

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLICATION NO.265 OF 2018

MOSES ALLAN ODHIAMBO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Moses Allan Odhiambo was aggrieved by the decision rendered by my sister Ngenye-Macharia J in **Nairobi High Court Criminal Appeal No.282 of 2011 Moses Allan Odhiambo -vs- Republic**. In her judgment, the Learned Judge allowed the appeal but ordered that the Appellant be retried. This is what the Learned Judge stated:

“I have taken into consideration of the fact that it is now 13 years since the commencement of the case but taking into account the seriousness of the offence and more so that a life was lost justice demands that a fair trial be conducted. Furthermore should the Appellant be convicted the attendant penalty is death sentence which has no time limit. As such, I do not think that any prejudice will be occasioned to the Appellant if a retrial is ordered.”

The decision was rendered on 19th October 2017. The Appellant was aggrieved by the part of the decision that he should be retried. Instead of appealing against the decision, the Appellant on 18th June 2018 filed a constitutional petition seeking to have the order of retrial quashed because the Applicant formed the view that his fundamental rights and freedoms related to fair trial were breached by the said order. Pending the hearing of the petition, the Applicant sought to stay **Criminal Case No.943 of 2018** now pending before the Chief Magistrate’s Court Makadara. The application is supported by the annexed affidavit of the Applicant.

During the hearing of the application, Mr. Mochere for the Applicant reiterated the contents of the Applicant’s application. He submitted that the court had jurisdiction to grant the orders sought because the petition was predicated on **Article 23** of the **Constitution**. He urged the court to grant stay of the proceedings before the Chief Magistrate’s Court Makadara pending the hearing and determination of the petition.

The application is opposed. Ms. Atina for the State submitted that the court had no jurisdiction to question a decision rendered by a court of concurrent jurisdiction. She was of the view that the application was misconceived and incompetent. The petition had no basis in law and therefore this court could not in the circumstances grant the orders of stay of proceedings sought by the Applicant. She was of the firm view that the Applicant had misinterpreted the law in seeking the orders prayed in the petition. She urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. It was clear to this court that the application is predicated on a misconception of the law. Ngenye-Macharia J is a Judge of concurrent jurisdiction. Her decision is appealable to the Court of Appeal. The Applicant cannot file a suit before a court of concurrent jurisdiction seeking to overturn a decision of a court of equal status. It does not matter that such suit is titled a constitutional petition. The only avenue available to the Applicant if he was aggrieved by the decision of Ngenye-Macharia J is to file an appeal to the Court of Appeal. This court agrees with Ms. Atina that the application is predicated on misinterpretation of the **Constitution** and the law. It seeks to render nonsense the hierarchy of courts. The Applicant’s remedy lies elsewhere not before this court.

For the above reasons, the application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE