



REPUBLIC OF KENYA



KENYA LAW

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**Kisule v Republic (Miscellaneous Application E085 of 2021)
[2022] KEHC 3183 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E085 OF 2021**

MW MUIGAI, J

JUNE 28, 2022

FROM ORIGINAL CONVICTION AND SENTENCE OF CRIMINAL CASE

NO. 123 OF 2012 AT MAKUENI LAW COURTS

AND

FROM CRIMINAL APPEAL NO. 98 OF 2013 AT MACHAKOS HIGH

COURT

AND

FROM MISC. CRIMINAL APPL, NO. 145 OF 2019 ON RE-

SENTENCING AT MACHAKOS HIGH COURT

BETWEEN

STEPHEN MUSYOKA KISULE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The Applicant herein (Stephen Musyoka Kisule) was charged with the offence of defilement of girl between the age of 12 and 15 years contrary to Section 8(3) of the *Sexual Offences Act* 2006 in Makueni Principal Magistrate's Court in Criminal Case No. 123 of 2012 and was convicted to serve a period of Twenty (20) years imprisonment on 16/05/2013.
2. Aggrieved by the conviction and sentence the Applicant filed an Appeal in this Court being Machakos Criminal Appeal No. 98 of 2013. On 2nd November, 2016 the Court dismissed the appeal and upheld the conviction.



3. The Applicant herein Stephen Musyoka Kisule filed an application dated 9th October, 2019 seeking resentencing pursuant to the Supreme Court Decision in Francis Kariuki Muruatetu & Another v Republic & 5 Others [2017] eKLR and dismissing the application on the same by Ruling delivered on 26th May, 2022.

Notice of Motion:

4. The Applicant filed another application on resentencing on 30th November, 2021 seeking the following orders:
 - (a) That this Court review of my sentence pursuant to Section 333(2) of the *Criminal Procedure Code*.
 - (b) That if the review succeeds he be given a non-custodial or community-based sentence for the remaining time of sentence as enshrined in the Probation of offenders Act Cap 64
 - (c) That he be present during the hearing of this application.
5. The application is supported by the Supporting Affidavit filed on 30th November, 2021 based on the following:-
 - (i) That he is currently held at Machakos Main Prison serving a 20 year imprisonment term for the offence of Defilement.
 - (ii) That this Court erred in law by not considering the period the Applicant spent in custody as per Section 333(2) of the *Criminal Procedure Code* upon resentencing.

Applicant's Submissions

6. That he was convicted and sentenced for the offence of Defilement and sentenced to serve a period of Twenty years on 16th May, 2013. That the Trial Magistrate when imposing the sentence of 20 years imprisonment disregarded Section 333(2) of *Criminal Procedure Code*.

Respondents Submissions

7. It was submitted that the Applicant was charged with the offence of Defilement contrary to Section 8(3)) of the Sexual offences Act No. 3 of 2006. The Senior Magistrate (Hon. R. Yator) sentenced the accused person to serve Twenty (20) years' imprisonment.
8. The Applicant appealed to the High Court via Criminal Appeal No. 98 of 2013, whereupon Hon. Justice E. Ogolla dismissed the Appeal and upheld the conviction and sentence.
9. The Applicant had filed a Miscellaneous Application 145 of 2019 seeking resentencing, Hon. Justice Kemei dismissed the application since it lacked merit. That the Applicant should exhaust his right of Appeal to the Court of Appeal.
10. It was submitted that this Court is functus officio and it is barred from proceeding with this application, since it heard and substantively adjudicated the first appeal.



11. In the case of *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former Employees of Telkom Kenya Limited)* [2014] eKLR where the Court of appeal observed thus;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler V Alberta Association of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);”

Determination

12. The issue for determination is whether the application of 30th November, 2021 on resentencing should or should not be granted to compute the sentence meted to include the period the Applicant spent in custody.
13. The Court record confirms as follows; In PM’s Ct Makueni Criminal Case 123 of 2012, the Accused was charged convicted and sentenced to 20 years imprisonment for the offence of defilement under Section 8(1) & 8(3) *Sexual Offences Act*.
14. In High Court Machakos Criminal Appeal 98 of 2013, the Appellant lodged an appeal against conviction and sentence and by Judgment delivered on 2/11/2016 by Hon. E. Ogola the appeal was dismissed and conviction and sentence was upheld.
15. In High Court Machakos Misc Criminal Appeal No 145 of 2019, the Applicant filed an application and sought resentencing pursuant to the Supreme Court decision in *Francis Kariuki Muruatetu & Anor v Republic & 5 Others* [2017] eKLR (Muruatetu 1). The High Court by Ruling of 20/5/2022 held that the Applicant exhausted the appeal and the Court was/is functus officio. The Applicant ought to lodge an appeal in the Court of Appeal.
16. The instant Misc Application is lodged in the High Court for resentencing on the basis of again *Francis Kariuki Muruatetu & Anor v Republic & 5 others* [2017] eKLR (Muruatetu 1) for this Court consider lesser sentence or non-custodial sentence such as probation. The Applicant now invokes Section 333(2) *CPC* on computation of sentence.
17. The High Court has jurisdiction to hear and determine an appeal of the decision of the Magistrate / Trial Court or a review of the decision of the Magistrate / Trial Court where an appeal has not been lodged only where the challenge is not to a finding sentence or order under Section 364 *CPC*.
18. In the instant case as confirmed by the Court Record, the Applicant lodged an appeal and a review for resentencing. By the instant application on similar grounds is to have a 3rd bite at the cherry and this Court lacks requisite jurisdiction to hear and determine the present matter. The Applicant clearly exhausted filing any application before the High Court.

The redress is in Lodging an Appeal to/in the Court of Appeal.

Disposition

1. The Application for resentencing of 30/11/2022 is dismissed.
2. The Appellant/Applicant may lodge appeal in Court of Appeal.

DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28/6/2022. (VIRTUAL CONFERENCE)



M.W. MUIGAI
JUDGE

