evidence is not mandatory in sexual offence trials. In any event, it has not been presented as new evidence.

Issue for Determination

8. The issue for determination is whether the applicant's case meet the threshold for ordering a retrial.

Analysis and Determination

9. The applicant's application expressly invokes Article 50 (6) (a) and (b) of the Constitution. It also indirectly invokes the revisionary power of the High Court which is ultimately drawn from Section 362 - 366 of the CPC. Article 165 (6) & (7) of the Constitution provides as follows:

> ***"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***
>
> ***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***"

10. Section 362 of the Criminal Procedure Code provides as follows on the High Court's revisionary jurisdiction:

> "***The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court***."

11. The question raised under the revision application is whether a retrial should be ordered on grounds that the applicant's questions at the trial were not answered, and that there is new evidence that was not available during the trial. Article 50(6) of the Constitution provides, regarding new evidence as follows:

> ***"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"***

12. Two preconditions must be present before a court may order retrial. It is mandatory that, firstly, the applicant exhausts all the available avenues of appeal and has remained unsuccessful or he failed to appeal on time; and that, secondly, new and compelling evidence has become available. From the supporting affidavit to the application, the facts deposed therein do not disclose any of these 2 conditions set by the Constitution.

13. In fact, from a perusal of the trial court's record, it appears that the applicant cross-examined the prosecution witnesses and his questions were answered and recorded by the court. Both the trial court and the first appellate court found that the elements of the offence of defilement were proved beyond reasonable doubt.

14. In the application herein, the applicant argues that DNA evidence was necessary to enable accurate identification of the victim's assailant. The state submitted that DNA evidence was not a prerequisite for identification of an assailant in a sexual offence case.

15. Section 124 of the Evidence Act guides a court presiding over a sexual offence case when it comes to identification of an assailant. The proviso thereof

takes the victim's evidence as sufficient proof of identification even without the need for corroboration of such evidence. Moreover, the trial Magistrate noted that the applicant was the victim's stepfather for a significant amount of time, therefore, he was very well known to him. The first appellant court, in its judgment, found that the applicant had been positively identified as the assailant.

16. While DNA evidence is important scientific evidence in sexual offence cases, the current laws as written do not envisage reliance on or awaiting this evidence before the assailant can be identified.

17. A DNA test at most would determine whether the accused is the father of the complainant's child, which is a different question from that of whether the accused person had defiled the complainant (see **William Sova v R 2016 KECA 147 [KLR]).** DNA evidence is definitely good evidence where needed. However, in the present case, there is no record of the applicant having sought that the court orders DNA evidence be produced by either the prosecution or the defense, nor is there any cross examination by the appellant whereby the issue of DNA evidence arose.

18. In light of the foregoing arguments, the proceedings at the trial court are correct and there is no basis for revision orders to be made. Further, the applicant has not proved that there is new and compelling evidence available to warrant ordering of a retrial.

Conclusion and Disposition

19. In light of the foregoing discussion, there is nothing availed by the appellant to persuade me that his conviction and sentence should be set aside or that a new trial should be convened because new evidence has been availed.

20. Consequently, I dismiss the application in its entirety.

21. Orders accordingly.

Delivered, dated and signed at Embu High Court this 28th day of January, 2026.

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R. MWONGO
JUDGE

Delivered in the presence of:

1. Applicant Present in Court

2. Miss Mwaniki for the Respondent
3. Francis Munyao - Court Assistant