



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS CRIMINAL APPL. NO.31 OF 2020

ALEX MUTHIANI MUENDO..... APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The Applicant approached the court *vide* a chamber summons filed on 5.3.2020. The Application seeks two substantive prayers: First, he seeks for an order reviewing the sentence and consideration of the 5 months' time served in custody and secondly an order for resentencing pursuant to the Supreme Court decision in Petition 15 of 2015; Francis Karioko Muruatetu.
2. The application is grounded on the supporting affidavit of the Applicant filed on 5.3.2020 in which the Applicant averred that his time spent in custody was not considered and that he was sentenced to 20 years' imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act.
3. The respondent *vide* a replying affidavit deponed on 23.6.2020 opposed the application and maintained that it lacked merit and ought to be dismissed.
4. The application was canvassed *vide* oral submissions that were made on 23.6.2020. It was submitted by the applicant that he had not appealed to the Court of Appeal but that the one year and nine months that he served in custody be considered. He indicated in rejoinder that this court ought to hear his mitigation.
5. Counsel for the respondent submitted that the sentence was appropriate and that the applicant ought to move to the Court of Appeal.
6. The background to the instant application is that the applicant was sentenced to 20 years imprisonment after being convicted of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act in Kithimani PM's court Criminal (SO) case 3 of 2013. Dissatisfied with the decision, the applicant filed an appeal to this court *vide* Criminal Appeal No. 230 of 2014. The appeal was duly heard by the high court and a judgement rendered Hon Justice E. Muriithi where the appeal was dismissed.
7. The applicant then filed the instant application that is the subject of the instant ruling.
8. It is against the above background that the issue for determination is whether this application has merit.
9. The cited case of Francis Karioko Muruatetu has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. However, the applicant was not sentenced to death but to life imprisonment. The applicant is therefore not entitled to resentencing. The appropriate way is for the applicant to approach the Court of Appeal.
10. It is trite law that a court cannot rehear an application that it had heard and determined before. This is consistent with the doctrine of *functus officio*.
11. The term *functus officio* is defined at p.840 of **Jowitt's Dictionary of English Law 2nd 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".

12. In the matter before me, the applicant in his own words admitted that the appeal was heard and a decision rendered and that he has not filed an appeal to the court of appeal. The record speaks to the fact that a decision was passed by this court. This court is *functus officio* in this regard. Further vide Criminal Miscellaneous application numbers 185 of 2014 and 26 of 2016 the applicant herein sought to lodge appeal out of time to the Court of Appeal which request was duly granted. That being the position, the applicant is best advised to approach the said court as this court is already functus officio.

13. In light of the above analysis, the only recourse available to the Applicant in this case would be to appeal against the said judgement in the Court of Appeal.

14. As regards the request for consideration under section 333(2) of the Criminal Procedure Code, it is noted that the applicant was released on a cash bail of Kshs 30,000 and hence his claim that he remained in custody for about two years is false. I find no merit in that ground.

15. In the result, the applicant's application filed on 5.3.2020 is devoid of merit and is dismissed.

It is so ordered.

Dated and delivered at **Machakos** this **21st** day of **July, 2020**.

D. K. Kemei

Judge