

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CRIMINAL APPLICATION NO. 5 OF 2016

M K.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. Through his Notice of Motion application filed on 11th March, 2016, the Applicant, M K prays that he be put on probation for the remainder of his prison term. His application is supported by an affidavit sworn on 20th January, 2016 in which he avers that he was jailed for 20 years by the trial Magistrate and he has already served the greater part of his sentence. Further, that he was a first offender and he prays for mercy. He also avers that he was arrested when he was 17 years old. It is his averment that he has acquired skills in prison and he would apply the skills under the supervision of a probation officer.

2. Mr. Fedha for the State opposed the application stating that the matter has been heard by a Court of concurrent jurisdiction and the application is therefore bad in law. Further, that the Sexual Offences Act does not provide for non-custodial sentences.

3. From the outset it must be pointed out that the application is attended by paucity of information. The Applicant does not reveal the name of the magistrate and the court that convicted him. He does not disclose the case file number and neither does he disclose the offence for which he was convicted. One is tempted to conclude that the Applicant's non-disclosure of material facts was strategic as would be shown shortly.

4. On 20th July, 2017 when the Applicant argued his application, Malindi High Court Criminal Appeal No. 73 of 2009 was also being mentioned so that the Deputy Registrar could avail the lower Court's records in respect of the Appellant therein one M K. It turns out that the M K in that appeal is the Applicant herein. The Deputy Registrar managed to retrieve records showing that the Applicant herein was also the appellant in Malindi High Court Criminal Appeal No. 148 of 2008. The judgment in that appeal was delivered on 29th July, 2010 by H. A. Omondi, J. The outcome was the rejection of the Applicant's appeal on conviction. The sentence was, however, reduced from the 21 years imprisonment imposed by the trial Magistrate to 20 years imprisonment.

5. The judgment and the record in Malindi High Court Criminal Appeal No. 148 of 2008 shows that the Applicant had been convicted and sentenced on his own plea of guilty in Lamu Senior Resident Magistrate's Court Criminal Case No. 371 of 2008 for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act, 2006.

6. In essence, the 20 years imprisonment allegedly imposed on the Applicant by a Magistrate's Court was actually a sentence imposed by this Court. The Applicant is therefore asking this Court to set aside a sentence imposed by a Court of concurrent jurisdiction. It is clear from his application that he is not seeking a review of the judgement of this Court. The attempt by the Applicant to review a sentence imposed by this Court in the manner he has done is not allowed by the law.

7. Mr. Fedha for the Respondent is also correct that the Sexual Offences Act, 2006 has no room for non-

custodial sentences. This Court would therefore be acting contrary to the law were it to impose a sentence other than that provided by Section 8 (3) of the Sexual Offences Act. Of course if the Applicant was indeed a child at the time of the alleged offence he ought to have been given punishment appropriate to children as required by the Constitution and the laws of the land. However, no evidence was adduced during his appeal to show that he committed the offence while under the age of 18 years. He has also not placed any evidence before this Court to support his claim that he was 17 years when he committed the offence. His already demonstrated lack of candour can only lead to the conclusion that his allegation that he was a child at the time of his conviction is not true.

8. For the reasons stated above, I find the Applicant's application to be without merit. The same is therefore dismissed.

Dated, signed and delivered at Malindi this 28th day of July, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT