



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 32 OF 2015**

**ABDULAZIZ ABUBAKAR....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant filed a notice of motion application seeking orders that this court be pleased to set him at liberty henceforth or the respondent has failed to produce the trial proceedings for the purpose of the hearing of the appeal and that the court declares that the inordinate delay by the respondent and the lower court to produce and avail the lower court record is a violation of the applicant's rights to fair trial enshrined under Article 50 (2) (q) of the Constitution.

2. The appellant contended that the trial court failed to avail the trial proceedings despite several orders by this court. That the delay in producing the proceedings is an indication that there is something sinister in the manner in which the appellant was convicted. That there are other appeals emanating from Mavoko Law Courts as late as the year 2017 which trial records have been produced and therefore failure to avail proceedings to his case is a blatant violation of the Constitution and that by failing to produce and avail the records, the appellant has been denied a right to be exonerated from the conviction and sentence he is serving.

3. The Respondent filed grounds in opposition to the application as follows:

a. That the application is misconceived, unprocedural and a wanton abuse of the process of court.

b. That any delay occasioned on availing the lower court proceedings is not sufficient ground to invoke this court's power to order the appellant's release.

c. That any violation of the appellant's Constitutional right can be addressed by him seeking legal redress for compensation and that the application lacks merit and ought to be dismissed.

4. In canvassing the application, the applicant submitted that despite having lodged this appeal in the year 2013, the lower court has taken too long to provide proceedings in contravention to his right to fair trial. Mr. Machogu, the learned prosecutor on the other hand contended that the delay in availing the trial court's proceedings is not sufficient reason for this court to order the release of the applicant. That this court can only exercise its power to interfere with the trial court's verdict upon satisfying itself that the lower court failed to exercise appropriate power in sentencing the applicant.

5. I have considered the application herein and empathize with the Appellant. However, this court cannot set the Appellant at liberty having been convicted by a competent court of law and having not considered the appeal or found fault in the trial court's decision. That can only be done on merit. It is prudent to obtain the lower court proceedings so as for this court to satisfy itself that the lower court had exercised its powers according to the law. In any event the Appellant is still at liberty to seek to be released on bond pending appeal. He has not opted to take such a route.

6. In the circumstances, I dismiss the application. The Executive Officer Mavoko Law Courts is hereby ordered to appear before this court on a date to be given by the Deputy Registrar to explain why the lower court file has not been forwarded.

Orders accordingly.

**Dated and delivered at Machakos this 3<sup>rd</sup> day of May, 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

Abdulaziz Abubakar - for the Appellant

Mogoi - for the Respondent

Kituva - Court Assistant