

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL MISC APPLICATION NO. 39 OF 2016

(Formerly Kisumu High Court Constitutional Petition No. 9 of 2016)

DANIEL NYAMOHANGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant herein, **Daniel Nyamohanga**, was charged with the offence of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006 before the Principal Magistrate at Kehancha Law Courts. He denied the offence, was tried, found guilty, convicted and sentenced to 10 years' imprisonment on 15/11/2013.

2. His appeal to this Court was dismissed on 06/06/2017. Prior thereto the Applicant had filed this matter before the High Court at Kisumu which was transferred to this Court for hearing. In this application the Applicant is seeking an order of acquittal on the grounds that his constitutional rights were variously infringed. The application is premised on **Articles 22(1)** and **23(3)** of the **Constitution**.

3. At the hearing the Applicant expounded on his written submissions. He submitted that his appeal was not properly considered and hence wrongly dismissed. He reiterated that the charge was defective and contrary to what this Court found the same was not curable under **Section 382** of the **Criminal Procedure Code**. He also contends that the aspect of the age of the complainant was not rightly settled. The Applicant also raised the issue of having not been provided with witness statements and submitted that his right to a fair trial under **Article 50(2)(b)** and **(j)** of the **Constitution** was infringed. He further challenged the evidence that it was contradictory and could not hold a conviction and that several potential witnesses including the investigating officer did not testify.

4. The application is opposed. The State submitted that all the grounds put forth do not demonstrate any infringement of any constitutional rights but a dissatisfaction from the appeal of this Court and that this Court is now called to sit on an appeal of its own judgment. It was submitted that the right forum was an appeal to the Court of Appeal.

5. I have carefully considered this matter and perused the appeal file being **Migori High Court Criminal Appeal No. 68 of 2016**. I am in agreement with the State that the grounds raised by the Applicant in this matter were raised in the appeal and that any dissatisfaction thereof ought to be by way of an appeal to the Court of Appeal since this Court has no jurisdiction to sit on its own appeal. I must however state that the ground on breach of **Article 50(2)(b)** and **(j)** of the **Constitution** did not form part of the appeal and as such I must consider it here.

6. The Applicant contends that he was not supplied with witness statements during the trial of his case. From the record the Applicant was charged on 10/05/2013 and the court made an order that he be supplied with all documents and witness statements free of charge. When the charge was amended and a fresh plea taken on 06/06/2013 the trial court again made an order that the Applicant be supplied with all documents and witness statements free of charge. There is nothing on record to show that the Applicant raised the issue of the witness statements thereafter. The Applicant participated in the hearing of the case and strenuously opposed applications for adjournment on the part of the prosecution arguing that the trial was taking inordinately long. There was hence no way the trial court could have known that its orders had

not been complied with. Had the Applicant raised the matter again before the court and no action is taken that could be a different scenario altogether. From that background I do not find the contention that the Applicant's right to a fair trial under **Article 50(2)(b)** and **(j)** of the **Constitution** was infringed to be valid. It is hereby rejected.

7. As the other grounds in this application were subject of the appeal which was already determined by this Court I find that this Court is not vested with the jurisdiction to revisit the same grounds.

8. Consequently, the application is misconceived and is hereby dismissed.

DELIVERED, DATED and SIGNED at MIGORI this 21st day of September 2017.

A. C. MRIMA

JUDGE