



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL REVISION NO.227 OF 2019

CHARLES WAMBUA KIVUVO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant filed chamber summons application on 7th May 2019 seeking for orders that; the Court be pleased to; vary the sentence meted upon him and discount the time spent in remand, pursuant to; section 333(2) of the Criminal Procedure Code (herein “the Code”) and that, the Court make any other order which it deems fit and just.
2. The Application is supported by an affidavit sworn by the Applicant in which he deposes that, he “concur[s] with the sentence meted out, however, it is harsh and punitive. He avers that, he has been pursuing justice for many years and should be granted freedom in the interest of justice
3. Further, he is a father of young school going children who depend on him, as a sole bread winner and so are his elderly parents. He is a first offender, remorseful and of good character. In addition, he has undertaken technical courses, which he will depend on if the application is allowed and he is released.
4. The application was first presented before the court on; 7th May 2019, and the court ordered that, the same be served for inter-parties hearing. By the time the application was heard, on 3rd May 2021, the Respondent had not filed any formal response to it.
5. However, the Respondent opposed the application by orally submitting that, the Applicant had his day in Court before Lady Justice G Ngenye, when he appealed against both conviction and sentence and a final decision made. Therefore, the court is *functus officio*. That, the Applicant should move to the Court of Appeal.
6. However, for ease of understanding of this matter, some brief background facts will be helpful. The Applicant was arrested on 24th February 2009 and arraigned in Court on 3rd March 2009; vide; Criminal Case No. 912 of 2009, at Chief Magistrate’s Court, at Makadara, charged with the offence of; defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, No. 3 2006, in count and alternative offence of act with a child to section 11(1) of the Sexual Offences Act No. 3 of 2006.
7. He pleaded not guilty to both counts. The case proceeded to full hearing with the prosecution calling a total of seven (7) witnesses and the Applicant defending himself without calling any witness. At the conclusion of the case, the trial Court delivered a judgment dated 26th July 2012, whereby the applicant was found guilty on the main count and convicted accordingly.
8. Subsequently, he tendered his mitigation to the effect that, he has children and wife and a sole bread winner of the family. The prosecution treated him as a first offender. After considering the mitigation, and the records, the trial Court noted that, the offence was serious and under the Sexual Offences Act No. 3 of 2006, carries with a minimum sentence twenty (20) years imprisonment, and sentenced him to serve twenty (20) years imprisonment. He was notified of his right of appeal within 14 days.
9. Being aggrieved with the decision, it does appear from ‘results of appeal’ on record that, the Applicant filed an Appeal against conviction and sentence; vide High Court Criminal Appeal No. 317 of 2012. The results availed indicate that, the Appeal was dismissed vide a judgment delivered on 5th November 2015.
10. The Applicant subsequently filed this application. However, it suffices to note that, when he moved the Court in this application, he did not disclose in the supporting affidavit that, he had filed an Appeal which had been dismissed four years earlier to the filing of this application. It is the Respondent that brought to the knowledge of the court.

11. By virtue of the fact that, the Applicant did disclose the dismissal of the Appeal, he has thus approached the Court with unclean hands, and cannot therefore tap on the “discretion of the Court”. For indeed, he who goes to equity must go with clean hands.

12. However, even if the Application is considered on merit, I find that, it is on record that, when the Applicant took a plea of not guilty, he was remanded at the Police station for three (3) days to undergo medical examination. Subsequently, he was given bond of Kshs 300,000 with a surety of similar amount, and an alternative cash bail of Kshs 200,000. He was released on bond by 7th April 2009.

13. The case was heard while he was on bond, until the surety withdrew following issuance of warrant of arrest on 11th July 2011 and he was remanded on 15th September 2009. On 15th December 2011, he sought for the bond reduction and it was reduced to Kshs 100,000 with one surety of the like amount. Therefore, any period he was in custody, resulted from his own conduct of failure to attend and resultant withdrawal of the surety. He cannot therefore seek to benefit from his own self-created incarceration.

14. Further, the arguments advanced by the Applicant now on revision of sentence in the light of provisions of; Section 333(2) of the Code should have been made at the time of hearing of the Appeal. The Applicant cannot be allowed to litigate in “piece meals” and in disregard of the principle of “finality”; that certain disputes must achieve a resolution from which no further appeal may be taken, and from which no collateral proceedings may be permitted to disturb that resolution.

15. Finally, at the time he was sentenced, the Court that meted out the sentence was bound by the minimum sentence provided by the law as at the given time. The Appellant Court did not find any reason to interfere with the sentence meted. This Court being a court of concurrent jurisdiction, it has no Appellant powers over its decision.

16. I therefore concur with the submission of the Respondent, that the court is thus; *functus officio*. The upshot of the aforesaid is that, the application has no merit and as a matter of fact, the Court is *functus officio*, therefore, the same is dismissed for lack of merit and/or struck out for want of jurisdiction.

17. It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 12TH DAY OF MAY. 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Applicant; present in person

Ms Chege for the Respondent

Edwin Ombuna - Court Assistant