



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC. APPLICATION NO. 45 OF 2019

MOHAMED OMAR ADELLE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application before court was filed on 29th July, 2019. It is by way of a chamber summons seeking to have the application heard pursuant to Section 333(2) of the Criminal Procedure Code and Article 48 of the Constitution 2010. The Applicant seeks for reduction of sentence.
2. The background to this matter is that the Applicant was charged with the offence of rape contrary to Section 3(1) of the Sexual Offences Act No. 3 of 2006, Garissa Chief Magistrate's Court in Criminal Case No. 779 Of 2013 tried, convicted and sentenced to 10 years imprisonment. He appealed to this court in Criminal Appeal Case No. 105 of 2015, the appeal was heard and dismissed.
3. In his affidavit in support of the application the Applicant states that he is not challenging the conviction or sentence but seeking to have the jail term reduced so that the court may consider the period between 2011 to 2015 when he was in custody.
4. The State opposed the application urging that this court is now *functus officio* having dealt with the appeal. It is the state's case that any grievance by the applicant ought to go to the Court of Appeal. Further the sentence meted out is within the law.
5. **Article 48 of the Constitution of Kenya 2010** speak towards access to justice for all persons.
6. **Section 333(2) of Criminal Procedure Code** requires that where one is sentenced to imprisonment and prior to the sentence had been held in custody the sentence shall take account of the custody period.
7. Sentencing is discretionary so that one court cannot fault the sentencing of another unless in principle the same is too low or excessive.
8. The charge against the Applicant carries a sentence of not less than 10 years and a maximum of a life term.
9. The trial court may not have uttered the provision of **Section 333 (2)** of the Criminal Procedure Code in its judgement or the high court on appeal. Nonetheless I am of the view that the trial court was very lenient by giving the Applicant the least severe punishment available.
10. Secondly the Applicant failed to raise the issue in mitigation or even as a ground of appeal and having failed to do so he has moved this court as an afterthought.
11. The trial court would have within the circumstances of the case having had a first hand feel of the matter aptly considered the issue so would this court have done so if it was raised at appeal level when re-evaluating and analyzing the evidence, considering conviction and sentence.
12. Thirdly the Applicant having failed to raise the issue on appeal, the court does agree with the State that the court for now is *functus officio*. There has to be an end to litigation.
13. Nonetheless the court did consider the trial court's file, the judgement and the High Court judgement on appeal and has come to the conclusion that a reduction of the sentence any further will be a travesty of justice as the sentence meted out to the Applicant was more than lenient in the circumstances of the case.

Application is therefore dismissed.

DELIVERED AND SIGNED AT GARISSA THIS 25th DAY OF FEBRUARY, 2021.

.....

ALI ARONI

JUDGE