



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CRIMINAL REVISION NO. E013 OF 2020**

**EVANS MUTALII MARANDA.....APPLICANT**

**VS**

**REPUBLIC..... RESPONDENT**

**RULING**

**Background**

1. The Applicant was charged under **Section 8 (1) and 8 (4)** of the **Sexual Offences Act** for defilement of a minor with the particulars being that he intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of TWW a girl aged 16 years and in the alternative committed an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act**. The Applicant was convicted accordingly and acquitted in the alternative charge on the 27/11/2014. He was sentenced to serve fifteen (15) years imprisonment.

2. Dissatisfied with the trial court's judgment he appealed against both the conviction and sentence vide **Naivasha High Court Criminal Appeal No. 28 of 2017**. In a judgment delivered on 29<sup>th</sup> July, 2019, the appeal was dismissed in its entirety Hon. Mwongo, J.

3. The Applicant did not further appeal to the Court of Appeal. Instead, he has approached this court vide a Notice of Motion application filed on 27<sup>th</sup> November, 2020 in which he prays to this court to review his sentence or give any relief that the court may deem fit.

4. From the original record, I find that the Applicant was convicted for the offence of defilement under **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. He was sentenced to serve 15 years imprisonment as provided by the law. Inside the trial court record is a judgment that was delivered by the High Court dismissing the first appeal.

5. In what he referred to as a 'Memorandum of Revision' filed on 27<sup>th</sup> November, 2020 the Applicant cited, *inter alia*, the following grounds that would warrant the review of his sentence:

- i. That he is not appealing against conviction and sentence but applying for review of sentence.
- ii. That he has no pending appeal.
- iii. That he is a first offender and was only 18 years at the time of the offence.
- iv. That he is completely remorseful of his offence.
- v. That he has since acquired tailoring, polishing and upholstery skills while in incarceration.
- vi. That he is now reformed and a law abiding citizen.
- vii. That he is from a poor family background and sole breadwinner of his family.
- viii. Leniency be considered and that he be put on C.S.O for the remainder of his sentence.

6. The application was canvassed by way of oral submissions. The Applicant who was in person submitted that the previous Judge, Hon. Mwongo J. recommended that a prisons officer report be filed. He also submitted that the time served in remand be considered having spent 8 months in remand. The Applicant moots that he has also added various skills to himself and a trusted title due to good conduct.

7. Learned State Counsel, Miss Maingi submitted that this court had no powers to hear the application as the Applicant had already been heard on the first appeal by the High Court. She submitted that the Applicant was not entitled to a review of sentence under the Muruatetu Supreme Court directions.

#### **Determination.**

8. The only issue for determination herein is whether the Application is merited. Firstly, the jurisdiction of the High Court is provided for under **Article 165** of the **Constitution** and includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretive jurisdiction; any other jurisdiction, original or appellate conferred on it by any legislation; and supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. However, Article 165 does not clothe this court with a jurisdiction to review a decision of a court of concurrent jurisdiction. Further, the revisionary jurisdiction of this court under **Sections 362 and 364** of the **Criminal Procedure Code** is only limited to proceedings from subordinate courts.

9. The sentence which the Applicant now seeks to review was imposed by the trial court and further reconsidered at appellate level by the High Court which is a court of concurrent jurisdiction with this Court. For emphasis purposes, it is important that the Applicant understands that on appeal, the High Court considers the merit of the conviction and the sentence. It was therefore at that level that he would have urged that Court relooks into the sentence.

10. That means that this court cannot therefore review the said sentence as doing so would amount to sitting on appeal against the decision of a court of concurrent jurisdiction which is unacceptable under the law. Therefore, this Court became *functus officio* the moment Hon. Mwongo, J. pronounced himself on the appeal against the conviction and the sentence. I thus entirely agree with the learned State Counsel that the only recourse that the Applicant has at this point is to move the Court of Appeal and appeal against the sentence as it is the Court clothed with the jurisdiction to hear appeals from the High Court under **Article 164 (3)** of the **Constitution** and **Section 379 (1)** of the **Criminal Procedure Code**.

11. In **Busia Criminal Petition 9 of 2019 Joseph Maburu alias Ayub v Republic [2019] eKLR** the court stated that:-

*“Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black’s Law Dictionary Tenth (10<sup>th</sup>) Edition describes defines sentence as:*

*“The judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.”*

12. Once a court becomes *functus officio*, the only orders it can grant are review orders which are an exception to the *functus officio* doctrine. The Supreme Court in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** stated that:

*“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”*

13. In the result, this applicant is unmeritorious and is hereby dismissed.

**DATED AND DELIVERED AT NAIVASHA THIS 31ST DAY OF JANUARY, 2022.**

**G. W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Applicant in person.

2. M/s Maingi for the Respondent.