



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO.17 OF 2019

MUTHOKA MWALYA.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. The appellant was charged and convicted with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. He was sentenced to 20 years imprisonment by the Senior Resident Magistrates Court at Tawa. He appealed to the High Court which appeal was unsuccessful. He has now applied to this court under Section 333(2) of the Criminal Procedure Code for revision of sentence.
2. There is no indication of any response in form of a replying affidavit or grounds of opposition by the Respondent to the application.
3. The application was disposed of by way of oral and written submissions. The applicant submitted that the sentence was lengthy and ought to be reduced. Mr. Cliff Machogu learned counsel for the respondent submitted that the application lacked merit as this court is functus officio.
4. The issue for determination is whether the court may grant the orders sought.
5. The application invokes the revisional powers of the High Court under Section 362 and 364 of the Criminal Procedure Code that empowers the High Court to revise the orders of subordinate courts.
6. A look at Section 8(1) as read with Section 8(3) of the Sexual Offences Act shows that the finding of the trial court is within the law hence there is no reason to interfere with the sentence of the trial court. In any case an appeal against the same has already been determined by this court when it dismissed it on 21.9.2015.
7. **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.”

8. I find no error or irregularity or illegality of principle when the court sentenced the appellant to 20 years and it is the considered opinion of this court that the request for reduction of sentence lacks merit.
9. Section 333 (2) of the Criminal Procedure Code that states:

“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

10. The applicant's claim for consideration under section 333(2) of the Criminal Procedure Code on the ground that he had been in custody prior to conviction might be legitimate but the fact that this court having determined the appeal on 21.9.2015 became functus officio and the only recourse is for the applicant to approach the Court of Appeal. This court cannot sit on appeal in a matter that it has determined and to do so will interfere with the program and hierarchy of the appeal system.

11. In the result the applicant's application filed on 17.6.2019 lacks merit. The same is dismissed.

It is so ordered.

Dated and delivered at Machakos this 30th day of January 2020.

D. K. Kemei

Judge