REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC CRIMINAL APPLICATION NO.22 OF 2016

GEORGE OTIENO OKUMU…….…..….APPLICANT

VERSUS

REPUBLIC…….……..RESPONDENT

RULING

1. **GEORGE OTIENO OKUMU** (the applicant) was charged, convicted and sentenced to serve 20 years imprisonment for the offence of rape contrary to section 140 of the Penal Code by the Ag. Senior Resident Magistrate (Homa Bay) on 21.01.2008 in Criminal Case No. 1457 of 2005. He appealed to the High Court at Kisii in Criminal Appeal No 3 of 2008 and the appeal was dismissed on 30.11.2010. He then lodged Criminal Appeal No 530 of 2010 before the Court of Appeal at Kisumu which was dismissed on 21st March 2014.

2. He has now filed an application under **Article 50 (2) (p), (q),** and **165 (3) (b)** of the **Constitution** saying he is seeking judicial review of the sentence as it was inconsistent with the then Act which prescribed 14 years imprisonment as the maximum penalty for sex offenders before the enactment of the Sexual Offences Act 2006

3. He has stated in the supporting affidavit that having unsuccessfully exhausted all avenues of appeal the court should allow a window of relief under the constitution.

4. MR. OLUOCH on behalf of the State opposes the application on grounds that the applicant has not shown any new and compelling evidence to warrant the court to hear him as envisaged under Article 50 of the Constitution. He further points out that the mere fact that the applicant never raised the issue regarding the legality of his sentence before the High Court and the Court of Appeal does not make it new or compelling evidence.

5. Counsel also submits that the application amounts to an appeal against the decision of the Court of Appeal, which is not permissible, so the application should be dismissed

6. **Article 50 (2) (p)** of the **Constitution of Kenya** provides that:

> ***(p) "Every accused person has the right to a fair trial which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing and***
>
> ***(q) if convicted, to appeal to, or apply for review by a higher court as prescribed by law"***

7. It is these two Constitutional provisions which the accused relies on. A look at the charge sheet and the judgment by the trial court shows that the applicant was charged in the year 2005 under the Penal Code before the enactment of the Sexual Offences Act 2006. The trial court before passing sentence noted that the passing sentence noted that the offence was common in the region and that a deterrent sentence was called for especially in the era of HIV/ AIDS. The trial magistrate was fully conscious that the offence and the penalty were under the provisions of the Penal Code. Under the repealed **section 140** of the **Penal Code** the provision stated as follows:

“Any person who commits the offence of rape is liable to be punished with imprisonment with hard labour for life, with or without corporal punishment.”

8. The issue regarding the harshness and excessive nature of the sentence was also canvassed before the High Court at Kisii during the appeal and Makhandia J noted that the offence then carried a maximum sentence of life imprisonment, so the twenty years sentence could not be said to be harsh or excessive “considering the savage and brutal manner in which the rape was committed. The judge held that the sentence was merited nay grossly lenient- so yes although the current constitution refers to the least severe sentence, this must be considered in light of the circumstances under which the offence was committed.

9. The applicant has therefore not raised any new and compelling issues not previously raised during the appeal and there is no reason whatsoever to interfere with the past decisions on sentence. Consequently the application lacks merit and is dismissed.

Delivered and dated this **22nd** day of **September 2016** at Homa Bay.

H.A.OMONDI

JUDGE