



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISCELLANEOUS CRIMINAL APPL. NO. 116 OF 2019

NICHOLAS KIUA KIILU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

1. **NICHOLAS KIUA KIILU**, the Applicant herein was charged with the offence of defilement contrary to section 20(1) of the Sexual Offences Act.
2. The Applicant pleaded not guilty and the case proceeded to full hearing. He was convicted and sentenced to life imprisonment.
3. The Applicant was aggrieved by that decision and filed an appeal to the High Court against both the conviction and sentence. The appeal was duly heard. A judgment was delivered on 25.7.2016 by this court. The judgment confirmed the conviction and the sentence of the trial court.
4. The Applicant did file a notice of appeal with intention to appeal against the decision of the High Court to the Court of Appeal and the same was withdrawn on 4.2. 2020. The applicant has now filed a new Application before this court in which he seeks review of sentence pursuant to the decisions in Francis **Karioko Muruatetu & Another v R (2015) eKLR** and **Evans Wanjala Wanyonyi (2019) eKLR**.
5. 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 and from the import of the functus officio doctrine the applicant is not entitled to resentencing.
6. 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 v 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.”*
7. In this regard the applicant’s application ought to be directed to the Court of Appeal.
8. Section 382 of the Criminal Procedure Code Act 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.”*

9. I find no error or irregularity or illegality of principle when the court upheld the sentence of the trial court. The Court of Appeal which is the appellate court is best suited to deal with the applicant's quest to have the sentence interfered with. Even though he has withdrawn the notice of appeal to that court, he is still at liberty to lodge a fresh one since the appeal had not been determined.

10. In the result, it is my finding that the application filed on 31.7.2019 by the applicant lacks merit. The same is dismissed.

It is so ordered.

**Dated and delivered at Machakos this 13<sup>th</sup> day of October, 2020.**

**D. K. Kemei**

**Judge**