



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. APPL. NO. 29 OF 2013

IN THE MATTER OF ARTICLES 22(1) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 23, 25(c), 27(1)(2), 165 OF THE CONSTITUTION

BETWEEN

ISMAEL GUDA OJWACH.....PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

RULING

The Petitioner, **ISMAEL GUDA OJWANG**, has told the Court that he was convicted for the offence of **Defilement** Contrary to **Section 8(1) and (2)** of the **Sexual Offences Act**.

1. Following his conviction, the Petitioner lodged an appeal at the High Court, being High Court Criminal Appeal No. **216B/2010**.
2. However, he indicated that when the appeal was first lodged it was HCCRA No. **148 of 2006**.
3. In effect, as at the year 2019, the Petitioner's appeal has not been determined for a period of about 13 years.
4. The Petitioner submitted that the delay in determining his appeal is completely unjustified. He further submitted that the continued delay in determining the appeal constituted a breach of his constitutional rights.
5. The reason for the delay in hearing and determining the appeal is that the record of the proceedings from the trial court are not available.
6. The learned Deputy Registrar of the High Court wrote to the trial court, seeking the proceedings. However, the trial court responded by pointing out that the record had already been provided to the High Court.
7. Notwithstanding efforts by both the trial court and the High Court, to trace the proceedings, the same have remained elusive.
8. In the circumstances, the Applicant is unable to prosecute his intended appeal.
9. Therefore, the Applicant has asked the court to order that he should go through a re-trial.
10. In response to the application, Mr. Muia, learned state counsel pointed out that the offence was committed more than 10 years ago.
11. In the circumstances, the state submitted that it was very unlikely that the witnesses would be found, so that they could testify at the proposed re-trial.
12. The Respondent pointed out that the Applicant had been convicted after undergoing a protracted trial.
13. This court was informed that during the trial, the Applicant had an opportunity to defend himself.

14. Furthermore, the Respondent expressed the view that the Appeal No. **148/2006** was never heard.
15. The Respondent was also surprised that the Appeal lodged in 2006 had later metamorphosed into Criminal Appeal No. **216B/2010**.
16. When called upon to reply to the Respondent's submissions, the Applicant said that he had lodged only one Appeal, which was Criminal Appeal No. **248/2006**.
17. According to the Applicant, he was unaware how the appeal acquired a new Number, as he was simply given the said Number whilst he was in prison.
18. When the court inquired from the Applicant about the record of proceedings which he had used when he lodged the appeal, he said that the same got lost in prison.
19. The court perused the Memorandum of Appeal, noting that the same was very detailed. In the event, the court expressed the view that the Applicant must have had the record of the proceedings, in order to enable him put together such a detailed Memorandum of Appeal.
20. However, the Applicant said that all the particulars of his detailed Memorandum of Appeal were obtained from his own memory.
21. In determining the application, I note that the record of proceedings from the trial court were not available.
22. If the Applicant wanted to pursue his right of appeal, he would undoubtedly require the record of the proceedings. Therefore, the non-availability of the said proceedings makes it impossible for the Applicant to pursue his constitutional right of appeal.
23. Is that a sufficient reason to warrant the issuance of an order for the Applicant to go through a re-trial?
24. A re-trial would ordinarily be ordered when there was an error or an irregularity on the part of the trial court.
25. In the case of **OPICHO Vs REPUBLIC [2009] KLR 369**, the Court of Appeal stated thus;

“In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a re-trial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for re-trial should only be made where the interests of justice require it.”
26. In this case, it is not possible for me to ascertain whether or not the Applicant had got a fair trial, because the proceedings have not been traced.
27. However, I also note that in the Memorandum of Appeal, the Applicant did not make any assertion about any perceived or real irregularity in the manner in which the trial court conducted the trial.
28. The grounds of appeal centre around the merits or lack thereof of the decision made by the trial court.
29. As no illegalities or defects or irregularities have been alluded to by the Applicant, I find that the application failed to meet the first ingredient which is a foundation for an order for re-trial.
30. Secondly, considering that the Applicant was convicted in 2006, I find that there has been a long delay between the date of the said conviction and May 2013 when the current application was lodged in court.
31. I find merit in the Respondent's contention, that due to the long delay in moving the court, it may be difficult to trace the witnesses who would be required to testify if a re-trial was conducted.
32. Effectively, therefore, it would imply that if a re-trial was to be undertaken, justice would be unlikely to be achieved if the witnesses could not be traced.
33. I also find that in the absence of the record of the proceedings, this court is unable to ascertain for itself whether or not the evidence which is admissible could lead to a conviction, in the event of a re-trial.
34. In the absence material that could lead the court to order for a re-trial, I do presume that the conviction remains lawful, and therefore there is no basis upon which the court can quash it, and then order for a re-trial.
35. Accordingly, the application for a re-trial is rejected.

DATED, SIGNED and DELIVERED AT KISUMU This 17th day of September 2019

FRED A. OCHIENG

JUDGE