



REPUBLIC OF KENYA



KENYA LAW
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**DOM v Republic (Criminal Petition 50 of 2019)
[2023] KEHC 17226 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL PETITION 50 OF 2019**

RE ABURILI, J

MAY 4, 2023

BETWEEN

DOM PETITIONER

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in Senior Principal
Magistrate's Court Sexual Offences Case No 659 of 2013 at Nyando)*

RULING

1. This Criminal Petition was filed in this court on September 26, 2019. The Petitioner DOM is a convict serving life imprisonment at Kisumu Maximum prison following his conviction for the offence of incest contrary to Section 20(3) of the *Sexual Offences Act*, vide Nyando Senior Principal Magistrate Sexual Offences Case No 659 of 2013.
2. He then filed his appeal to this court vide HCRA No 92 of 2013 but the appeal could not be heard on merit owing to the disappearance of the lower court file which has never been availed to this court from 2019 despite the many letters, reminders and orders issued to Nyando Senior Principal Magistrate's Court.
3. In addition, orders for reconstruction of the police file which also appeared missing did not bear fruit and it was only discovered that the Petitioner had been processed by Pap Onditi Police station which was being directed all along to reconstruct the police investigation file.
4. Yesterday on May 3, 2023, I delivered a ruling in HCCRA No 92 of 2013 closing that appeal file and directing the Appellant to be released and handed over to Pap Onditi Police station to be charged afresh with the offence of incest and this time, not before Nyando Law Courts, but before Kisumu Chief Magistrate's Court.



5. The Petitioner herein was seeking for retrieval of the court records in Nyando SPM Criminal Case No 659 of 2013. The evidence contained in the Criminal Appeal No 92 of 2013 is clear that the above original court file could not be traced even in the archives meaning, the court file is lost and Nyando SPM's Court were unable to explain how the file disappeared after Judgment, conviction and sentencing.
6. In addition, even the High Court original appeal file also disappeared and only the skeleton file was available for me to make orders on. It is not clear when the skeleton file was opened as there is no record of the same for noting.
7. No doubt, an evil hand played a role in the mysterious vanishing of the lower court file and High Court file. In the High Court Appeal file, not even a petition of appeal was traceable hence the court had nothing to work with to determine the appeal on merit.
8. Having ordered for a retrial of the convict for the same offence, and having found that the Nyando SPM's Criminal Case No 659 of 2013 cannot be traced, neither could the original High Court Criminal Appeal No 92 of 2013 case file be traced, I find that this Petition cannot be allowed as it would be making orders in vain.
9. Accordingly, although the Petition was well intended to expedite justice, the orders sought are incapable of being granted. The Petition is therefore dismissed.
10. This file is hereby closed.
11. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF MAY, 2023

R. E. ABURILI

JUDGE

