



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CONSTITUTIONAL PETITION NO. 19 OF 2017

WILLIAM MAINA OJWANDO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein, **William Maina Ojwando**, was charged with the offence of defilement contrary to **Section 8(1)(4)** of the **Sexual Offences Act** before the Chief Magistrate's Court at Migori in Criminal Case No. 395 of 2011. He denied the offence and a trial was held. He was eventually found guilty as charged and convicted. He was sentenced to 15 years imprisonment on 30/10/2012.
2. The Petitioner filed an appeal before the High Court in Kisii which appeal was transferred to this Court. It was Appeal No. 134 of 2013. The appeal was heard and dismissed on 01/09/2014 by this Court [*Majanja, JJ*]. The Petitioner then filed an appeal which is pending before the Court of Appeal.
3. This Petition was hence brought under **Articles 22, 23, 24, 25, 27, 29, 53 and 165** of the **Constitution** in which the Petitioner averred violation and denial of his rights and prayed that the conviction be quashed, and the sentence be set-aside. It was supported by the Affidavit of the Petitioner. The Petitioner deponed that because of the dismissal of the appeal he was denied his freedom and right to liberty arbitrarily and without any just cause contrary to **Article 29** of the **Constitution**.
4. In his submissions the Petitioner contended that the age of the Petitioner was not settled as well as the issue of penetration. That, there was evidence that the victim consented to the act and that witnesses confirmed that the way the victim behaved was not commensurate to a minor. That, the medical evidence was also contradictory. He further submitted that the continued delay in hearing of his appeal before the Court of Appeal forced him to lodge this Petition. He prayed that the Petition be allowed.
5. The Petition was opposed. The Respondent submitted that the Petition was misconceived as there was an appeal before the Court of Appeal where all the issues raised will be fully canvassed thereat.
6. It appears that the delay in hearing of the appeal at the Court of Appeal prompted the filing of the Petition. I have perused the judgment of the trial court as well as that of the High Court on appeal. Looking at the nature and the grounds in support of the Petition one cannot miss out the fact that the issues raised in the Petition are substantially those argued before the High Court and are likely to be pending before the Court of Appeal. This Court therefore lacks jurisdiction to entertain the Petition based on those grounds as the converse will be tantamount to this Court sitting on an appeal of a decision of a Court of concurrent jurisdiction.
7. The ideal way forward is for the Petitioner to fast track the hearing of the appeal before the Court of Appeal and if he is eventually unsuccessful, he may venture into other avenues of redress including applying for retrial of the case. I am therefore unable to see how the rights of the Petitioner as enshrined in the various Articles of the Constitution were infringed since his incarceration is a result of a lawful Court process which is yet to be impugned.
8. The upshot is that the Petition must fail. It is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

William Maina Ojwando, the Petitioner in person.

Miss Monica Owenga, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant