



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISCELLANEOUS CRIMINAL APPL. NO. E015 OF 2020

STEPHEN MUNGOKA MWENDANDU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. **Stephen Mungoka Mwendandu**, the Applicant herein was charged with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.
2. The Applicant pleaded not guilty and the case proceeded to full hearing. He was convicted and sentenced to serve 20 years imprisonment.
3. The Applicant was aggrieved by that decision and he filed an appeal to the High Court against both the conviction and sentence. The appeal was duly heard and that the High Court upheld the conviction but substituted the sentence with a sentence of 15 years. The applicant did not appeal against the decision of this court to the Court of Appeal but opted to file the present application in which he seeks a revision of sentence pursuant to section 362 and 364 of the Criminal Procedure Code.
4. The enabling law for revision is **Article 165(6) and (7) of the Constitution** and **section 362** as read together with **section 364 of the Criminal Procedure Code**. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the same. Reproduced as follows:

“362. The High court may 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.

“364. (1)In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may

a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 354,357 and 358, and may enhance the sentence;

b) in the case of any other order than an order of acquittal, alter or reverse the order.

5. I must point out that section 362 and 364 are of no assistance to the applicant as this court rendered itself on the first appeal and hence this court is already functus officio. The only recourse for the applicant is to move to the Court of Appeal for redress if need be. Further, the applicant having preferred an appeal against the conviction and sentence of the lower court which was duly heard by this court he cannot again seek to go back in the manner envisaged. That recourse is not available to the applicant at this stage. He should move to the Court of Appeal.

6. If for arguments sake I were to consider the application, section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings

under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

7. I find no error or irregularity or illegality of principle when the court meted the mentioned sentence on the applicant when the same came on appeal. I do not see any error or irregularity in the sentence imposed upon the determination of the appeal. Hence, the applicant’s request under the above provision is misplaced.

8. In the result, it is my finding that the applicant’s application filed on 25.9.2020 lacks merit. The same is dismissed.

It is so ordered.

Dated and delivered at Machakos this 20th day of January, 2021.

D. K. Kemei

Judge