



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 91 OF 2015

MORRIS NZIOKI MBITHI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Appellant was charged and convicted with the offence of defilement contrary to 8(1) as read with Section 8(2) of the Sexual Offences Act. He was sentenced to life imprisonment by the Principal Magistrate's Court at Mavoko and appealed to this court which appeal was unsuccessful. He has now applied to this court under Section 362 and 364 of the Criminal Procedure Code for the trial in the lower court to start de novo.
2. The state opposed the application vide grounds of opposition and a replying affidavit where counsel found the application un-procedural and that the court is functus officio after it had heard the appeal and delivered its judgement on 31.7.2017.
3. The application was disposed of by way of oral and written submissions. The appellant submitted that his lawyer conducted the trial on his behalf and that he did not participate and thus sought that the trial in the lower court start afresh. Mr. Cliff Machogu, prosecution counsel, relied on the replying affidavit and the grounds of opposition.
4. The issue for determination is whether the court may grant the order sought.
5. I note that there is a judgement that was passed by this court on 29.5.2017. The word "judgment" is defined in **Jowitt's Dictionary of English Law 2 Ed. at p.1025** as follows:

"Judgment, a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding, or on one of the questions, if there are several. The judgment so pronounced is entered on the records of the court. The term "judgment" is also used to denote the reasons which the court gives for its decision: so that where the court consists of several judges, it may and often does happen that each judge gives a separate judgment or statement of his reasons, although there can be only one judgment of the court in the technical sense of the word."

6. The term functus officio is defined thus at p.840 of Jowitt's Dictionary of English Law 2nd Ed.:

"Functus officio (having discharged his duty), an expression applicable to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted".

7. The application is cited as being brought under 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. The sections provide as follows:

"362.The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

364.(1)In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may

(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 354,357 and 358, and may enhance the sentence;

(b) in the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence;

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction;

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

8. I find it rather strange that the appellant has popped up with this issue almost four years after the judgement of the trial court has been passed and almost two years after the judgement on appeal has been passed. Be that as it may, the appellant has assailed the fact that he was absent during the trial and only his advocate was present in the trial court. A perusal of the record indicates that on 20.8.14 the appellant was present when Pw1 testified and on 1.10.2014 when Pw2 to Pw5 testified, the appellant was present. Therefore it is not correct to state that he was absent during trial as alleged and hence the prayer to start trial afresh must fail.

9. 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 and I am unable to find any illegality in the proceedings of the trial court to warrant a reversal of the decision of the trial court. In any event the appellant had fully participated in the trial throughout and later lodged an appeal before this court which was dismissed. This court is already functus officio and the only remedy available to the appellant is to lodge an appeal to the Court of Appeal.

10. The instant matter was heard on appeal and the court made its findings in that regard meaning that the appellant is free to exercise his right of appeal if still aggrieved with the finding of this court. Because of the doctrine of functus officio, this court cannot go and scrutinize the findings of the trial court again as intimated by the appellant as this court cannot sit on appeal on a matter that it had heard and finalized.

11. In the result, I find the Appellant's undated application filed on 03/05/2019 lacks merit and is dismissed.

It is so ordered.

Ruling read, Signed and delivered at Machakos this 30th day of October, 2019.

D. K. Kemei

Judge