



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO.E252 OF 2021

GEORGE BOKE KISIAWO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant **GEORGE BOKE KISIAWO** herein, was convicted for the offence of defilement contrary to **Section 8(1) as read with Section 8(2)** of the **Sexual Offences Act** in **Kibera Criminal Case (S/0) No.35 of 2017**. He was sentenced to serve twenty (20) years imprisonment. He appealed to the High Court in **Criminal Appeal No.132 of 2018**. His appeal against conviction was dismissed. On sentence, the appellate court set aside the twenty (20) years sentence and replaced it with a fifteen 15-year sentence.

2. The Applicant has now approached this court through the undated **Chamber Summons** application seeking revision of the fifteen (15) years sentence meted against him on 13th July, 2018 by taking into account the period he stayed in remand custody during trial pursuant to the provisions of **Section 333 (2)** of the **Criminal Procedure Code**.

3. The application was disposed by way of oral submissions. The Applicant stated that when being sentenced, the one (1) year 2 months period he had stayed in custody during trial was not considered. The Applicant submitted that he is an orphan and his children are suffering being that he does not know their whereabouts. He thus urged the court to consider that period and reduce the sentence meted against him.

4. The application was opposed by the Respondent. **Ms. Ntabo**, the learned prosecution counsel submitted that the Applicant had made the same application which was heard and determined in **Cr. Appeal No.E132 of 2018**, where Justice Kimaru reduced his sentence from twenty (20) years to fifteen (15) years imprisonment. She also submitted that the said period was factored during sentence, hence the application is spent and any further orders on reduction of sentence should be sought for before the Court of Appeal. She thus urged the court to dismiss the application.

5. I have considered the application and the submissions made by both parties in support and in opposition thereof. It is my considered view that the issue for determination is whether the same is merited.

6. I have perused the record in **Milimani Criminal Appeal No.132 of 2018** and confirmed that Kimaru, J. vide the **Judgement** delivered on **15th December, 2020** did set aside the trial court's sentence of twenty (20) years imprisonment to fifteen (15) years imprisonment. As such, it is clear that the Applicant herein is currently serving a sentence meted out by this court. It is this sentence that the Applicant wants reviewed in consideration of the time spent in custody during his trial.

7. It was submitted by the Respondent that the application is already spent in the appeal. Further, any orders on reduction should be before the Court of Appeal. In the case of **Raila Odinga & 2 Others –vs- Independent Electoral & Boundaries Commission & 3 Others [2013]eKLR** the Court 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.”

8. Further, in the case of **Joseph Maburu alias Ayub –vs- Republic [2019] eKLR**, where the learned Judge 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 (10th) 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. Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."

9. The rule of the thumb is that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction, much less those courts higher than themselves.

10. The sentence which the Applicant wishes to have reviewed was passed by this court. As such the Applicant is basically seeking that this court to review its own decision regarding sentence of fifteen (15) years imprisonment and further invoke the provisions of **Section 333(2)** of the **Criminal Procedure Code**.

11. **Section 333(2)** of the **Criminal Procedure Code** provides thus: -

"(2) Subject to the provisions of Section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

12. In the upshot, this court is *functus officio* and hence bereft of jurisdiction to review the sentence that was meted against the Applicant by Hon. Justice Kimaru (which was also done on revision) as that will be akin to reviewing a decision of a court of concurrent jurisdiction. If the Applicant was aggrieved by the said sentence, what she ought to have done is appeal to the Court of Appeal.

13. Accordingly, the undated **Chamber Summons** application, filed by the Applicant herein lacks merit and is dismissed.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MARCH, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Applicant in person

M/S Ndombi counsel for the State

Court Assistant - Gitonga