REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL REVISION NO. 16 OF 2019

BONIFACE MUSAU MUTUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was charged and convicted with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. He was sentenced to 30 years imprisonment by the Senior Principal Magistrates Court at Kangundo and appealed to this court which appeal was unsuccessful as he was sentenced to 20 years imprisonment from the date of conviction in the trial court. He has now applied to this court under Section 333(2) of the Criminal Procedure Code for review of sentence. On record are supplementary grounds of appeal against sentence that were filed by the applicant without requisite leave of court.

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

3. The application was disposed of by way of written submissions. The appellant submitted that he be considered for remission and that the time served in remand be considered by this court. He submitted that the 20 years imprisonment that was mandatory is unconstitutional. Reliance was placed on the case of **Jared Koita Injiri v R (2019) eKLR**. Mr. Cliff Machogu, prosecution counsel submitted that he was not averse to the time spent in custody being taken into account.

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

5. The applicant seeks for a review of sentence and at the same time is appealing against the sentence. The record bears witness that there was judgement that was passed by this court on 31.1.2017. 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 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 8(1) as read with Section 8(3) 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. The applicant appealed against conviction and sentence and thus this court having made its final determination on the same cannot sit on appeal and rehear this matter.

8. Similarly, **Section 382 of the Criminal Procedure Code Act 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 applicant of 20 years imprisonment and it is the considered opinion of the court that this application lacks merit and the same is dismissed. I am alive to the finding in **Jared Koita Injiri v R (2019) eKLR** where the appellant's life imprisonment was reduced to a 30 year sentence and add that the issue of the legality of the sentence of 20 years is one that could be addressed on appeal and not in revision proceedings.

10. With regard to the request that his time in custody should be considered, Sections 333 (2) of the Criminal Procedure Code that states:

"(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

11. Having had due regard to Section 333 (2) of the Criminal Procedure Code I find that the request by the applicant has merit. Accordingly, this court finds that the computation of twenty (20) years that the applicant was sentenced be inclusive of the period he was in custody. I note that he was arrested on 18.8.2013 and there was no indication that the applicant was out on bond. Hence the application for review succeeds to the extent that the sentence of 20 years is to commence from the date of arrest namely 18.8.2013.

It is so ordered.

Dated and delivered at Machakos this 18th day of December, 2019.

D. K. Kemei

Judge