



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

PETITION NO. 4 OF 2017

BETWEEN

CHARLES ENOS MAKOKHA.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner, **CHARLES ENOS MAKOKHA**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (4)** of the *Sexual Offences Act* in *Homa Bay PM Criminal Case No. 1917 of 2011*. He was sentenced to serve 15 years' imprisonment. He appealed to the *High Court at Kisumu, Criminal Appeal No. 84 of 2012*. The appeal was dismissed on 20th January 2014. His appeal to the Court of Appeal, *KSM CA Criminal Appeal No. 79 of 2014* was dismissed on 27th May 2016.

2. In the petition filed on 3rd March 2017 he seeks declarations that his right to a fair trial were infringed and that he was discriminated against by the High Court and Court of Appeal. He prays for orders that he be acquitted and released from prison or for the court to order a re-trial.

3. In his supporting affidavit, he stated that his rights to a fair trial as envisaged under **Article 25(c)** of the Constitution were infringed in the following manner:

- That the prosecution exhibits and charge sheet that formed the basis of his conviction were not properly filled hence not authentic.
- That the prosecution did not comply with the provisions of **Article 50(2)(j)** of the Constitution.
- That he was not given time and facilities to prepare his defence contrary to **Article 50(2)(c)** of the Constitution.
- That note of the ingredients forming the charge of defilement were proved beyond reasonable doubt as required by law under **section 8(1)** of the *Sexual Offences Act*.
- That his grounds of appeal both at the High Court and Court of Appeal were not considered.

4. When the petitioner filed the petition, the Deputy Registrar, drew the court's attention to the fact that the petitioner had filed another application being *KSM HC Misc. Criminal Application No. 7 of 2014* in which he moved the court for an order of acquittal on the ground that his rights to a fair trial were violated. He set out similar grounds as I have outlined above. Maina J., heard the application and dismissed it on 5th February 2016.

5. By the time the application was determined, the petitioner's appeal to the Court of Appeal had not been determined hence the process of the Court of Appeal in the petition.

6. This petition seeks to review the conviction and sentence affirmed by a judgment of the High Court sitting as the first appellate court and the judgment of the Court of Appeal as a final court. The High Court lacks jurisdiction to review its judgment as a first appellate court and the judgment of the Court of Appeal as the final appellate court **except** as provided for in **Article 50(2)(6)** of the Constitution where the party furnishes new and compelling evidence that would entitle the person convicted to a new trial after he has exhausted all appeals or has failed to appeal within the time limited by the law.

7. What the appellant has presented are procedural infractions which ought to have been raised before the trial and appellate courts. Moreover, Maina J., addressed the petitioner's complaints in ***KSM HC Misc. Criminal Application No. 7 of 2014*** where she expressly found that the petitioner's case that he did not have a fair trial had no merit. The learned Judge further held that the merits of the case against the petitioner were matters that could be properly dealt with on appeal. In this case, the petitioner had the benefit of two appeals in where the Court's exhaustively dealt with his case. Nothing further can be said about the facts except that both appellate courts arrived at the conclusion that the petitioner was guilty.

8. I would add that **Article 25** of the Constitution, which the petitioner has invoked, does not enumerate any rights that are protected. It only states that the right to a fair trial is one of the rights that may not be limited. As the facts show, the petitioner had the opportunity to ventilate his case before two appellate courts. In addition, he filed another application where the court found that his rights to a fair hearing were not violated.

9. For completeness of the record, I also find that all the issues raised by the petitioner cannot constitute new and compelling evidence to entitle the petitioner to a new trial (see ***Lt Col. Tom Martins Kibisu v Republic Sp. Ct. Petition No. 3 of 2014 [2014]eKLR***).

10. The petition is devoid of merit and is dismissed.

DATED and DELIVERED at KISUMU this 12th day of April 2017.

D.S. MAJANJA

JUDGE

Petitioner in person.

Ms Barasa, Prosecution Counsel, instructed by the Director of Public Prosecutions for the Respondent.