

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC .CRIMINAL APPLICATION NO. E007 OF 2025

ROBERT JUMA SIMIYU.....APPLICANT
VERSUS

REPUBLIC.....
.....RESPONDENT
JUDGMENT

1. This is a ruling relates on the application dated 13th February, 2025. The application seeks a declaration that as provided in Article 50(6) of the Constitution, a convicted person is entitled to apply for a new trial and has the right to be heard.
2. The application is supported by the affidavit of the applicant Robert Juma Simiyu, the applicant, who is currently serving a sentence of fifteen years imprisonment for the offence of defilement.
3. The gist of the application, as can be discerned from the grounds on its face thereof and in the affidavit, is that the applicant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act; that he pleaded guilty and was sentenced to 15

years imprisonment. He did not appeal within the time allowed and thus seeks for a new trial.

4. The application was vehemently opposed by prosecution.

Submissions.

5. The matter was canvassed by a way of written submissions.

6. The applicant submitted that the trial court failed to exercise caution prior to convicting him on his own plea of guilty and that it did not also explain to him the consequences of pleading guilty. The appellant relied on the case of **Osike Emongonyang and 2 others CRA 69 of 1990, Farahat Ibrahim Ahmed & 2 others vs Republic Criminal appeal No 68 of 2016**

7. The appellant contended that failure by the court to explain the consequences of pleading guilty to such a serious offence renders the proceedings a nullity and thus this court ought to interfere with that judgement.

8. The respondent on the other hand submitted that the appellant had not demonstrated that he has exhausted the course of appeal to the highest court and also has not demonstrated the availability of new and compelling evidence in his case. Placing reliance on the case of Tom **Martins Kibisu vs Republic [2014] eKLR** counsel for the State

submitted that the applicant has not met the conditions set out in Article 50(6) to warrant the court to allow his application and the same should be dismissed.

Determination

9. I have carefully considered the application, the rival submissions, the cases cited and the law.

10. As correctly submitted by the applicant **Article 50(6) of the Constitution** affords a convicted person the right to a new trial. The sub-article states:

“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 for appeal; and

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

11. The person must however meet the conditions set out in the article in order to enjoy that right. The person must have

appealed and lost or he/she did not appeal within the time allowed for appeal. More importantly there must have emerged new and compelling evidence.

12. The Supreme Court had occasion to determine an application for a new trial in the case of **Tom Martins Kibisu v Republic [2014] eKLR** and to determine what constitutes new and compelling evidence. It held;

“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.

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’.

The court went on to state “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.”

13. The applicant has stated that he did not appeal within the 14 days limited for appeal to the High Court so clearly he meets the procedural criteria set out in sub article (6)(a) but does he meet the second one (b) which I would define as the criteria on the merit of the application?
14. The applicant's contention is that he wants a new trial because he pleaded guilty without understanding what it entailed. That he was not cautioned and he had no legal representation. He has cited extensively from cases which touch on plea taking and the effect of equivocal pleas but nowhere does mention that new and compelling evidence has

become available. In the case of **Tom Martins Kibisu v Republic (supra)** the Supreme Court agreed with the Court of Appeal on what constitutes new evidence. It is evidence which was not available at the time of the trial and which despite due diligence, could not have been availed at the trial. The court also found that **“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.”**

15. It follows therefore that in order to get a new trial the applicant should have demonstrated that there was new evidence which was not available to him at the trial. He must also demonstrate that the new evidence is compelling. He has not met the test. In my view his application is but an appeal disguised as an application for a new trial. Unfortunately, it is not merited and it must fail and it is dismissed.

Judgment signed, dated and delivered virtually this 27th day of November 2025.

E. N. MAINA

JUDGE

IN PRESENCE OF:

Ms Kaburu for state/Respondent

The Applicant in person present but at Kitengela Prison

C/A: Geoffrey

ORIGINAL