REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MiSCELLANOUS CRIMINAL APPEAL NO.35 OF 2014

MOSES TOKYO MARIGA ….....ACCUSED

VERSUS

REPUBLIC ….....PROSECUTOR

J U D G M E N T

The application is brought by the applicant under the provision of Article 22 and 159 of the Constitution and by extension Article 50. The applicant apparently is asking the court to review the matter afresh and proceed to order for fresh trial.

The applicant had been charged with defilement. He was convicted and sentenced to 20 years imprisonment. His appeal to the High Court as well as the Court of Appeal did not succeed. He has therefore filed the current application.

The substance of his application are founded on his oral evidence in which he has argued that one Mr. Mogaka did not testify yet he was a Key witness. He said that when he raised the issue the trial court advised him to bring him as his witness.

He further challenged the findings on the medical report. He equally challenged the fact that no DNA was done and the T-shirt was not produced as evidence.

The state opposed the application arguing that all the issues raised by the applicant had been addressed in all the appeal processes and nothing was therefore new. The matter at the lower court was adjourned at various instances with good and plausible grounds.

I have perused the proceedings herein especially the judgments of various courts. I respectfully do not find anything to suggest that the issues raised by the applicant are new and so compelling that it requires fresh consideration. The applicant has exhausted the appeal process. This court and the Court of Appeal has pronounced itself and therefore it cannot sit as an appellate court again.

Even more interesting is that the issues regarding the evidence adduced during trial especially the medical evidence and the witnesses called or left behind cannot be a basis for this court to deal with as it was within the applicant's knowledge and in any case ought to have been dealt with by the other courts earlier on.

The Supreme Court in **TOM MARTINS KIBISU VRS REPUBLIC (2014) eKLR** stated as follows:

“we are in agreement with the Court of Appeal that under Article 50(6), “new evidence”

means "evidence which was not available at the trial "and compelling evidence" implies "evidence that would have been admissible at the trial, of high probative value capable of belief and which, if adduced at the trial would probably have led to a different verdict. A court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie material to or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against the accused person."

I am therefore of the considered opinion that the application herein does not met the above criteria and the same is hereby dismissed.

DATED, DELIVERED THIS 25TH DAY OF MAY, 2015

H. K. CHEMITEI

J U D G E