REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL MISC. APPLICATION NO. 80 OF 2019

MWENDWA MAKAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In the application before court undated and filed in court on 2nd September 2019 the applicant seeks for revision of his sentence pursuant to Section 333(2) of the Criminal Procedure Code.

2. In order to arrive at the determination of this application, it is important to consider the background of this matter leading to this current application.

3. The applicant was charged in Mwingi Court Criminal Case No. 707 of 2013 with the offence of defilement contrary to Section 8(1) (4) of the Sexual Offences Act No. 3 of 2006, with an alternative count of the offence of committing an indecent act with a child contrary to section 4(1) of the Sexual Offences Act No. 3 of 2006.

4. The applicant was convicted of the offence on the main count and sentenced to 15 years imprisonment.

5. Dissatisfied with the conviction and sentence the applicant preferred an appeal No. 65 of 2014 to this court. This court presided over by **Dulu J** found no merit in the appeal, upheld both conviction and sentence.

6. In his grounds of appeal the applicant did not raise the issue he has now raised based on Section 333(2) of the Criminal Procedure Code, neither did he raise the same at the trial. Needless to say, that the High Court in the appeal addressed both the issue of conviction & sentence.

7. In opposing the application, the State argued that there are laid down procedures of challenging decisions from one court to another. So that if one is aggrieved by the decision of the subordinate court, he would prefer a 1st appeal to the High Court and if dissatisfied further he would move on 2nd appeal to the Court of Appeal.

8. The argument of the State is the correct position so that if the applicant was dissatisfied with the High Court's decision, he ought to have moved the Court of Appeal. Needless to point out that the applicant did not raise the issue he now attempts to raise with this court on his appeal so that the application before court currently appears to be an afterthought.

9. There has to be an end to litigation. Convicts cannot keep rushing to court as and when they remember a forgotten point. Again, due process has to be followed. This court cannot sit on appeal over a decision of a court of concurrent jurisdiction. The applicant already moved this court on an Appeal.

10. The above was aptly pointed out by **Ngugi J** in **John Kagunda Kariuki v Republic [2019] eKLR** where he stated, in a case similar to the one before court:

> **"10. In the present case, the applicant's appeal has already been heard by the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.**
>
> **11. Consequently, I reach the conclusion that the applicant cannot, in the circumstances of this case benefit from the doctrine propounded in Muruatetu case. I therefore dismiss the application for re-sentencing as unmeritorious."**

11. The other issue that arises from this application is whether the court can use its supervisory powers to revise a sentence in the manner being sought by the applicant. This issue was considered by **Muchemi J** in **Sospeter Muchangi Ndwiga v Republic Criminal Revision Case No. 33 of 2019 (Embu)** where the said Judge had this to say in a case on all fours with the current case:

> **"8. The applicant was charged and convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act and sentenced to serve fifteen (15) years imprisonment. He subsequently appealed vide Embu High Court Criminal Appeal 49 of 2015 but the appeal was dismissed for lack of merit.**
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> **9. …….**
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> **10. …….**
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> **11. …….**
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> **12. …….**
>
> **13. The applicant having chosen to file an appeal which was heard and determined by a court of equal jurisdiction with this court, is barred by law to file this revision. Judgment in the appeal was delivered on 4/05/2016 dismissing his appeal. The appeal court dealt with the whole judgment including the legality and severity of the sentence. This court has no business dealing with the issues again for it would be tantamount to sitting on appeal on matters determined by a court of equal jurisdiction."**

12. Equally am persuaded by the sentiments of **Muchemi J,** that, in this instance the supervisory powers of the High Court cannot be invoked to revise the sentence already dealt with by a court of concurrent jurisdiction.

13. Convicts now appear to consistently attempt to reduce their sentences in failed appeals by means of revision. This is not only illegal but total abuse of court process.

14. Thus, the application is doomed to fail. It is dismissed.

DELIVERED AND SIGNED AT GARISSA THIS 24TH DAY OF JUNE, 2021.

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ALI-ARONI

JUDGE