REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CRIMINAL APPLICATION NO. 110 OF 2012

B O O ……..... APPLICANT

V E R S U S

REPULIC ……. RESPONDENT

R U L I N G

By his Notice of Motion dated 24.7.2012 the applicant is seeking to be acquitted or an order of retrial of his case as there is new and compelling evidence. The application is made under **Article 50** of the Constitution. The application is based on grounds that the age of the complainant was not ascertained and that it was alleged that the applicant was HIV positive and had infected the complainant yet he has now been found to be HIV negative. The applicant informed the court that it was alleged that he had infected the complainant with HIV and he was put on anti retrievals while in prison. Some tests were done later and it was discovered that he was not HIV positive. He was taken to Kakamega Provincial Hospital for further testing and he was found that he had no aids and he was issued with a letter to that effect.

Mr. Oroni, State counsel, conceded that there was new and compelling evidence that raises fundamental issues on the conviction. The conviction was based on the allegation that the applicant was HIV positive yet he is not.

I have gone through the record of the trial magistrate as well as the record of appeal before the High Court. It is true that before the trial magistrate **PW6 JOHN KISINDAI**, a clinical officer based at the Butere District Hospital, testified that they did HIV tests on the applicant and he was found to be HIV positive. The applicant also had veneral disease. The complainant was however tested but found not to have been infected with the veneral disease as per the evidence of PW4 Moses Wanyonyi who was also a clinical officer at the same hospital. According to the two expert witnesses it could have been possible that the complainant could have been infected but it was going to take time although she tested negative. The period after the alleged defilement when the complainant was examined was too short to make conclusive medical analysis.

The applicant was sentenced to serve 20 years' imprisonment. His appeal was dismissed not mainly on the issue of HIV but the court noted that the applicant had been found to be HIV positive and the complainant had not been affected. The court noted that the complainant was given drugs and that sexually transmitted diseases take different periods to manifest themselves.

The main issue of determination is whether there is new and compelling evidence and whether the court should order a retrial. The applicant produced a letter from Kakamega Provincial General Hospital dated 7.11.2013 signed by Dr. Winstone J. Ongalo. According to the doctor the applicant was put into different testing methods to find out whether he was HIV positive and even that date, i.e. 7.11.2013, he was tested and found to be non-reactive. He was found to be HIV negative and the laboratory testing form was also annexed. Although the two courts did not find that the complainant was infected with HIV, however, the contention that the applicant was HIV positive and could have infected the complainant also plaid a role in the conviction of the applicant. Both courts noted that the applicant could have infected the complainant although it was too early to tell. I believe that the issue of HIV plaid a role in the minds of the court during the hearing of the case. Now that it has been discovered that the applicant is HIV negative after having been put on anti-retroviral drugs, I do find that there is new and compelling evidence to reconsider the conviction. It is my finding that had the applicant been found to been HIV negative then the court could have considered its decision differently. It is human to conclude that if

someone knows that he is HIV positive and decides to have unprotected sex then such a person should not be treated leniently as one can conclude that he or she wanted to infect the other party. That aspect normally comes into play when such cases arise.

Having found that there is new and compelling evidence the next issue is whether I should order a retrial. The record shows that the victim was either 15 or 16 years. According to PW4 she had fully developed breasts and pubic hair. The age assessment gave the complainant's age at between 15 and 16 years. There was mention of 13 years. The age is important in that if the victim is between 16 and 18 years the sentence is not less than 15 years. Both courts went for the lower age of 15 years and made applicant to serve 15 years. The applicant was charged before the court on the 11.5.2010. He has been in custody for over four years. He was convicted on the 26.11.2010. He has undergone the pain of thinking that he was HIV positive yet he is not. He has also been taking HIV drugs. The alleged offence occurred on the 8.5.2010. A period of over four years has elapsed and I do find that it will not be prudent to order a retrial. The applicant has suffered enough in prison and I do find that he has undergone enough punishment and the circumstances of this case do not call for a retrial. The application is hereby allowed and the applicant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 18th day of September 2014

SAID J. CHITEMBWE

J U D G E