



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. E011 OF 2021

(From Original Criminal case No.464 of 2013 and HCCR App No. 30 of 2015 at Malindi)

THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL HIGH COURT PRACTICE RULES 2013.

AND

IN THE MATTER OF REVIEW OF SENTENCE

AND

IN THE MATTER OF ARTICLE 22 (1), 23(1), 25 (C), 27, 48 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 23 (1), 25 (C), 27, 48, 50(2) (P), 165(3), 258(1)

OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLE 165(3), 258(1), 259 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 20 (1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

BETWEEN

AKK.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

KYM – Petitioner

Mr Mwangi for the state

R U L I N G

The Petitioner was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act pleaded not guilty and in his trial he was to be tried, convicted and sentenced to serve life imprisonment. Being aggrieved with both conviction and sentence he preferred an appeal to the High Court. On consideration of the appeal, Chitembwe J determined the appeal in a judgement delivered on 2.3.2016 on the strength that the appeal lacks merit and therefore disallowed it.

With that the petitioner ought to have proceeded to the Court of Appeal. Incidentally that opportunity was seized by the Petitioner by lodging an appeal to the Court of Appeal which in effect is pending hearing and determination. That benefit stipulated under Article 50 (6) (a) & (b) of the Constitution as of right cannot be availed to the petitioner.

There are two substantive considerations which I consider to fall within the realm of jurisdiction of the High Court. In the first instance, the petitioner's appeal is pending before the Apex Court. Secondly, there is no new and compelling evidence to entertain the petition.

The plight for the petitioner is to prosecute the appeal as preferred to the Court of Appeal and upon dismissal or otherwise be at liberty to seek review in terms of Article 50 (6) (b) of the Constitution. In any event, it is difficult; if not impossible to adjudicate this petition in terms of Article 50 (6) (a) & (b) of the Constitution. Further, in view of the vigor with which the Supreme Court rendered itself in **Muruatetu case**, it resonates that those charged with crimes under the Sexual Offences Act must not take refuge in the full measure of that decision.

The comparative decision in **PN Eswara Iyer v The Registrar the Indian Supreme Court** opined that:

“A review of a Judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled argument, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient.”

Leaning towards this principle, the only disturbing factor is that the petitioner has lamentably failed to bring himself within the notable exceptions for the enforcement of his rights.

Decision

From the evidence adduced and submissions made before the Court at the very least, I see no merit in the petition. I order it to be dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

Mr. Mwangi for the state