



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

PETITION NO. 8 OF 2017

RICHARD SIMIYU MAKOKHA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Richard Simiyu Makokha**, the Petitioner herein, filed the present petition pursuant to **Article 22** and **23** of the **Constitution of Kenya 2010**. The Petitioner alleged that his fundamental rights and freedoms guaranteed under **Articles 25, 27** and **50** of the **Constitution** were violated during the trial of his case. Further that **section 214** of the **Criminal Procedure Code** and **section 36** of the **Sexual Offences Act No. 3 of 2006** were not complied with.

2. In his written submissions, the Petitioner argued that he was not afforded a fair trial and was convicted on an incurably defective charge sheet. He further stated that the sentence of life imprisonment imposed against him threatened his right to life which is guaranteed under the **Constitution**.

3. The state opposed the constitutional application through learned state counsel Mrs. Njeru who urged the court to dismiss the petition stating that the Petitioner had filed an appeal which was heard and dismissed. That he could therefore only seek recourse at the Court of Appeal.

4. Indeed the record demonstrates that the Petitioner filed a **Criminal Appeal No. 112 of 2012** in the High Court of Bungoma vide a Memorandum of Appeal dated 13th June, 2012. In his grounds of appeal, he argued that the prosecution case was not proved to the required standard and did not therefore justify the conviction against him. Further that the sentenced meted was harsh and excessive.

5. The Appeal was heard before Lady Justice Hellen Omondi who dismissed the appeal vide a judgment dated 11th July, 2017. The learned Judge found that the prosecution evidence was duly considered and proved the offence against the Appellant and was safe to sustain the conviction. The learned Judge also confirmed the sentence stating that it was legal as provided by law. The judgment therefore addressed the concerns raised by the Petitioner in the present petition.

6. In light of the fact that the Petitioner herein had filed an appeal which was consequently heard and determined on merit, the present petition filed is tantamount to a second appeal. It is disguised as a petition but it in effect raises issues that had been addressed in the Bungoma High Court Criminal Appeal No. 112 of 2012. The Petitioner therefore seeks to have a second bite at the cherry and have this court sit on an appeal against its own decision.

7. Whereas **Article 165(3)(b)** of the **Constitution** grants the High Court jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, there is no doubt that the Petitioner filed the present petition because he was dissatisfied with the decision of Lady Justice Hellen Omondi. In any event, rights and freedoms guaranteed in the Bill of Rights can be limited within the confines stipulated under **Article 24** of the **Constitution**.

8. The alleged contravention of constitutional rights complained of by the Petitioner focuses on matters which had been re-evaluated and re-assessed in his appeal which was consequently dismissed on merit. The issues can therefore be appropriately catered for and addressed in a second appeal to the Court of Appeal. It is trite law that an appeal against a judgment of the High Court can only be determined by the Court of Appeal by dint of **Article 164(3)(a)** of the **Constitution** which clothes it with jurisdiction to hear appeals from the High Court.

9. In the instant case, since the Petitioner herein had filed an appeal against the decision of the trial court, and which was heard and determined by the High Court in Bungoma which was vested with jurisdiction to hear and determine the appeal which arose from a subordinate court, I find that this court is therefore *functus officio* in this matter.

In the premise therefore, I find that the present petition is misguided and an abuse of court process. Accordingly, it fails and is consequently dismissed. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 14TH DAY OF DECEMBER 2018.

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H. K. CHEMITEI

HIGH COURT JUDGE