



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 178 OF 2019**

**ANTHONY KURIA WAMBUI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant herein has by application filed on 26th June 2019, sought for orders that, the Honourable court be pleased to make an order varying the sentence meted upon him, on medical ground and discount the time he spent in remand pursuant to; Section 333(2) of the Criminal Procedure Code and Section 35 thereof. Further, the court be pleased to make any other order it deems fit and just.
2. The application is based on the grounds thereto and the affidavit sworn by the applicant. He avers that, he was arrested and charged vide; criminal case number 4135 of 2012, at the Chief Magistrate's Court at Makadara. He was charged with the offence of defilement contrary to; section 8(1) as read with section 8(3) of the Sexual Offences Act No.3 of 2006 (herein "the Act). He was then convicted and sentenced to serve a period of twenty (20) years imprisonment, after spending three years in remand. That, the entire process was unreasonably delayed by the prosecution without cogent reasons.
3. That, in view of the aforesaid, he has decided to abandon his right of appeal to pave way for review and "negotiation" of sentence imposed. He deposes that, the Honourable court has the power to exercise its discretion to deal with the matter as prayed for.
4. He further avers in the certificate of urgency accompanying the chamber summons application that;
  - a) *He is the sole bread winner of his entire family;*
  - b) *He is first offender; and*
  - c) *He is languishing in custody since he was denied his liberty.*
5. He has annexed to the affidavit in support of the application, various academic certificates, as evidence of the training undertaken and the skills acquired, which he states will enable him be productive, if released from custody.
6. Be that as it may, on the 25<sup>th</sup> June 2019, the court directed that, the application be served for hearing. Subsequently, on the 24<sup>th</sup> May 2021, the applicant in oral address, told the court that, he appealed against the decision of the trial court but the appeal was dismissed, by the High Court.
7. He then moved to the Court of Appeal but is yet to have the appeal determined. However, he maintained that, though he has benefitted from remission, he still prays that the sentence be reviewed as

he is now fully rehabilitated.

8. In brief, the Respondent orally argued that, the applicant has already exhausted his right of appeal in the High Court and should be at the Court of Appeal, if he seeking for further recourse.

9. I have considered the application in the light of the materials placed before the court and in particular the record of the trial court. I find that, on 11th August 2012, the applicant was arrested and arraigned in court on 13th August 2012. The applicant was charged with the offence of; defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offence Act, on the main count and the offence of; committing an indecent act with a child contrary to section 11(1) thereof, in the alternative count.

10. He pleaded not guilty to the charges and the case was fully heard. The prosecution called a total of six witnesses. The defence case was supported by the evidence of the applicant alone. At the conclusion of the trial, the learned trial Magistrate delivered a ruling and found the applicant was guilty as charged on the main count and convicted. He was then sentenced to serve twenty (20) years imprisonment.

11. It is against this sentence that; the applicant avers the period he spent in custody was not considered. However, before I venture into the substance of the matter, I noted from the applicant's address that, he appealed against decision of the trial court but the appeal was dismissed. He then moved to the Court of Appeal.

12. However, no materials were placed before the court of the record of the appeal in the High Court of the Court of Appeal. The court could only establish from its records upon a search that the appeal in the High court was, criminal appeal number 76 of 2015 Even then the results thereof could not be ascertained.

13. Therefore, in the absence of the same, this court cannot make any decision on the issue before it. Further as the High Court has already dealt with the matter, then, the court is *functus officio*.

The applicant's recourse then lies with the Court of Appeal. In the given circumstances, the application is disallowed. It is so ordered.

**DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 28TH DAY OF JUNE, 2021.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

No appearance for the applicant

Applicant present in person

Ms Ndombi for the Respondent

Edwin Ombuna; the Court Assistant