



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**REVISION NO. E004 OF 2020**

**JEREMIAH ONDARI NYAKAYE.....APPLICANT**

**=VRS=**

**THE REPUBLIC.....RESPONDENT**

**{From original Conviction and Sentence of Hon. C. W. Waswa – RM in the Original**

**Nyamira Chief Magistrate’s Court Sexual Offence No. 14 of 2019}**

**RULING**

This file has been placed before me for revision vide a Notice of Motion filed herein on 9<sup>th</sup> December 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 (also undated) in which the applicant deposes that he was sentenced to ten (10) years imprisonment for the offence of defilement; 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 6<sup>th</sup> May 2019 in the Chief Magistrate’s Court at Nyamira.

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)** 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 indicating he has not filed any appeal in respect to his case. He is therefore by dint of **Section 364 (5)** of the **Criminal Procedure Code** prevented from filing this application for revision. For that reason, his application is incompetent and not properly before this court.

Secondly, even were we to assume that 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** I would still find the application incompetent. This is because no material whatsoever has been placed before me that would enable me to consider the application. The proceedings and judgement were not attached to the application. It is also my finding that the reason advanced that after the conviction and sentence ***“I was totally confused and was unable to write an appeal in time as per the law (14 days) and that the applicant is now spiritually mentored and ready to lead a life of a role model”*** do not suffice to upset the sentence of the lower 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 unmerited and also incompetent and it is dismissed.

**E. N. MAINA - J**

**18/12/2020**