



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

PETITION NO. 19 OF 2020

KAZUNGU KITSAO KOMBE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RULING

The petitioner was charged and convicted with the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence which formed the basis of the indictment were that on the 15.9.2012 at Magarini District at Kilifi County, intentionally and unlawfully caused his penis to penetrate anus of **RKM** a child aged 6 years.

On conviction, the trial Court sentenced the petitioner to life imprisonment. Being aggrieved with both conviction and sentence, the petitioner preferred an appeal to the High Court on 7.11.2016. On consideration of the appeal on the merits the petitioners appeal was found unmeritorious and subsequently disallowed.

Decision

The petitioner's argument is that the Court should invoke the principle in Yusuf Shiunzi Kunani in Petition No. 24 of 2019 to vary and interfere with the sentence. However, to me, the principle of fundamental justice calls for the petitioner to be tried and punished under Section 8 of the Sexual Offences Act, the Law in force at the time the alleged offence was committed. It is clear that the petitioner is yet to have his appeal heard by the Highest Court of the land to wit the Court of Appeal endowed with jurisdiction on such matters.

The petitioner has placed considerable emphasis on this aspect of sentence that on-going deprivation of liberty offends Article 22 (1), 23 (1), 25 (c), 27, 48, 50, 2 (a), (p), 165 (3), 258 (1), 259 (1) of the Constitution.

In my view, the original conviction and sentence would not have escaped the constitutional scrutiny if the orders had been pronounced in violation of the same Constitution. It is clear also that under Article 50 (6) (a) and (b) of the Constitution:

“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 the appeal.

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

This, would seem to be the basis for the petition the Court is asked to exercise jurisdiction. However, in my view the petitioner cannot invoke the jurisdiction under this Article because he is yet to file an appeal to the Court of Appeal constitutionally endorsed by Article 50 (6) (a) of the Constitution to give way for a fresh trial. It is not arguable that the Malindi High Court upholding the petitioner's conviction and sentence on 7.11.2016 permits a subsequent appeal of his sentence to the Court of Appeal. This Court has already affirmed the trial Court Judgment on the seizure of jurisdiction and without complying with doctrine of exhaustion before subjecting a matter of this nature to a fresh

trial. The petitioner's offence is punishable under the provisions of Section 8 (1) and (2) of the Sexual Offences Act prescribed as life imprisonment.

In his new quest to have the sentence varied by no means has the petitioner demonstrated that the nature of the offence and circumstances surrounding its commission entitle him to an eligibility to be heard for a relief under the constitution. None of the grounds in the petition to this Court could reasonably be said to come within the limits of the Articles of the Constitution cited by the petitioner.

I find no substance in this petition and his claim for relief in this Court on alleged violation of his fundamental rights lacks merit.

Accordingly, it is for dismissal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF DECEMBER, 2020

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R. NYAKUNDI

JUDGE