



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION NO. 83 OF 2015

BERNARD OMBUNA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

Bernard Ombuna, the Applicant herein, was charged with, and convicted of the offence of defilement contrary to section (1) of the Sexual Offences Act, after a trial held in Mavoko Principal Magistrate's Criminal Case No 160 of 2013. He was sentenced to 10 years imprisonment. The Applicant then appealed to the Machakos High Court, and after hearing his appeal, Jaden J. substituted the Applicant's conviction for attempted defilement to that of indecent assault, and upheld the sentence of 10 years imprisonment in a judgment delivered on 18th March 2015.

The Applicant subsequently made an application to this Court to appeal out of time to the Court of Appeal, which leave was granted on 28th September 2015. He filed his Notice of Appeal to the Court of Appeal on 25th November 2015. On 25th February 2016, the Applicant then filed a Chamber Summons in this Court under certificate of urgency seeking a review of the 10-year imprisonment term imposed on him to time served. The Applicant's main grounds and arguments in the submissions he availed to the Court dated 27th September 2016, were that the alternative charge that the judge varied the lower court's decision with was equally defective as the particulars of the offence reflected actual defilement; that he was a first offender; was deeply remorseful; was the breadwinner for his family prior to his conviction; and that he was reformed and rehabilitated. He also availed to the Court various certificates of the course of rehabilitation he has undertaken while in custody.

The learned prosecution counsel, Ms Rita Rono submitted during the hearing on 25th July 2016 that this Court has no jurisdiction in this matter as the Applicant had filed an appeal against the decision of the lower Court, which was heard and determined, and had already filed a Notice of Appeal to the Court of Appeal.

I have considered the Applicant's application and response by the prosecution. The applicable law in this application is section 362 of the Criminal Procedure Code which gives revisionary powers to this Court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Section 364 of the Criminal Procedure Code provides for the powers of the High Court on revision as follows in this regard:

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

With respect to the present application, I find that the issue before this Court is whether **this Court can exercise supervisory** jurisdiction of review when an appeal against the judgment of the subordinate Court in question has been heard and determined. The answer to this issue is in the negative for two reasons. Firstly, the jurisdiction given by section 362 and 364 of the Criminal Procedure Code is only exercisable by this Court as against an order or proceedings before a subordinate Court. In the present application the Applicant is challenging not only the findings of the subordinate Court, but also the findings of this Court, made on an appeal from a subordinate Court’s judgment. The provisions for review in section 362 and 364 of the Criminal Procedure Code are therefore inapplicable, as they do not donate power to review the findings of a court of concurrent jurisdiction.

Secondly and more fundamentally, this Court cannot entertain revision of a decision made by the High Court in its supervisory and appellate jurisdiction, which can only be appealable to the Court of Appeal, as was held by the Court of Appeal in Muya vs Republic (2004) (1) KLR 515. The Court notes that the Applicant has filed a Notice of Appeal to the Court of Appeal, which he should pursue as it is the only allowable legal avenue available to him in the circumstances.

The application for revision therefore fails for the foregoing reasons and is accordingly dismissed.

Orders accordingly.

DATED AT MACHAKOS THIS 21ST NOVEMBER 2016.

P. NYAMWEYA

JUDGE