



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

H. MISC. CR. 15 OF 2017

(Formerly Ksm Pet No. 7 of 2017)

(Defilement)

(CORAM: J.A. MAKAU – J.)

AGGREY LIHANDA MWAJAKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant **AGGREY LIHANDA MWAVAKA** through a Notice of Motion filed on 18.4.2017 seeks retrial following his conviction for an offence of defilement and sentence to life imprisonment.
2. That his appeal in High Court of Kenya at Kisumu, was dismissed on 21.11.2013, his appeal to Court of Appeal was similarly dismissed and as such urges he seeks retrial as he was not given a fair trial in that he was not informed in advance of the evidence the prosecution intended to rely on.
3. The application is supported by the Applicant's supporting affidavit dated 28th March 2017, to which he has not attached the High Court judgment being H.C. Cr. A No. 25/2013, the Court of Appeal CR. A. No. 82 of 2014, which makes it difficult for this Court to know the nature of his grounds of appeal, and the decision of the two appellate Courts.
4. **Article 50 (6) of the Constitution** which is the basis of this application provides:

“30. (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.”

5. I have carefully considered the Applicant's submissions in support of the application and those of the State Counsel, who opposed the application, it is indeed correct that the applicant was convicted of a criminal offence as he has attested in his application and exhausted all his right of appeal, to the highest Court of Appeal, however, in his application he has not demonstrated that a new and compelling evidence has become available to him after exhausting all his rights of appeal. His allegation that he was not supplied with witnesses statements is not true as the trial Magistrate's Court on record review that on 7.4.2014, it directed the Accused to be supplied with witnesses8 statements. That when the case came up for hearing on 8.5.2014, all the Accused persons were ready to proceed and none of them raised the issue of lacking witnesses statements. It is not clear whether or not the issue of lack of witness's statements was not dealt with in the two appeals. I find the applicant has not demonstrated that there is a new and compelling evidence which has now become available to him. I find he has not stated what new and compelling evidence he has unearthed to warrant granting his application.

6. In view of the above, I find the application devoid of merits and dismiss the same.

DATED AND SIGNED AT SIAYA THIS 19TH DAY OF APRIL 2018.

HON. J. A. MAKAU

JUDGE

Delivered in the open Court

In the Presence of:

No Appearance for Applicant

M/s. Odumba for State

Court Assistants:

1. Laban Odhiambo

2. Brenda Ochieng

HON. J. A. MAKAU

JUDGE