



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS CRIMINAL DIVISION

CRIMINAL APPEAL 140 OF 2013

BENSON MAITHA MULI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. On 22nd June 2011, the applicant was arrested and was arraigned in court on 23rd June 2011, charged with the offences of; defilement contrary to; Section 8(1) as read together Section 8(3) of the Sexual Offences Act, No. 3 of 2006, in count one, and an alternative count of; committing an indecent act with a child contrary to Section 11(1) of the Act. The particulars of each count are as per the charge sheet.

2. He pleaded not guilty to both charges and the case proceeded to a full hearing. At the conclusion of the entire case, he was convicted on the main count, vide a judgment delivered on 6th June 2013, by Honourable H. L. Onyina, Acting Senior Principal Magistrate and sentenced to serve twenty (20) years imprisonment.

3. However, being aggrieved by both conviction and sentence, he filed an appeal herein. The appeal was duly heard by Hon. Justice L. Kimaru and a decision thereon rendered on; 9th September 2015, wherein the appeal on both conviction and sentence was dismissed in its entirety for lack of merit.

4. However, on 22nd February 2021, the applicant filed a certificate of urgency application on the grounds that:

- a) He has been languishing in prison for a long period of time;*
- b) He is a first offender, is remorseful and seeking the leniency of the court; and*
- c) He is the sole bread winner of his entire family.*

5. In addition, the applicant filed a chamber summons application seeking for orders as here below reproduced: -

- a) That, the Honourable court be pleased to make an order to hear and determine this application;*
- b) That, the Honourable court be pleased to make an order to treat it as a matter of urgency and award priority basis;*
- c) That, the Honourable Court be pleased to make an order to call upon the applicant from custody for hearing and orders;*

d) That, the Honourable court be pleased to order to be availed with subordinate court records for perusal and satisfaction pursuant to; section 362 of the CPC;

e) That, the Honourable court be pleased to make orders to invoke Section 333 (2) of the CPC, thus time spent in custody, be considered; and

f) That, the court be pleased to make an order to invoke Section 35 of the Penal Code, hence the entire time served since he was deprived his liberty.

6. The application is based on the grounds thereto and an affidavit sworn by the applicant. However, the application was opposed by the Respondent, through submissions dated; 26th March 2021.

However, it suffices to note that, the Respondent has not filed any formal response to the application. In the given case, the application is basically unopposed.

7. Be that as it were, I have considered the application in the light of the materials placed before the court and I find that, the applicant is seeking for review of the sentence herein. He argues that, when the trial court sentenced him, it did not consider the two (2) years he spent in custody during the trial. He relies on the provisions of; Section 333(2) of the Criminal Procedure Code.

8. However, before I deal with the merit of the application, it is imperative for the court to consider whether, it has jurisdiction to entertain this matter in the light of the decision of the High Court rendered by Hon. Justice Kimaru. In my considered opinion, when the High Court delivered its final decision in this matter on 9th September 2015, it became *functus officio*.

9. It is noteworthy that, the Supreme Court of Kenya expounding on the doctrine of; *functus officio* in; *Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR* cited with approval an excerpt from an article by *Daniel Malan Pretorius, in "The Origins of Functus Officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:*

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

10. The court also relied on the holding in the case of; *Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550*, to the effect that:

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court becomes functus officio, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

11. Therefore, the applicant's appeal having been dealt with in this High Court, the court is *functus officio* and has no jurisdiction to hear and determine this application and therefore, it cannot grant the orders sought.

12. Further, in that decision, the court has already pronounced itself on the issue of sentence. If the applicant had any issue on the same, he should have raised the issues therein. If this court makes any order that will vary the decision it had already given, it will be an illegal and unlawful order due to want of jurisdiction.

13. Therefore, if the applicant is aggrieved, he should seek recourse in the Court of Appeal. In that regard, I order the application be and is hereby struck out for want of jurisdiction and decline to grant the orders prayed.

Ordered accordingly.

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

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Ndombi for the Respondent.

No appearance for the applicant.

Applicant present in person.

Edwin Ombuna the Court Assistant