



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**PETITION NO. 3 OF 2017**

**BETWEEN**

**ANTHONY OTIENO NDONJI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The petitioner, **ANTHONY OTIENO NDONJI**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the *Sexual Offences Act* in *Winam SRMC Criminal Case No. 1645 of 2010*. He was sentenced to serve 20 years imprisonment. He appealed to the *High Court at Kisumu, Criminal Appeal No. 31 of 2015*. The appeal was dismissed on 15<sup>th</sup> July 2015. The petitioner states that he did not pursue the matter any further.

2. He has now moved this court for orders that sentence imposed on him be revised. According to the supporting deposition filed together with his petition, he states that he was not accorded a fair trial in accordance with **Article 50(2)(g)** of the Constitution as the court failed to comply with the provisions of **section 200** of the *Criminal Procedure Code*. He further contends that the trial court did not take into account the time he had spent in remand pending trial.

3. This petition seeks to review the conviction and sentence affirmed by a judgment of the High Court sitting as the first appellate court. The High Court lacks jurisdiction to review its judgment as a first appellate court except as provided for in **Article 50(2)(6)** of the Constitution where the party furnishes new and compelling evidence that would entitle the person convicted to a new trial after he has exhausted all appeals or has failed to appeal within the time limited by the law.

4. The gravamen of the petitioner's complaint is that the trial court ought to have commenced the matter afresh after the trial magistrate, who originally took the evidence, was transferred. When the new magistrate took over the matter, the accused requested to start the matter afresh but the trial magistrate declined as he was of the view that the matter concerned a child and it would not be in the interests of justice to start the matter afresh. The appellant raised the same matter in his first appeal to the High Court. Chemitei J., considered the matter and agreed with the trial magistrate, he further held that the petitioner was not materially prejudiced as he had actively participated in the matter by cross-examining the prosecution witnesses and even calling his own witnesses.

5. The issue raised by the petitioner was the subject of his first appeal. It cannot be re-litigated afresh as this court does not have jurisdiction. Even if I consider this petition as one under **Article 50(6)** of the Constitution, the matters raised by the petitioner are procedural in nature, were dealt with by the appellate court and cannot constitute new and compelling evidence to entitle the petitioner to a new trial (see *Lt Col. Tom Martins Kibisu v Republic Sp. Ct. Petition No. 3 of 2014 [2014]eKLR*).

6. The application is devoid of merit and is dismissed.

**DATED and DELIVERED at KISUMU this 15<sup>th</sup> day of March 2017.**

**D.S. MAJANJA**

**JUDGE**

Petitioner in person.

Ms Osoro, Prosecution Counsel, instructed by the Director of Public Prosecutions for the Respondent.