REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC.APPLICATION NO 130 OF 2012

W N.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

Introduction

1. The applicant herein William Nyongesa, is serving ten (10) years imprisonment upon conviction for the offence of incest contrary to **section 20(1)** of the Sexual Offences Act after this (differently constituted) upheld his conviction by the lower court but reduced the sentence . His case is straightforward and is founded on the provisions of **Article 25(c)** and **Article 50(6)** of the **Constitution.** Article 25 provides as follows;

> ***"25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited -***
>
> ***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;***
>
> ***(b) freedom from slavery or servitude;***
>
> ***(c)the right to a fair trial; and***
>
> ***(d) the right to an order of habeas corpus***

Article 50(6) provides as follows:-

> ***"50(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—***
>
> ***(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and***
>
> ***(b) new and compelling evidence has become available".***

The application

2. The applicant commenced these proceedings by way of a Notice of Motion filed on 31st August 2012 where he sought for orders that he be admitted to a retrial in Butali Criminal Case No.1165 OF 2010 and Kakamega High Court Criminal Appeal No. 61 of 2011. His application is based on the grounds that he was convicted of the offence herein above stated and sentenced to serve life imprisonment which was reduced to **ten (10) years** by the High Court. That during trial the prosecution failed to adduce medical evidence which to him would have proved whether or not there was penetration, the degree of injuries sustained and the exact date when the offence occurred. Further that the trial court failed to determine where the alleged PW1 was at the time the offence was allegedly committed and finally that the mother of the complainant herein who was away has established new evidence which he believes to be true and that such evidence will be used to shed light in the intended proceedings for retrial.
3. The application is also premised on the applicant's own affidavit sworn on 31st of August 2012 wherein he depones that there is a serious issue to be addressed which can only be done during retrial. He reiterates that new evidence will be availed at the retrial because medical records will be produced and the mother of the complainant who is a crucial witness will be called to testify. Lastly that there is need for a retrial because the prosecution failed to investigate this case to the required standards and that the trial was unfairly conducted.

The Submissions

4. This matter came up for hearing on the 11/11/2014. The applicant acted in person whereas the State was represented by Mr. Oroni. He (Applicant) relied on his written submissions dated 11/11/2014 and further submitted that he is seeking a retrial because certain witnesses were not called who would have assisted him in his case. He added that the evidence of his witness DW2 was not considered by the trial court as he thought it should have. Further that the Doctors who examined the complainant PW1 never testified and lastly that the case was a frame up following a dispute with his in-laws. He concludes by submitting that the investigations in this case were not properly carried out.
5. Mr. Oroni, prosecution counsel, opposed the application and submitted that applicant had not demonstrated to the court what new and compelling evidence there is to warrant a retrial. That what the applicant has attempted to do is to give a second line of defence which is not acceptable in cases of this nature. He contended that if the applicant was dissatisfied with the result of his appeal to High Court he should have appealed to the Court of Appeal. He urged this court to dismiss the applicant's application.

The Case in the Lower Court

6. The applicant herein was charged with one count of incest contrary to section 20(1) of the Sexual Offences Act, No.3 of 2006, the particulars of which, were that *"On the 21st day of August 2010 in [particulars withheld] sub-location Kakamega North District within Western Province, being a male person caused his penis to penetrate the vagina of T N a female person aged 12 years who was to his knowledge his daughter."* The applicant denied the offence and during the trial that ensued, the prosecution called 3 witnesses. T N as PW1, D W as PW2 and M. PW2 was PW1's grandfather while PW3 was a teacher at PW1's school.
7. From the evidence, the complainant was living with the applicant when the alleged offence took place in the applicant's bed where he had summoned PW1, the applicant's two other children namely M and W. The prosecution did not call the doctor nor did they call the arresting and/or investigating officer. However, upon careful analysis of the evidence that was placed before it, the trial court was satisfied that the prosecution had proved its case against the applicant beyond any reasonable doubt. The trial court found that applicant guilty as charged, convicted him and sentenced him to life imprisonment. The sentence was reduced to ten (10) years on appeal to the High Court.

Findings

8. This court has considered the submissions made by the applicant and the prosecution counsel

herein together with the written submissions by the applicant. I have carefully gone through the Judgments both of the lower court and the High Court. This court finds that the applicant has the right to file the application under **Article 50(6)** to seek a new trial. This right has not been abridged and all the applicant has to demonstrate is that his case falls within the parameters set by the Constitution.

9. It is on record that the applicant herein filed an appeal in the High Court against the judgment of the lower court and succeeded partially. The appeal was however dismissed, conviction upheld but the sentence reduced to **ten (10) years**. He now wants a retrial both in the High Court and the Trial Court. The applicant has therefore to show that new and compelling evidence is available to warrant a retrial as is required by the Constitution. He claims that the Doctors who examined the complainant PW1 were not called to testify and that the trial court did not consider the evidence by DW2 to his (applicant's) expectation. He also claims that investigations were not properly done and that the case against him was a frame up. Prosecution Counsel Mr. Oroni maintains that the applicant has not demonstrated what new and compelling evidence there is to warrant a retrial. That all that the applicant is doing is giving a second line of defence.
10. The question that comes to my mind is whether by calling the evidence of the Doctor who examined the complainant herein and the applicant's wife there would be new and compelling evidence. I find the answer to this to be in the negative as the evidence of the Doctor will only buttress the prosecution's case. The defence never challenged the prosecution on the examination of the complainant since she was allowed to produce the P3 form. Calling his estranged wife does not mean that she will give evidence in his favour, nor has he shown what evidence the wife is going to give if she is called. Nor does he say whether she will come as his witness or as a witness for the State. Looking at the evidence of DW2 William Misiko I find that the same was considered by the trial court in its judgment.
11. Concerning the witnesses either called or not called by the prosecution, it is not the duty of the applicant to choose these. That is a preserve of the prosecution to decide who to all as a witness and in what order such witnesses are to testify.
12. I find that the grounds for the re-trial as submitted by the applicant are the same grounds which the first appellate court considered before coming up with its decision. The applicant has not therefore demonstrated before this Court that the evidence he intends to call during the re-trial is new and compelling evidence .The best recourse the applicant has therefore is to appeal to the Court of Appeal if he is dissatisfied with the High Court's finding and if the need arises he can move to the Supreme Court. The applicants application is therefore dismissed as there is no reason to order a re-trial.
13. Orders accordingly.

DELIVERED, DATED and SIGNED in open court at KAKAMEGA this 17th day of December 2014

RUTH N. SITATI

J U D G E

In the presence of

Present in person - Applicant

Mr. Ngetich (present) - for Respondent

Mr. Murumia - Court Assistant