



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. E058 OF 2021

OLIVER OMUSUGU OKWAKAU.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, Oliver Omusugu Okwakau filed the instant Chamber Summons on 8th March, 2021 seeking a review of his sentence so that the same can be substituted with a non-custodial one preferably probation. The application is supported by a self-sworn affidavit dated 11th March, 2021.
2. Being an application for review of sentence and pursuant to **Section 362** of the **Criminal Procedure Code**, the original trial court record was forwarded to this court so that the court can satisfy itself as the correctness, propriety, regularity and legality of the proceedings or the order sought to be reviewed.
3. In this case, the court was informed and correspondence does show that both the Trial and High Court records were forwarded to the Court of Appeal, the Applicant having preferred a second appeal to that court. This automatically implies that the Applicant had appealed to the High Court against his conviction and sentence.
4. His appeal to this court was vide **Criminal Appeal No. 19 of 2017**. The same was dismissed in its entirety by learned Hon. Mwongo, J. on 8th March, 2019. In that, case the Applicant's recourse is only to appeal to the Court of Appeal against both the conviction and sentence.
5. I note that he seeks revision against the sentence. In his submissions, he urged the court to consider the period he served in remand prior to his conviction by the trial court. This position obtained when the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** was applied in resentencing.
6. The Counts below the Supreme Court understood it that, in addition to murder trials, in other offences where minimum mandatory sentences or mandatory death sentence was provided, courts could vary the sentence as such provision took away the discretion of the trial court in imposing an appropriate sentence based on the circumstances of the case and the mitigation an accused offered. This saw many cases going through a process of resentencing by the trial courts notwithstanding that the Applicant may have appealed all the way to the Court of Appeal.
7. This position has since changed. The Supreme Court vide a ruling dated 6th July, 2021 in the same Petition issued directions clarifying that other than in murder trials where accused persons were sentenced to death without the opportunity of mitigation, resentencing was unlawful in other cases.
8. In that regard, if a first appeal as in the instant case has been concluded where both the conviction and sentence were considered, and consequently the appeal was dismissed in its entirety, the court that heard the appeal becomes *functus officio* in the matter. If for instance the sentence is illegal or the court did not consider the period the Applicant had served in remand custody prior to the sentencing, the only recourse is to appeal to the Court of Appeal as against the sentence. To underscore this position, the Applicant must understand that it was at the hearing of his appeal in this court that he would have urged the court to consider the period he was in remand prior to sentencing. If this court were then to redo what the Applicant seeks, it would be sitting on a review of a judgment of court of concurrent jurisdiction which is unlawful.
9. I would further wish to add that revisionary jurisdiction of this court under **Sections 362 and 364** of the **Criminal Procedure Code** is only limited to proceedings from subordinate courts. As such, I have no powers to revise a judgment of a judge of concurrent jurisdiction.

10. I empathize with the Applicant but my hands are tied by the law. He has the option of appealing the sentence in the Court of Appeal. I sum therefore, the application herein is dismissed. This file should close and High Court file remitted back.

DATED AND DELIVERED AT NAIVASHA THIS 27TH DAY OF JANUARY, 2022

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Oliver Omusugu Okwakau - Applicant in person

2. Ms. Maingi for the Respondent