THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CRIMINAL MISCELLANEOUS APPL. NO. 48 OF 2019

GEORGE KIOKO NZIOKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein has approached this court seeking a review of sentence imposed upon him and urges the court to consider the period spent in remand custody prior to conviction and sentence as provided for under section 333(2) of the Criminal Procedure Code.

2. The Applicant's case is that he had been charged with an offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 vide Machakos Chief Magistrate's court criminal case No. 21 of 2009 wherein he was convicted and sentenced to serve twenty-five years' imprisonment which was later reviewed to twenty years' imprisonment by the High Court in **Machakos HCRA No. 17 of 2012**. It is also the Applicant's case that he lodged an appeal to the Court of Appeal vide **Appeal No. 133 of 2015** but which was dismissed and the High Court's judgement in the appeal upheld.

3. There was no response by the Respondent.

4. The Applicant opted to canvass the application by way of oral submissions while the Respondent filed written submissions.

5. The Applicant submitted that he had been arrested on 5/7/2009 and remained in remand custody until his conviction by the trial court on 26/10/2011 and which amounted to a period of two years three months and twenty one days. He now seeks the same be factored into the sentence. He maintained that all that time he did not manage to come out on bond. The Applicant submitted that he has since been reformed while in prison and has attained several skills in carpentry/joinery as well as tailoring. He urged the court to consider the decision of Francis Karioko Muruatetu by the Supreme Court to interfere with the sentence.

6. Mr Mwongera for the Respondent filed submissions dated 2/2/2021. It was submitted that this court is already functus officio as the matter had already been handled by the Court of Appeal and hence this court is barred from handling the matter. Reliance was placed in the case of **Telkom Kenya Limited Vs. John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] Eklr** where the Court of Appeal held that a court is functus when it has performed all its duties in a particular case. Learned counsel urged the court to dismiss the Applicant's application.

7. I have given due consideration to the Applicant's application and the submissions tendered. It is not in doubt that the Applicant was convicted and sentenced by the trial court and that his appeal to this court partly succeeded as the sentence was reviewed downwards from twenty-five years to twenty years' imprisonment. It is also not in doubt that the Applicant lodged an appeal to the Court of Appeal vide No. 133 of 2015 which was subsequently dismissed on 24/4/2020. The only issue I raise for determination is whether the application has merit.

8. The Applicant's gravamen is that the period spent in custody was not considered during sentencing. Indeed, section 333(2) of the Criminal Procedure Code provides that the period spent in custody by a convict ought to be factored during sentencing. The same provides as follows:

> ***"Subject to the provisions of section 38 of the Penal Code 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.***
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> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been in custody, the sentence shall take account of the period spent in custody.''***

9. I have perused the judgement of the Court of Appeal page 19 thereof wherein the Applicant's complaint on the issue of application of section 333(2) of the Criminal Procedure Code was addressed by the said court. The Applicant having had his appeal determined by this court prompting him to go to the Court of Appeal, then it follows that this court does not now have jurisdiction to entertain the Applicant again due to the principle of hierarchy of courts provided by Articles 164(3) (a) as read with Article 165 (6) of the constitution. The constitutional architecture especially with regard to the courts is such that each court is assigned its mandate in its functions. For the purpose of this case I will illustrate by touching on both the High Court and Court of Appeal. Starting with the Court of Appeal, the same has jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of parliament while the High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial functions, but not over superior courts. Due to the aforesaid hierarchy, it is clear that the Applicant who had proceeded with his appeal to the Court of Appeal cannot now come back to this court seeking review of sentence when already the court is functus officio.

10. From the foregoing, the doctrine of functus officio must apply to the Applicant's case. The Court of Appeal in the case of **Telkom Kenya Limited Vs John Ochanda (suing on his own behalf and on behalf of 996 former Employees of Telkom Kenya Limited) [2014] eKLR** held as follows:

> ***"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the later part of the 19th Century. In the Canadian case of Chandler Vs. Alberta Association of Architects [1989] 2 S.C.R 848, Sopinka J. traced the origins of the doctrine as follows (at p.860);***
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> ***While this court is vested with adjudicative powers, once a court becomes functus officio, the only orders it can grant are review orders which are an exception to the functus officio doctrine. This was aptly summarized in the case of Jersey Evening Post Ltd Vs. Al Thani [2002] JLR 542 at page 550 which was cited and applied by the Supreme Court in Raila Odinga & 2 Others Vs. Independent Electoral and Boundaries Commission & 3 Others [2013] that:***
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> ***"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgement or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."***

11. Being guided by the above authority, I find that the Applicant who is seeking review of sentence must channel his grievance elsewhere namely before the Court of Appeal since this court is already functus officio. Suffice here to add that the said court while determining his appeal did address itself on the Applicant's complaint regarding the non-consideration of the period spent in remand custody by the trial court during sentencing. It would seem to me that the Applicant is engaging in lottery by approaching this court yet it had already dealt with his appeal instead of approaching the Court of Appeal where he had been previously.

12. In light of the foregoing observations, it is my finding that the Applicant's application for review of sentence filed on 15/2/2019 lacks merit. The same is dismissed.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF JUNE, 2021.

D. K. KEMEI

JUDGE