



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

REVISION NO. E003 OF 2020

GEDION NYAMARI MOSE.....APPLICANT

=VRS=

THE REPUBLIC.....RESPONDENT

{From original Conviction and Sentence of Hon. N. Kahara – RM in

the Original Keroka Senior Resident Magistrate’s Court Criminal Case No. 640 of 2016}

RULING

This file has been placed before me for revision vide a Notice of Motion filed herein on 6th August 2020. The applicant who is a convicted prisoner seeks what he describes as “**mitigation of sentence reduction only.**” In the body of the application he also states that he wishes to be present at the time of hearing of the application and that he has lodged the application as a pauper. The application is supported by an affidavit (undated) in which the applicant deposes that he was sentenced to ten (10) years imprisonment for the offence of rape; that he is not appealing against the conviction but is only asking for a review of the sentence. Attached to the application is a warrant of commitment showing that he was sentenced on 14th August 2017 in the Senior Resident Magistrate’s Court at Keroka.

I have considered the application carefully and I am of the view that firstly it is incompetent and not properly before this court and secondly that it has no merit. Upon conviction and sentence the accused person has a right of appeal. That right is enshrined in **Article 50 (2) (q)** of the **Constitution** which states: -

“(2) Every accused person has the right to a fair trial, which includes the right: -

(q) If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

That right is given expression in **Section 347 (1) (a)** of the **Criminal Procedure Code** which states: -

“347 (1) Save as in this part provided—

(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court;”

Convictions and sentences for sexual offences are therefore appealable as of right. It is clear from **Section 347 (1) (a)** of the **Criminal Procedure Code** that a person who is convicted of an offence and who is aggrieved is expected to exercise that right of appeal first to the High Court and then to the Court of Appeal as provided under the law. A person who fails to exercise that right cannot come to this court for revision of a sentence lawfully passed by the trial court. Indeed, **Section 364 (5) of the Criminal Procedure Code** expressly prohibits that and states: -

“(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

The applicant has attached a certificate to the effect that he has not filed any appeal in respect to his case. He is therefore by virtue of **Section 364 (5)** of the **Criminal Procedure Code** prevented from filing this application. For that reason, his application is not properly before this court and is incompetent.

Secondly, even were we to assume the power of revision vested in this court by **Section 362** of the **Criminal Procedure Code** is different

from the right to a review by a higher court donated to a convicted person by **Article 50 (2) (q)** of the **Constitution** and that the applicant seeks to exercise that right under **Article 50 (2) (q)** of the **Constitution**, I would still find the application incompetent as no material has been placed before me that would enable me to review the sentence. No proceedings or judgement have been attached to the application and the notice of motion is therefore unsupported.

Secondly an appellant does not pay any fees to appeal a conviction and sentence to the High Court so again that too is not a good ground. That he is a first offender is an issue of mitigation which I believe was considered by the trial court. In regard to the delay in filing an appeal, the applicant had opportunity to apply for leave to appeal out of time and as for the ground that he has reformed that ought to be taken into account by the Prison authorities when considering remission.

In the upshot the application is found to be not only incompetent but also unmerited and it is dismissed.

E. N. MAINA - J

18/12/2020