

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVIEW NO. 127 OF 2020

PHINEAS MUGAMBI MUTETHIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was convicted for the offence of rape contrary to section 3(1)(a)(b) of the Sexual Offences Act No. 3 of 2006 in Runyenjes Criminal case No. 13 of 2018 and sentenced to ten (10) years imprisonment. He subsequently petitioned this court in petition No. 33 of 2020 for orders that the time spent in custody be considered and the said petition be allowed. He has now come before this court vide an application dated 24/09/2020 seeking for review of his sentence and further that the sentence by the trial court to be substituted with a non-custodial sentence or a lesser one.

2. At the hearing of the application, the applicant elected to rely on his written submissions. Ms. Mati the Learned State Counsel opposed the application on the grounds that the same is similar to an earlier application (Petition 33 of 2020) and further that the applicant had not shown that the sentence was illegal. In a rejoinder, the applicant urged the court to be lenient.

3. I have considered the application herein and the submissions made in relation to the same and in my view, the main issue for determination is whether the same is merited.

4. It is undisputed that the applicant was convicted by the trial court (Runyenjes law Courts) for the offence of rape and sentenced to ten (10) years imprisonment. As such, as a matter of procedure, such a case can come before this court either as an appeal under Sections 347- 361 of the Criminal Procedure Code or revision under Sections 362- 378 therein.

5. Under Section 347, a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court. Such an appeal may be on a matter of fact as well as on a matter of law. In an application for revision under section 362 on the other hand, this court has powers to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

6. However, in the instant application, the applicant based the same on the grounds that he has reconciled with the victim and as thus this court ought to grant alternative dispute resolution methods. In my view, such grounds cannot form a basis for this court to review the decision of the trial court (lower court) under Section 364 of the Criminal Procedure Code. I have looked at the said proceedings *suo moto* (under Section 364 of the Criminal Procedure Code) and it is my view that there is nothing to show that the sentence therein was incorrect, illegal or improper or that the proceedings of the trial court were irregular.

7. Assuming that the applicant intended to appeal against the decision of the lower court, it is my view that the grounds on the face of the application do not amount to an issue of fact or law so as to warrant the same being a ground of appeal. Further, the applicant did not satisfy the principles upon which an appellate court can interfere with the sentence of the trial court as were laid down in **Bernard Kimani Gacheru vs. Republic [2002] eKLR**. He did not prove that the sentence by the trial court was manifestly excessive in the circumstances of the case, or that the trial court overlooked some material fact, or took into account some wrong material, or acted on a wrong principle and thus warranting interference with the sentence on appeal.

8. In my view, what the applicant is trying to do is to offer mitigation. That is why he invites the court to consider Section 216 of the Criminal Procedure Code (which allows the court, before passing sentence or making an order against an accused person under Section 215 to receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made). However, in my view, this court does not have jurisdiction to take mitigation in relation to a judgment by a lower court save for where it's exercising resentencing under **Muruatetu's** jurisprudence and which is not the case herein.

9. The applicant ought to have offered mitigation in the trial court and not in this court. He did not present any evidence as to having been denied a chance to mitigate before the trial court and which failure could have made the decision by the said court subject to revision under Section 364.

10. Taking into consideration all of the above and for the reasons thereof, it is my view that the instant application is an abuse of the court process. The same is unmerited and it is hereby dismissed.

11. Orders accordingly.

Delivered, dated and signed at Embu this 20th day of January, 2021.

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....**for the Respondent**