

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 35 OF 2017

DANIEL GITAU MUNGAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant brought a notice of motion under Article 50 (2) (q) of the Constitution of Kenya seeking orders that:

i. The court be pleased to set the applicant at liberty forthwith as the respondent together with the trial court have failed to produce the lower court records for the purposes of disposing the appeal.

ii. The court be pleased to declare that the appellant's right to fair trial have been violated by the lower court and respondent and they continue to be violated as a result of failure to provide the lower court record.

2. The motion is based on the grounds on the body of the motion and the supporting affidavit to the motion. He lamented that he was convicted in the year 2015 and immediately filed this appeal. That despite numerous orders by this court calling for the records, the same has not been availed. That the appellant has served a substantial part of his sentence therefore his rights under Article 50 (2) (q) of the Constitution of Kenya continues to be violated. That it is in the interest of justice for this court to make a finding that the failure to produce the trial record cannot be visited on the Appellant and therefore this court is duty bound to ensure that the appellant's rights to fair trial is upheld.

3. In arguing the application, the appellant lamented that the trial court proceedings have not been availed from Mavoko Law Courts since the year 2015. That due to the said delay, he ought to be set at liberty forthwith. He stated that he had been in remand prior to sentencing.

4. In response thereto, Mr. Machogu, Learned prosecutor submitted that if the prayers sought is allowed, the trial court's discretion on sentencing will be interfered with without consideration of the merits of the case.

5. I have considered the application herein. While I empathize, this court cannot set the appellant at liberty having been convicted by a competent court of law and having not considered the appeal or found fault in the trial court's decision. That can only be done on merit. It is appropriate for this court to obtain the record of the lower court and to satisfy itself that the sentence passed was lawful and proper. The Appellant wants to bypass such a critical process in the determination of appeals. This court is reluctant to accede. Suffice to note that the Appellant is at liberty to seek to be released on bond pending appeal but has opted not to take such a route. In the circumstances, I dismiss the application. The Executive Officer Mavoko Law Courts is hereby ordered to appear before this court on a date to be given by the Deputy Registrar to explain why the lower court file has not been forwarded.

It is so ordered.

Dated and delivered at Machakos this 3rd day of May, 2018.

D. K. KEMEI

JUDGE

In the presence of:

Daniel Gitau Mungai - for the Appellant

Mogoi- for the Respondent

Kituva - Court Assistant