



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. 64 OF 2019

(From Original conviction and sentence in Criminal Case No.2920 of 2013 of the Chief Magistrate's Court at Naivasha and HCCRA No. 22 of 2016)

ANTHONY MWANGI WAIRIMU.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

IN CHAMBERS ON 16TH SEPTEMBER, 2019

BEFORE HON. JUSTICE R. MWONGO, J

1. The applicant **Antony Mwangi Wairimu** was convicted for the offence of Sexual assault contrary to **Section 5(1) (a) (b) (c)** and Rape contrary to **Section 3 (1)** of the Sexual Offences Act and sentenced to ten (10) years imprisonment. This chamber summons application seeks orders that the applicants be granted non-custodial sentence and further that the court considers the period the applicant has spent in prison as a factor in determining the length of the non-custodial sentence sought.
2. The application is filed under Certificate of Urgency supported by the grounds set out on the face thereof and also premised on the applicants' supporting affidavits.
3. It is not clear under what provisions the application is made, but I assume that it is an application for revision. I also note that the Applicant herein had filed an Appeal in the High Court **HCCRA No. 22 of 2016** which the Appellant withdrew on **14th December, 2018**.

Analysis and Determination

4. The powers of the High court in revision are contained in Section 362 to 366 of the **Criminal Procedure Code**. Sections 362 and 364 are relevant herein and provide as follows:

“362: The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.

5. What the High Court can do under its revision jurisdiction concerns proceedings in in subordinate courts as stated under **section 364** and **367** of the Criminal Procedure Code Cap 75, as follows:-

“364 (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

- (2) ***No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:***

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it

was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction”

.....;

“367. When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.”

6. The applicant merely seeks the imposition of a more lenient sentence. This court has no revision jurisdiction over an appeal it has concluded. The applicant’s only option is to appeal in the Court of Appeal.

7. I find no merit in the said application. Given the earlier appeal in this court, this application is an abuse of the court process and is hereby dismissed.

Dated at Naivasha this 16th Day of September, 2019

RICHARD MWONGO

JUDGE