



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL REVISION NO. E063 OF 2021

PETER CHARAGU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Background

1. The Applicant was charged under **Section 8 (1) and 8 (4)** of the **Sexual Offences Act** for defilement of a minor with the particulars being that he intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of RA a girl aged 16 years and in the alternative committed an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act**. The Applicant was convicted under **Section 8 (1) and 8(4)** of the **Sexual Offences Act** and acquitted in the alternative charge on the 25/10/2013. He was sentenced to serve fifteen (15) years imprisonment.

2. Dissatisfied with the trial court's judgment he appealed against both the conviction and sentence vide **Naivasha High Court Criminal Appeal No. 7 of 2018**. In a judgment delivered on 7th March, 2019, the appeal was dismissed in its entirety Hon. by Mwongo, J.

3. The Applicant did not further appeal to the Court of Appeal. Instead, he has approached this court vide a Chamber Summons application filed on 8th March, 2021 in which he prays to this court to review his sentence by either putting him on probation or setting him at liberty altogether.

4. Before I render myself, let me state that this application is in the nature of a revision of sentence. I therefore called for the original trial court's file to verse myself with the original record. I have since confirmed that indeed the Applicant was convicted for the offence of defilement under Section 8(1) as read with Section 8(4) of the Sexual Offences Act. He was sentenced to serve 15 years imprisonment as provided by the law. Inside the trial court record is a judgment that was delivered by the High Court dismissing the first appeal.

5. In what he referred to as a 'Memorandum of Sentence Review' filed on 8th March, 2021 the Applicant cited, *inter alia*, the following grounds that would warrant the review of his sentence:

- i. That he is not appealing against conviction and sentence but applying for review of sentence.
- ii. That he has no pending appeal.
- iii. That he is a first offender.
- iv. That he is completely remorseful of his offence.
- v. That he is now reformed and a law abiding citizen.
- vi. That he is from a poor family background and sole breadwinner of his family.
- vii. That the one year and four months served in remand custody be considered in this application.

6. The application was canvassed by way of oral submissions. The Applicant who was in person submitted that he did not prefer an appeal to the Court of Appeal and all that he requests the Court to do is to consider the period that he was in remand to constitute part of his sentence. He added that he had reformed and would not engage himself in a similar offence. Furthermore, he had trained in skills that have empowered him against committing offences.

7. Learned State Counsel, Miss Maingi submitted that this court had no powers to hear the application as the Applicant had already been heard on the first appeal by the High Court. She submitted that the only recourse that the Applicant had was to appeal to the Court of Appeal.

Determination.

8. The only issue for determination herein is whether the Application is merited. To begin with, the jurisdiction of this court is provided for under **Article 165** of the **Constitution** and includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretive jurisdiction; any other jurisdiction, original or appellate conferred on it by any legislation; and supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. The said Article does not clothe this court with a jurisdiction to review a decision of a court of concurrent jurisdiction. Further, the revisionary jurisdiction of this court under **Sections 362 and 364** of the **Criminal Procedure Code** is only limited to proceedings from subordinate courts.

9. The sentence which the Applicant now seeks to review was imposed by the trial court and further reconsidered at appellate level by the High Court which is a court of concurrent jurisdiction with this Court. For emphasis purposes, it is important that the Applicant understands that on appeal, the High Court considers the merit of the conviction and the sentence. It was therefore at that level that he would have urged that Court to relook into the sentence.

10. That means that this court cannot therefore review the said sentence as doing so would amount to sitting on appeal against the decision of a court of concurrent jurisdiction which is unacceptable under the law. Clearly, this Court became *functus officio* the moment Hon. Mwongo, J. pronounced himself on the appeal against the conviction and the sentence. I thus entirely agree with the learned State Counsel that the only recourse that the Applicant has at this point is to move the Court of Appeal and appeal against the sentence which is clothed with the jurisdiction to hear appeals from the High Court under **Article 164 (3)** of the **Constitution** and **Section 379 (1)** of the **Criminal Procedure Code**.

11. I find persuasion in the case of ***Joseph Maburu alias Ayub v Republic [2019] eKLR*** where the court stated that:-

“Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black’s Law Dictionary Tenth (10th) Edition describes defines sentence as:

“The judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.”

Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”

12. In the result, I find this application unmerited and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIVASHA THIS 2ND DECEMBER, 2021.

G.W.NGENYE-MACHARIA

JUDGE

IN THE PRESENCE OF:

1. APPLICANT IN PERSON.

2. MISS MAINGI FOR THE RESPONDENT.