

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.317 OF 2016

HABIL ACHONGO OLEMBO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Habil Achongo Olembo was convicted of the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The trial court held that the prosecution had established to the required standard of proof that the Applicant had on 15th September 2007 at Huruma Estate in Nairobi County, intentionally and unlawfully committed an act which caused penetration of his male genital organ into the female genital organ of the complainant who was then a girl aged twelve (12) years. The Applicant was sentenced to serve twenty (20) years imprisonment. His appeal to this court was dismissed on 5th May 2016. The appeal is **Nairobi HC Criminal Appeal No.110 of 2011 Habil Achongo Olembo vs Republic**. The court upheld both the conviction and sentence.

Instead of filing an appeal to the Court of Appeal, the Applicant petitioned this court to have his sentence revised. In particular, the Applicant stated that the period that he was in pre-trial custody prior to his conviction ought to have been taken into account under **Section 333(2)** of the **Criminal Procedure Code**. The Applicant therefore urged the court to take this period into account and sentence him accordingly. This court is not persuaded that it has jurisdiction to consider the Applicant's application. The Applicant ought to have raised this issue in his appeal. He did not. He cannot raise the same in a separate application before the same court that heard the appeal. Once this court heard the appeal and dismissed the same, the only avenue open to the Applicant for appropriate remedy is an appeal to the Court of Appeal. This court, once it rendered its judgment, became *functus officio*.

The application therefore lacks merit. It is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE