



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CRIMINAL APPL. NO. 97 OF 2019

THOMAS KIOKO WAMBUA.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. The appellant was charged and convicted with the offence of incest contrary to section 20(1) of the Sexual Offences Act. He was sentenced to life imprisonment by the Chief Magistrates Court at Machakos and appealed to this court which appeal was unsuccessful. He has now applied to this court under Section 216 and 329 of the Criminal Procedure Code for reduction of sentence.

2. The state has not filed any response to the application.

3. The application was disposed of by way of oral and written submissions. The appellant submitted that he ought to be resentenced and that the time spent in prison should be considered. Mr. Cliff Machogu, prosecution counsel submitted that the court is functus officio after it heard the appeal and delivered its judgement hence the application lacks merit.

4. The issue for determination is whether the court may grant the orders sought.

5. The record bears witness that there was judgement that was passed by this court on 17th September, 2018. 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. A look at Section 20(1) of the Sexual Offences Act shows that the finding of the trial court with regard to sentence and this court on appeal is within the law hence there is no reason to interfere with the

sentence of the trial court. This court having made its final determination cannot sit on appeal and rehear this matter. The only option left for the applicant is to lodge an appeal to the court of appeal.

8. 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.”

9. I find no error or irregularity or illegality of principle when the court maintained the sentence meted on the appellant of life imprisonment and it is the considered opinion of the court that this application lacks merit and the same is dismissed.

It is so ordered.

Dated and delivered at **Machakos** this **28th** day of **November, 2019**.

D. K. Kemei

Judge