



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL PETITION NO. 4 OF 2020**

**HILLARY OPONI MALETO.....APPLICANT**

**VERSUS**

**REPUBLIC.....STATE**

**RULING**

1. The Petitioner was tried and convicted in Narok Chief Magistrate’s Criminal Case No. 31 of 2016 of the offence of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. The trial Court sentenced the Petitioner to life imprisonment.

2. The Petitioner was dissatisfied with the conviction and sentence. He appealed to the High Court. His appeal was heard and determined by the Learned Justice Bwononga at Narok High Court. Among the issues specifically taken up on appeal by the Petitioner was the issue of his age. The Petitioner argued before the High Court that the Trial Court had committed an error because it did not ascertain that he (the Petitioner) was a minor at the time of the commission of the alleged offence and at the time of the trial.

3. The Learned Judge adverted his mind to this ground of appeal and rendered himself thus:

*22. In ground 4, the Appellant has faulted the Trial Court in failing to find his age before this judgment was delivered. In this regard, I find the Appellant, according to his own evidence, was aged 18 years. He is therefore an adult. In the circumstances, I find no merit in this ground of appeal and [it] is hereby dismissed.*

4. After delivery of the judgment at the High Court, the Petitioner approached the self-same Court seeking a declaration that he had been discriminated against because he was treated differently than the female complainant. He sought to rely on the decision in Homa Bay High Court Constitutional Petition NO. 1 of 2017: POO v DPP. That case held that when two minors of opposite sex engage in “consensual” sexual conduct, it is unlawful discrimination to charge only one of them with defilement. It further held that it is a violation of the rights of the one who is charged not to afford them with an advocate during the trial.

5. Judge Bwononga, who had heard the Petitioner’s appeal at Narok High Court recused himself from hearing the Petition and sent it to Nakuru High Court for hearing and determination.

6. Unfortunately for the Petitioner, the Application is one for summary dismissal. This is because, the substratum of the Petitioner’s claim is that he was a minor during the alleged commission of the offence and during the trial. However, the issue of the Petitioner’s age was a subject of appeal at the High Court and the Learned Judge specifically made a finding that the Petitioner was an adult during both the commission of the offence and during the trial. As such, the Petitioner cannot, again, approach the self-same Court hoping for a different factual determination on the question of his age. The only option available to the Petitioner, if he is dissatisfied with the findings of the Trial Court and the High Court on the question of his age, is to appeal to the Court of Appeal as a matter of law. This Court lacks jurisdiction to review the factual findings of a fellow High Court judge.

7. For this reason, this Petition is dismissed.

8. Orders accordingly.

**Dated and delivered in Nakuru this 1<sup>st</sup> day of July, 2020**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.