



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. KEMEI-J

MISC. CRIMINAL APPLICATION NO. E041 OF 2020

NYAMAI MUSYOKA.....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 custody prior to conviction and sentence as provided for under section 333(2) of the Criminal Procedure Code. The applicant also pleads with the court to consider the fact that he has been in prison for a long period and has earned several certificates and hence the sentence should be revised and that he be released from prison custody.

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 and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act vide Kitui Principal Magistrates Court criminal case number 641 of 2009 wherein he was convicted and sentenced twenty years' imprisonment. He was aggrieved by the said conviction and sentence and duly lodged an appeal at **Machakos High Court vide HCCRA No. 213 of 2009**. The High Court vide its judgement dated 28/9/2012 dismissed the appeal and upheld the sentence of twenty years' imprisonment on the main charge of defilement. It is also the applicant's case that he lodged an appeal at the Court of Appeal vide Criminal Appeal Number 155 of 2013. The Court of Appeal subsequently dismissed the said appeal vide its judgement dated 10/10/2014. He now seeks for review of the sentence.

3. The application was disposed of by way of oral submissions. The Applicant submitted that his application should be allowed and that he was arrested on 19/05/2009 and convicted in 24/11/2009. The Applicant submitted that he was in remand for approximately Six (6) months and thus he sought a review of sentence. The Applicant submitted in his oral submissions that he has shown propensity to reform hence he sees no logic in waiting until he is seriously sick so as to be considered for release. He sought for a reduction of sentence to the time served.

4. In opposing the Application, Miss Njeru on behalf of the Respondent submitted that this court is *functus officio* as the Applicant was duly tried and sentenced and which sentence was re-affirmed by both the High Court and Court of Appeal.

5. I have given due consideration to the applicant's application and the oral submissions. It is not in dispute that this court heard and determined the applicant's appeal vide **Machakos HCCRA No. 213 of 2009** where it rendered its judgement on 28/09/2012. It is also not in dispute that the applicant lodged an appeal to the **Court of Appeal vide appeal number 155 of 2013** wherein judgement was delivered on the 10/10/2014. It is not in dispute that both appeals were dismissed and that the applicant's conviction and sentence of twenty years was upheld. I find the issue for determination is whether the application has merit.

6. 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 sentence imposed ought to take into account the period a person had been in custody. The applicant having had his appeal determined by this court prompting him to move 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 section 165(6) of the constitution. The constitutional architecture especially with regard to courts is such that each court is assigned its mandate in its functions. For instance, the Court of Appeal 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 other person or body or authority exercising a judicial or quasi-judicial functions but not over superior courts. As a result of the said 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 this court is *functus officio*. The term *functus officio* is defined at **p.840 of Jowitt's Dictionary of English Law 2 Ed.:**

"*Functus officio* (having discharged his duty), an expression applicable to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted".

7. From the foregoing, the doctrine of functus officio must apply to the applicant's case since this court duly heard and determined his appeal prompting him to move to the Court of Appeal. 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;

While the 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 850 which was cited and applied by the Supreme Court in Raila Odinga & 2 Others Vs. Independent and Electoral Boundaries Commission & 3 Others [2013] that;

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”.

8. Being guided by the above authority, I find that the Applicant who is seeking review of sentence must channel his grievance elsewhere namely the Court of Appeal since this court is already functus officio.

9. In light of the foregoing observations, it is my finding that the Applicant's application for review of sentence filed on 17/11/2020 lacks merit. The same is dismissed.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 10TH DAY OF JUNE, 2021.

D. K. Kemei

Judge