



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HC. CR. MISC. APP. NO. 72 OF 2018

(CORAM: R. E. ABURILI - J.)

GEOFFREY INDUNYI WERE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and Sentence dated 13.07.2015 in Criminal Case No. 624 of 2015 at Bondo Law Courts, before Hon. M. Obiero, PM)

And

(A Subsequent Judgment that was made on 26.11.2015 in Criminal Appeal No. 69 of 2015 at Siaya High Court before Hon. Justice J.A. Makau, Judge)

RULING

The Application filed on 29/10/2018 by the Convict/Petitioner Geoffrey Indunyi, Were is brought under the provisions **Article 50(6)(a)(b) of the Constitution and Articles 165, 23(1) of the Constitution of Kenya.**

The Applicant claims by his grounds and annexed supporting affidavit that he was cheated by a police officer into pleading guilty to the charge of defilement wherein he was convicted and sentenced to serve 20 years imprisonment.

That he was therefore not accorded a fair trial and has nothing to do with the defilement charge. That he has new and compelling evidence and seeks for a retrial as he is in poor health.

The court observes that the Applicant cited a wrong case number from which he was convicted and sentenced and further cited a wrong appeal case number.

Upon this court ordering for the correct case file to be availed, it has now turned out to be that the applicant was on 13th July 2015 convicted and sentenced to serve 20 years imprisonment by the PM's court at Bondo for the offence of **defilement of a child contrary to Section 8(3) of the Sexual Offences Act.** This was on his own plea of guilty in Bondo PM Cr. Case No. 624/2015 (not Siaya PM's Cr. Case No. 624/2015).

Upon his conviction and sentence, the applicant filed an appeal vide Kisumu High Court Cr. Appeal No. 114/2015 challenging his conviction and sentence.

The said appeal, file was transferred to Siaya High Court and assigned a new case file number being Siaya HCRA No. 69 of 2015.

The said appeal was admitted to hearing on 30/9/2015 and heard on 13/11/2015 and judgment delivered on 26th November, 2015, the Learned Hon. Justice J.A. Makau dismissed the Appellant's appeal both against conviction on his own plea of guilty and against the mandatory 20 year imprisonment sentence as stipulated in **Section 8(3) of the Sexual Offences Act No. 3 of 2006.**

That being the case, the Appellant could only have appealed against the judgment of Hon. J.A. Makau J, the Court of the Appeal and not to return to this court and allege that his rights were violated and or that he was not accorded a fair trial or that he has new and compelling evidence for reconsideration under **Article 50(6) of the Constitution.**

This court would only have jurisdiction under **Article 50(6) of the Constitution** if the applicant had challenged the decision of Makau J

before the Court of Appeal and therefore the applicant had exhausted all the appeal mechanisms. To return to this court through a different case file number is to ask this court to sit on an appeal of the decision of a court of concurrent jurisdiction which is not permissible in law.

In the premise, I find and hold that the application before me is fatally incompetent and misconceived. It is an abuse of court process. The same is hereby dismissed and the file is closed.

Dated, Signed and Delivered at SIAYA this 2nd Day of November 2018.

R.E. ABURILI

JUDGE