



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISCELLANEOUS CRIMINAL APPL. NO. 147 OF 2019

NICHOLAS WAMBUA KITHEKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Nicholas Wambua Kitheka, 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 subsequently convicted and sentenced to serve 15 years' imprisonment.
3. The Applicant was aggrieved by the conviction and sentence and lodged Criminal Appeal No. 110 of 2017 to the High Court in which he contested only on the sentence. The appeal was duly heard. A judgement was delivered on 11.11.2019 by this court. The court partially allowed the appeal and directed that the sentence that was meted on the applicant do take into account the period that the applicant spent in custody. The rest of the appeal against the sentence was dismissed.
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 yet again 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 issue of time served was duly considered vide the judgement that was delivered on 11.11.2019 and cannot be addressed a second time. The applicant is barred from agitating an application under the guise of a review yet he is very well aware that this court is already functus officio. I decline the applicant's request to entertain his application as doing so would be tantamount to sitting on appeal on a matter that it has already determined. The only avenue available to the applicant is to proceed to the Court of Appeal.
5. In the result it is my finding that the applicant's application filed on 9.10.2019 lacks merit. The same is dismissed.

Orders accordingly.

Dated and delivered at **Machakos** this 20<sup>th</sup> day of **July, 2020**.

**D.K.Kemei**

Judge