

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS CRIMINAL APPL. NO. 54 OF 2020

KYALO KIOKO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Kyalo Kioko, the Applicant herein was charged with defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act.
2. The Applicant was taken through a full trial and was subsequently convicted and sentenced to serve 15 years imprisonment.
3. The Applicant was aggrieved by the conviction and sentence and filed an appeal to the High Court wherein the conviction and sentence was upheld.
4. The Applicant did not appeal against the decision of the High Court to the Court of Appeal. He opted to file a new application before this court in which he seeks review of sentence pursuant to the decision in **Evans Wanjala Wanyonyi (2019) eKLR**. He also sought that the time he served in custody be considered pursuant to section 333(2) of the Criminal Procedure Code. From the import of the functus officio doctrine the applicant is not entitled to resentencing. The applicant has sought to have the period spent in custody to be considered. Well, under section 333(2) of the Criminal Procedure Code such period ought to be taken into account. However, the lower court record reveals that the applicant was released on a cash bail of Kshs 30,000 and remained on bond until his conviction and sentence when the said cash bail was ordered to be refunded to the depositor. Hence the applicant is not sincere when he alleges that he had remained in custody throughout the trial when the record reveals otherwise. That being the position, the applicant's claim lacks merit. Due to the hierarchy of the courts and the appeal system, this court is already functus officio and hence the applicant is best advised to proceed to the Court of Appeal for redress if need be.
5. In the result it is my finding that the applicant's application filed on 5.6.2020 lacks merit and is dismissed.

Orders accordingly.

Dated and delivered at **Machakos** this **20th** day of **July 2020**.

D. K. Kemei

Judge