



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION No. 50 of 2018.**

**BOAZ MATARA MAKOKHA.....APPLICANT.**

**VERSUS**

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

**RULING.**

1. Boaz Matara Makokha, hereafter the Applicant, brought the present application pursuant to Sections 137 I(2e), 362 and 364 of the Criminal Procedure Code. He sought a revision of the sentence. His prayer is that the court takes into account the period spent in remand from 9<sup>th</sup> October, 2008 to 10<sup>th</sup> December, 2009. The application is supported by an affidavit, filed 14<sup>th</sup> March, 2018.

2. The application was canvassed before me on 21<sup>st</sup> May, 2018 with Ms. Sigei acting for the State while the Applicant representing himself. In addition, the Applicant informed the court that he had become literate while in prison and also learnt tailoring and theology. He produced copies of his Grade II and III certificates for tailoring. That whilst he had been in custody for the last 9 years he could be a great help to society.

3. Ms. Sigei opposed the application since the Applicant had already appealed in the High Court and in the judgment of learned Riechi, J the court had already considered the issue of the sentence. As such, a review of the sentence was not tenable

**DETERMINATION.**

4. The court has considered the respective submissions and the record in Kibera Chief Magistrate's Criminal Case No. 3017 of 2008 and Nairobi High Court Appeal No. 574 of 2009. The Applicant was charged under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. However, in making her judgment the trial court convicted the Appellant under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. This action meant that the Applicant was consequently sentenced to serve a sentence of 20 years. This error was unfortunately not corrected by the High Court. The judge in his judgment upheld the Applicant's conviction stating that:

***“...I am satisfied that the prosecution proved the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and appellant was properly convicted and sentenced.”***

The court did not therefore confer the sentence mandated for a conviction under Section 8(2) of the Sexual Offences Act, life imprisonment.

5. Although in my view the legality of the sentence is an issue, this court lacks the jurisdiction to entertain the instant application on grounds that, the issue of sentence was dealt with by a court of concurrent jurisdiction. The Applicant cannot have his cake and eat it. He opted to go the appeal way before the High Court. And therefore, the same court cannot revise the sentence that is already dealt with. Accordingly, the application is dismissed with no orders as to costs.

**DATED and DELIVERED this 31<sup>st</sup> day of May, 2018.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Applicant in person.

2. Miss Sigei for the Respondent.