



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 1 OF 2019

DERRICK MUEMA MUSYOKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The appellant was convicted with defilement contrary to **section 8(1)** read together with **section (8)(2) of the Sexual Offences Act, 2006** and sentenced to 20 years imprisonment. His appeal to this court was unsuccessful. The counsel for the Respondent filed an application challenging the judgement that was delivered by this court on the grounds that the issue of legal representation was not addressed in the appeal and that the appellant being unrepresented during trial was occasioned prejudice and that the right to representation was guaranteed under Article 53(2) of the Constitution and Section 77(1) and 186 of the Children Act.

2. Vide his affidavit in support of the application, Cliff Machogu averred that the failure of the appellate court to address the issue of legal representation that the appellant had addressed in his submissions has prejudiced the appellant and the request for retrial meant that the constitutional rights of the appellant were violated during trial and it was incumbent that the trial court addressed the issues raised in the appeal, failure of which the appellant shall suffer prejudice.

3. The issues that would commend for resolution in light of the application are:

a) Whether the appellant’s constitutional right to fair trial and constitutional rights as a child were infringed.

4. The resolution of the above issues would need this court to satisfy itself that this is not a constitutional application and that the court is not functus officio and whether or not the said issues properly belong to this court.

5. It is commonplace that the burden of proof is on the appellant to show that his rights have been violated. Whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. I find that the application does not raise any constitutional issues at all and any such constitutional issues would be raised in a proper constitutional petition and not in an application for review like the instant one. Secondly, the appellant has failed to prove the alleged infringement of constitutional rights to the required standard and on this ground the application fails.

6. The applicant seeks for a review of sentence and at the same time is seemingly appealing against the sentence. The record bears witness that there was judgement that was passed by this court on 10.7.2019. The word "judgment" is defined in **Jowitt’s Dictionary of English Law 2 Ed. at p.1025** as follows:

"Judgment, a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding, or on one of the questions, if there are several. The judgment so pronounced is entered on the records of the court. The term "judgment" is also used to denote the reasons which the court gives for its decision: so that where the court consists of several judges, it may and often does happen that each judge gives a separate judgment or statement of his reasons, although there can be only one judgment of the court in the technical sense of the word."

7. The term functus officio is defined at p.840 of Jowitt's Dictionary of English Law 2 Ed.:

"Functus officio (having discharged his duty), an expression applicable to a judge, magistrate or arbitrator who has given a

decision or made an order or award so that his authority is exhausted".

8. As indicated in the judgement that was delivered on 10.7.2019 there is no petition or memorandum of appeal on record. Therefore the issue of constitutionality of legal representation was not raised as a ground of appeal and this court having made a decision on the appeal and having found that the same lacked merit after analyzing the evidence on record cannot sit on appeal and rehear this matter on appeal. The appellant if dissatisfied with the decision that was made on appeal still has avenues to exhaust in the court hierarchy.

9. It is indubitable that the Appellant was unrepresented during trial and that the learned trial magistrate did not make an inquiry as to the same. I have perused the lower court record and there appears to be no indication that the Appellant brought the matter of representation to the attention of the trial magistrate. Had he done so, an opportunity would have been given to the prosecution to furnish the court with an explanation to enable a determination as to whether the apparent infraction was explicable. The appellant fully participated in the trial and seemed not to take issue with the same. As it is, the matter was belatedly raised in the submissions by the Respondent. In any event, the remedy for such violations would be in the civil realm and therefore beyond the scope of a criminal trial.

10. Clearly therefore, the lack of representation of the Appellant before the lower court cannot vitiate the trial process that was conducted subsequent thereto by the lower court and the same cannot vitiate the appeal.

11. In the result therefore, I am not satisfied that the instant application raises any new issues that would warrant a review of the decision of this court on appeal.

12. Similarly, **Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:**

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

13. I find no error or irregularity or illegality of principle when this court on appeal upheld the conviction and sentence that was passed by the trial court.

14. In the result the application dated 9.10.2019 lacks merit and is dismissed.

It is so ordered.

Dated and delivered at Machakos this 18th day of December, 2019.

D. K. Kemei

Judge