



**Siro v Republic (Criminal Revision E144 of 2021)
[2021] KEHC 348 (KLR) (14 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E144 OF 2021**

MW MUIGAI, J

DECEMBER 14, 2021

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL
FREEDOM AND RIGHTS UNDER ARTICLE 22(1),(3),23(1), 27(1),28,47(1)
AND 165(3) (D)(11) OF THE CONSTITUTION OF KENYA,2010**

AND

IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE, CAP.75

AND

IN THE MATTER OF THE SUPREME COURT DECISION IN PETITION NO.15 OF 2015

AND

**IN THE MATTER OF CRIMINAL APPEAL NO.57 OF 2016 AT MACHAKOS HIGH
COURT FROM ORIGINAL CASE FILE NO.32 OF 2015 AT MAVOKO LAW COURTS**

BETWEEN

EDWARD MOKAYA SIRO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

TRIAL COURT JUDGMENT

1. The Applicant was charged before the Principal Magistrate's Court at Mavoko in Criminal case No. 32 of 2015 for 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 of 2006.
2. The police also preferred against the Applicant an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006.



3. The Trial Magistrate convicted and sentenced the Appellant to serve 20 years imprisonment.

HIGH COURT JUDGMENT

4. Aggrieved by the conviction and sentence, the Applicant appealed before this Court in High Court Criminal Appeal No. 57 of 2016.
5. On 3rd July, 2017, the Honourable Justice D.K Kemei dismissed the appeal and upheld both the conviction and sentence for the charge of defilement.

REVISION

6. The Applicant is now before this court seeking a reduction of the 20 years sentence upheld by Honourable Justice D.K Kemei.
7. On 9th August, 2021, the Applicant filed a Chamber Summons under Certificate of Urgency seeking the following orders:-
 1. THAT I humbly pray this Honourable Court implement the Court of Appeal decision and review my sentence application as in factors of *Muruatetu vs. Republic* [2015] eKLR.
 2. THAT the Applicant wasn't subjected to remand period prior to conviction and sentence.
 3. THAT I humbly pray this court to take in determination any mitigating factors beforehand.
 4. THAT I pray to be present during the hearing and determination of this application.
8. The application is based on the initial and supplementary grounds as well as the averments in the Applicant's supporting affidavit sworn on unknown date which the court has considered.

APPLICANT'S SUBMISSIONS

9. It is urged by the Applicant for the court to consider that he has changed during his incarceration for the good based on the reports from Prison authorities. Reliance was placed on the cases of HCCr Ap. No. 83 of 2018, *Nicholas Mukila Ndetei vs. Republic*, *Robert Mutash vs. Republic* Cr.Ap.No.247 of 2014, *Douglas Muthaura Njoribi* Misc. Cr. Ap 4of 2015 and in *Mithu vs. State of Punjab* Cr. No. 745 of 1980, Indian Supreme Court.
10. According to the Applicant, he has acquired several important skills like Alternative To Violence Prayers, Mizizi, Climb Training Institute-kenya, Africa Prison Project And University of Exeter, The Prison Journey and Men of Valor to warrant a review of his sentence. The Applicant assert that he has patently reformed and capable of re-integration into the society. According to the Applicant the court should consider his health status, age and general life expectancy which falls within the mitigating factors.
11. The Applicant urged the court to review the sentence downwards or order that the time spent in custody from 2015 be an enough punishment and acquit him.

PROSECUTION SUBMISSIONS



12. The Prosecution Counsel, Martin Mwangera submitted that the Applicant case has already been heard and determined substantively by this Court hence the Applicant ought to proceed to the Court of Appeal. According to counsel, the application is unprocedural and an abuse to the structure of courts.
13. According to counsel, this court is functus officio at this point. Reliance was placed on Article 50(2) (q) of the Constitution, 2010 and in the cases of Telkom Kenya Limited vs. John Ochanda (Suing on behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR and in Jersey Evening Post Ltd vs. Al Thani [2002] JLR 542 at 550 cited and applied by the Supreme Court in Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR.

DETERMINATION

14. I have considered the application and written submissions filed on behalf of the respective parties.
15. Section 362 of the Criminal Procedure Code(CPC) is clear on the scope of revision in criminal trial as follows:-

“The High Court may call for and examine the record of any Criminal proceedings before any Subordinate Court for the purposes 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.”

16. Section 364 of the CPC provides that:-

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

17. As was stated by the High Court of Malaysia in Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:

“.....The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...”

18. Section 333(2) of the Criminal Procedure Code stipulates that the time spent in custody must be taken into account. It was emphasized in the cases of Abamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR and in Bethwel Wilson Kibor vs. Republic, CA at Eldoret Cri. Appeal No. 78 of 2009 that the period must be taken into account before sentencing.
19. However, the court’s view is that the application lacks merit for two reasons stated hereunder.
20. First, this court on appeal upheld the sentence that was meted by the Trial Magistrate hence this court is functus officio. The proper forum to ventilate the issue of the sentence at this point is the Court of Appeal.



21. Kiarie Waweru Kiarie J. in the case of *Joseph Maburu alias Ayub vs. 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 judgment 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.”

22. A reading of Section 362 and 364 of the Criminal Procedure Code, the High Court can only revise the decision of the Magistrate’s Court.
23. Secondly, the Supreme Court on 6th July,2021 in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR directed that the decision of Muruatetu and the Sentencing guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. It follows therefore that the Applicant charged with offence of defilement will not benefit from the guidelines in Muruatetu case. The appeal in this Court is a 2nd appeal after the 1st appeal was dismissed by Hon. D. K. Kemei on 3rd July, 2017 and upheld both conviction and sentence. The appeal was before a court of similar, equal, competent and concurrent jurisdiction to this Court. This court is functus officio.

DISPOSITION

- a. The Chamber Summons filed on 9th August, 2021 lacks merit and is hereby dismissed. The Applicant to exercise his right of appeal to Court of Appeal.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF DECEMBER, 2021.

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

Edward Mokaya Siro Applicant - present virtually

Mwongera- for Respondent

Geoffrey - Court Assistant

