

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

MISC. CR. APPL. NO. 28 OF 2018

(DEFILEMENT)

(CORAM: R. E. ABURILI - J.)

DAVID OWINO OGINJO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 19/2/2018 vide judgment written by Hon. Majanja J. and delivered by T.W. Cherere J, the Learned Judge vide Siaya HCCRA No. 101/2016 dismissed the appellant's appeal against conviction and sentence meted out on him on 23/3/2015 in Cr. Case No. 1075/2014 at Bondo Law Courts by Hon. M. M. Nafula, SRM.

The learned Judge upheld the conviction and sentence of 30years imposed on the appellant who is the applicant in the present matter, Mr. David Owino Onginjo. The Applicant was charged and convicted of the offence of **defilement contrary to Section 8(1) and (2) of the Sexual Offences Act** in that on 19/11/2014 at about 9.00 pm at [particulars withheld] Village within Nyawita Sub-location, Bondo District of Siaya County, he intentionally caused his penis to penetrate the anus of L.A, a child aged 10 years. He was sentenced to serve 30 years imprisonment.

Being dissatisfied with the conviction and sentence imposed on him by the Hon. SRM, he appealed vide Siaya HCCRA No. 101/2016 which appeal was dismissed and the conviction and sentence affirmed on 19/2/2018 by Hon. Justice D.S. Majanja.

The matter is now before this Court vide Miscellaneous Criminal Application No. 28 of 2018, where the Applicant convict has filed an application for leave to appeal out of time as a poor person, under **Section 113(1) A and B of the Court of Appeal Rules, 2010**. The application is supported by the affidavit sworn on 16/3/2018 by the Application wherein he deposes that he was convicted and sentenced by Bondo PM's Court in Cr. Case No. 174/2014 and that he has filed Notice of Appeal against conviction and sentence to the Court of Appeal but that he has no money for preparation of records of Appeal due to poverty occasioned by his imprisonment. That his appeal has high chances of success, given an opportunity to argue.

I have carefully considered the application in line with **Section 113(1) A and B of the Court of Appeal Rules, 2010 and Rule 113(2) and (5) of the Court of Appeal Rules**. I have also perused the High Court records and judgment by Majanja J as read by T.W. Cherere J on 19/2/2018.

In my humble view, the application for leave to appeal under **Rule 113(2) and (5) of the Court of Appeal Rules**, to appeal out of time as a poor person has no merit. There is no sufficient material placed before the court to demonstrate that the Applicant deserves the discretionary orders sought.

In addition, there is nothing on record demonstrative of any one or more questions of law proper for the determination by the Court of Appeal, the intended appeal is a second Appeal which would only lie on points of law. No such point(s) of law have been demonstrated to exist.

The Applicant has also not satisfied this court that he deserves to be excused from paying the whole or part of the fees required for preparing the record of appeal.

In the premises, I find the application as presented unmeritorious. The same is hereby dismissed.

Dated, Signed and Delivered at SIAYA this 31ST DAY OF JULY 2018.

R.E. ABURILI

JUDGE