



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL MISC. APPLICATION NO. 12 OF 2017

GMM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. **GMM** was convicted of the offence of **Incest** by the trial Court on **20th September, 2013**. Being aggrieved, he appealed to this Court, an Appeal that was dismissed for lack of merit.
2. On the **21st July, 2019** he approached this Court by way of Chamber Summons seeking to be reconciled with the Complainant, his daughter who was a minor when the offence was committed.
3. The Application is premised on grounds that after the dismissal of the Appeal by the High Court the Applicant has lodged a second Appeal to the Court of Appeal that is pending determination. That a new development has emerged as his family including the Complainant are willing to swear affidavits in support of a proposed reconciliation an exercise pursuant to **Article 159(2)(C), 50(1) and 165(3)(a)** of the **Constitution**.
4. In response the State/Respondent by way of an affidavit sworn in reply depones *inter alia* that the Applicant was seeking to benefit from the provision of **Article 159(2)(c)** even as the 2nd Appeal was pending hearing.
5. The Application was canvassed by way of written submissions. It was urged by the Applicant that it will be in the interest of justice for the Application to be allowed to enable him to take full responsibility of his family either financially or otherwise as the Respondent/State will not suffer any prejudice.
6. In response, the learned State Counsel, **Mr. Mamba** alluded to the provisions of **Article 159(2)(c)(3)** of the **Constitution** that provides thus:

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.”

7. He urged that the Appellant had not furnished the Court with any proof of the family member’s willingness to reconcile with him and in particular in respect of the Complainant, a minor, who should have communicated through the ODPP.
8. I have duly considered rival submissions of both parties.
9. As stated in **Syengo Mwendwa vs. Republic (2019) eKLR**, Courts are guided by some principles that should be upheld while exercising

judicial authority which include promotion of reconciliation. However, circumstances of each matter as well as the timing of the Application should be taken into consideration.

10. As aforesaid, at the outset, the instant case was in the Magistrate's Court at the first instance. Being dissatisfied with the decision of the trial Court the Applicant exercised his right of appeal to this Court (High Court) which upon consideration of the Appeal confirmed the decision of the trial Court. The stated decision having not been favourable to him he appealed to the Court of Appeal which was his entitlement. The 2nd Appeal is pending hearing. This means that his Appeal has not been dismissed by the Highest Court, an act that would prompt him to move the Court to consider his case afresh.

11. This being the case the Application herein is misconceived. Allowing it will be tantamount to a miscarriage of justice.

12. Therefore, it is dismissed.

13. It is so ordered.

Dated, Signed and Delivered at Kitui this 13th day of June, 2019.

L. N. MUTENDE

JUDGE