



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS CRIMINAL APPL. NO. 26 OF 2020

KASELO MASAI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RESENTENSING

1. **Kaselo Masai**, the Applicant herein was charged with defilement contrary to section 8(1) as read with Section 8(2) of the sexual offences Act.

2. The Applicant pleaded not guilty and the case proceeded to full hearing. He was convicted and sentenced to serve life imprisonment.

3. The Applicant was aggrieved by that decision of the trial court and filed an appeal to the High Court against both the conviction and sentence. The appeal was duly heard. A judgment was delivered on 28.1.2020 by this court. The judgement confirmed the conviction but the sentence was reduced to 30 years' imprisonment.

4. The Applicant did not appeal against the decision of the High Court and opted to file a new application before the High Court in which he seeks review of sentence pursuant to the decision in **Evans Wanjala Wanyonyi (2019) eKLR**. In **S v. Ndlovu 2012 (1) ZLR 393** the Zambian High Court observed that sentencing must utilize an engendered approach and a constitutional and human rights perspective. From the import of the *functus officio* doctrine the applicant is not entitled to resentencing as this court has already dealt with the issue of conviction and sentence. Such an application can only be entertained by a higher court namely the Court of Appeal.

5. Once a court becomes *functus officio*, the only orders it can grant are review orders which are an exception to the *functus officio* doctrine. The Supreme Court in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** stated that:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

6. Section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

7. I find no error or irregularity or illegality of principle has been established by the Applicant to warrant an order for resentencing since all

the matters then in controversy have been fully thrashed by this court on appeal. The only avenue for the applicant is to proceed to the Court of Appeal if aggrieved.

8. In the result it is my finding that the application filed on 6.2.2020 by the Applicant lacks merit. The same is dismissed.

It is so ordered.

Dated and delivered at Machakos this 7th day of July, 2020.

D. K. Kemei

Judge