



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CRIMINAL APPLICATION NO. 11 OF 2018

JOHN NDACHU NGANGA..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The background to the instant Motion filed as a **Miscellaneous Criminal Application No. 11 of 2018** by **John Ndachu Ng'ang'a** is as follows.

2. In 2011 the Applicant was charged before the subordinate court at **Githunguri in Cr. Case No. 1743 of 2011** for the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. Following a full trial, he was convicted and sentenced to life imprisonment in 2013. His subsequent appeals to the High Court (**HCRA 51 of 2013**) and to the Court of Appeal (**Cr. Appeal No. 55 of 2016**) were unsuccessful. Having exhausted the appeal system, the Applicant filed the instant motion, expressed to be brought pursuant to the provisions of Articles 25(c) and 50 of the Constitution and Section 362 and 364 of the Criminal Procedure code.

3. The substantive prayers in the motion seek:

“2. THAT criminal proceedings and record in Criminal Case No. 173 of 2011 at Githunguri (court) be reviewed.

3. THAT this ...court be pleased to order a re-trial of criminal case No.1743 of 2011 at Githunguri (court),

AND/OR ALTERNATIVELY.

4. Quash the entire proceedings and set aside the orders made in Criminal Cause No.1743 of 2011 at Githunguri.

5. Exercise its powers to revision and reverse the orders of the Chief Magistrate at Githunguri issued on 12th March 2013.

6. THAT the court do make such other orders as it may deem fit and just,”

4. There are no grounds on the face of the motion, but in the affidavit sworn by the Applicant's counsel in support of the motion, paragraphs 9 – 17 directly challenge the evidence adduced at the trial and was the basis of the conviction. In paragraphs 6, 7, 8, 19 there is an allusion to the violation of the Applicant's right to a fair trial. It is deposed at paragraph 18 that this court *“has unlimited original jurisdiction in criminal and civil matters to determine the question whether a fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened”*, by dint of the provisions of Article 165(3) of the Constitution.

5. In view of the novel nature of the motion, this court directed at the outset on 8th October, 2018 that the question of this court's jurisdiction to entertain the matter be first addressed.

6. In that regard, on 11/2/19 Mr. Kihara for the Applicant submitted that the instant application touches on fair trial guarantees under Articles 50 and 25 (c) of the Constitution and cited Rule 4 of the Constitution of Kenya (**Protection of Rights and Fundamental Freedoms Practice and Procedure Rules (the Mutunga Rules)**). He further asserted that the Applicant's rights were violated right from the trial court to the Court of Appeal as he was not represented by an advocate and that the Court of Appeal denied him free legal representation. That therefore this court has jurisdiction to review the entire proceedings from the trial court to the Court of Appeal.

7. He called to his aid the decision of the High Court in **Joseph Ndung'u Kagiri v R [2016] e KLR**. He urged that this court has liberty to innovate new remedies under Article 23, and for this proposition appeared to rely on an Article by **James P. Tugee and Nimokkering** in the

separate **Kenya Law Society Journal – 9(1) (2013) entitled “Courts Approach to Post 2010 Petitions for Enforcement of Rights”** where the authors cite the decision of the Court of Appeal in **Kenya Airports Authority v Mitu – Bell Welfare Society and 2 Others [2016] e KLR.**

8. On behalf of the DPP, **Mr. Maatwa** offered the following submissions. That the Applicant having exhausted the criminal entire appeal process, the application before the court is incompetent and this court lacks the jurisdiction to entertain it.

9. There is no dispute that the Applicant was tried and convicted in the subordinate court for the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and that his subsequent appeals to the High Court and Court of Appeal were unsuccessful. By his present motion the Applicant invokes the provisions of Article 50 and 25(c) of the Constitution (on fair trial) and Section 362 and 364 of the Criminal Procedure Code (powers of revision).

7. On the face of it, the Applicant’s motion is based on the complaint that the Applicant’s right to a fair trial was violated, or denied as he had no legal representation, and that the Court of Appeal, in particular rejected his application in that regard. Moreover, the majority of the depositions in the Applicant’s affidavit relate to evidential matters relating to his trial.

8. I have considered the relevant judgments by the High Court and the Court of Appeal annexed to the instant motion. The question of the adequacy of the evidence upon which the Applicant’s conviction was premised was severally considered in the appeals before the High Court and the Court of Appeal. This court has no jurisdiction to revisit the challenge now raised in that regard by the Applicant. Equally, the Appellant in his appeal before the High Court and the Court of Appeal was at liberty to raise grounds related to the alleged violation of his fair trial guarantees. For whatever reason, such matter did not comprise the Applicant’s grounds of appeal before the High Court or before the Court of Appeal.

9. Section 362 and 364 of the Criminal Procedure Code relate to the exercise of this court’s power on revision of conviction, sentence or order where no appeal has been preferred. Matters of evidence or law which properly belong to an appeal and more so, where an Applicant has exhausted his right of appeal cannot be re-agitated through the invocation of this courts revision jurisdiction. Secondly, the position the Applicant seems to canvass is that this court has power to supervise the exercise of appellate power by courts of concurrent and higher jurisdiction, in the guise of enforcing the constitutional right to fair trial. That is both a novel and unprecedented proposition.

10. The application before me in my opinion is totally misconceived and is incompetent, as this court has no jurisdiction to entertain issues of law and fact which have already been fully determined by courts of competent jurisdiction. The application filed on 6th July, 2018 is accordingly struck out.

DELIVERED AND SIGNED AT KIAMBU THIS 4TH DAY OF JULY 2019

C. MEOLI

JUDGE

In the presence of:

Mrs. Muthoni for the DPP

Applicant in person

Court Assistant - Nancy