



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 5 OF 2019

SHADRACK MUTIE NDAKA.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. The appellant was charged and convicted with the offence of sexual assault contrary to 5(1) as read with Section 5(2) of the Sexual Offences Act. He was sentenced to 10 years imprisonment by the Principal Magistrates Court at Kithimani and appealed to this court which appeal was unsuccessful. He has now applied to this court under Section 362 and 364 (b) of the Criminal Procedure Code for reduction of sentence.

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 heard the appeal and delivered its judgement on 29.5.2017.

3. The application was disposed of by way of oral and written submissions. The appellant submitted that his application should be allowed and that he was arrested on 12.5.2012 and convicted in October, 2013. The applicant submitted that he was in remand for two weeks and was on bond until 2.10.2013 and thus he sought a review of sentence. The applicant submitted in his written submissions that he attended upholstery, tailoring and painting and decoration and thus sought an opportunity for a reduction of sentence to the time served. 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 orders sought.

5. I note that there is a judgement that was passed by this court on 29.5.2017 and 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 at p.840 of Jowitt's Dictionary of English Law 2 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 principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were observed in the case of **OGOLLA & S/O OWUOR Vs. REPUBLIC [1954] EACA 270** where the court stated:

***"The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in JAMES Vs. REPUBLIC [1950] EACA page 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."***

8. A look at Section 5(1) as read with Section 5(2) 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.

9. Similarly, 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.”**

10. I find no error or irregularity or illegality of principle when the court sentenced the appellant to 10 years and it is the considered opinion of this court that the application lacks merit and the same is dismissed. Further it is noted that the Applicant had been released on bond by the trial court and was remanded upon his conviction and thus the claim for review of sentence is not meritorious. This court had already determined the applicant’s appeal and as such is functus officio. The only avenue for the applicant is by lodging an appeal to the Court of Appeal.

It is so ordered.

Dated and delivered at **Machakos** this **28<sup>th</sup>** day of **October, 2019**.

**D. K. Kemei**

**Judge**