



**REPUBLIC OF KENYA**

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

**MISC CR. APPL NO E008 OF 2020**

**GEORGE MUTHIORA NYUTU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Notice of Motion filed herein is not dated. Nevertheless, under the command of article 159 of the Constitution to serve substantive justice, I will determine it on merit.

2. The Motion seeks the court to consider time spent in jail and include it in the sentence imposed by Bwonwong'a J. He makes this request under section 333(2) and 38 of the CPC, Articles 27(1)(2), 169(1), 159(1)(2), 47(1)(2) and(3)(A) of the Constitution. His major argument is that his trial took 4 years, yet, he was not given the benefit of section 333(2) of the CPC. In his oral submissions he stated that the judge did not take his mitigation or the time spent in prison when passing sentence. He therefore asks the court to give him the benefit of section 333(2) of the CPC and accordingly reduce the sentence herein.

3. The learned prosecution counsel, M/S Torosi argued against the Motion and more specifically: -

*i) That this court is functus officio.*

*ii) That the remedy being sought could only be sought in the Court of Appeal.*

*iii) That the applicant is merely abusing court process.*

*iv) That in any event, it is not true that the appellate court did not consider his mitigation.*

*v) That the application should be dismissed.*

4. The applicant in his reply stated that Kenya Court [I believe Court of Appeal of Kenya] will take a long time and so waiting for it will simply produce delay. He insisted on getting remedy from this court.

#### **ANALYSIS AND DETERMINATION**

5. I will say just enough. I agree with the prosecution counsel that this court is *functus officio* and any further remedy on sentencing could only be sought from the Court of Appeal. The applicant is therefore, inviting the court to sit on appeal of its own judgment; an invitation that is not only ominous and misconceived but an abuse of process of the court.

6. Be that as it may, I have perused the decision on sentence and the judge specifically stated that he had considered all the mitigation offered including the fact that the accused had been in custody for 3 years. Therefore, without delving into the merit, it is in plain eyesight that the statement by the applicant that the judge did not consider his mitigation is not true or correct.

7. For reasons stated above, I reject the application herein.

**Dated, signed and delivered at Narok through Microsoft Teams Application this 25<sup>th</sup> day of January 2021**

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**F. M. GIKONYO**

JUDGE