REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL MISC. APPLICATION NO. 3'A' OF 2016

J M M.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The Applicant herein, **J M M** approached this Court by way of Chamber Summons seeking orders thus:

> a. That the Honourable Court be pleased to hear and determine this application seeking leave for direction and advise on the applicability of an issue of family reconciliation pursuant to **Article 159(2)(c)** of the **Constitution.**

2. The application is supported by an affidavit deponed by the Applicant where he avers that having been convicted by Kyuso Law Court for the offence of **Incest** contrary to **Section 20(1)** of the **Sexual Offences Act No. 3 of 2006** his first Appeal was dismissed by the High Court on the **10th** day of **February, 2015.** That there is a new development regarding the case in that his family, daughter **M,** the complainant inclusive are willing to forgive him pursuant to **Article 159(2)(c)** of the **Constitution.** That pursuant to **Article 50(1)** of the **Constitution** every person has a right to have any dispute that can be resolved by the application of law in a fair and public hearing of an independent and impartial tribunal or body.

3. The State through learned State Counsel **Mr. Mamba** filed a replying affidavit where he deposed that after the Applicant's Appeal failed to succeed in the Lower Court he appealed to the Court of Appeal and that he has not adduced any evidence in Court of the alleged reconciliation particularly of the Complainant whose age at the time of the offence has not been disclosed by the Applicant and whose consent in reconciliation is paramount. That the Appellant seeking to benefit from the provision of **Article 50(1)** of the **Constitution** cannot stand as he is serving sentence therefore he has failed to demonstrate how he can benefit from **Article 165(3)(a)** of the **Constitution.**

4. The application was canvassed by way of written submissions.

5. The Applicant urged that his wife and the Complainant his daughter visited him in prison where they discussed and reconciled. That it will therefore be in the interest of justice if he is allowed to take full responsibility of his family either financially or otherwise. He therefore seeks to be released on humanitarian grounds pursuant to **Article 159(2)(c)** of the **Constitution.**

6. The State through **Mr. Mamba,** learned State Counsel submitted that the Applicant's second Appeal is pending determination. That alternative forms of dispute resolution including reconciliation are recognized by **Article 159(2)** of the **Constitution** but these should not contravene the Bill of Rights; be repugnant to justice and morality or result in outcomes that are repugnant to justice and morality or be inconsistent with the Constitution or any written law that the intended reconciliation in criminal proceedings is limited.

7. I have considered rival submissions by the Applicant and the State Counsel alongside authorities cited by the State.

8. The Applicant seeks to benefit from the provisions of **Article 159(2)(c)** of the **Constitution, 2010** that provides thus:

> ***"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***
>
> ***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause(3);"***

9. This is a matter where the Applicant was convicted by a trial Court of first instance for the offence of **Incest.** He moved to this Court on

Appeal which was dismissed. On the **20th** day of **February, 2015** he filed a Notice of Appeal. His Appeal against the decision of this Court is pending in the Court of Appeal. He has made allegations without proof of intentions to reconcile with the Complainant.

10. That notwithstanding, this Court was seized of the jurisdiction to determine the matter at the Appellate stage. It heard the matter and determined it by making a final decision.

In the case of **Telkom Kenya LTD vs. John Ochanda** (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited (2014) eKLR the Court of Appeal stated thus in regard the principle of *functus officio:*

> ***"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in common law tradition from as long as the latter part of the 19th century. In the Canadian case of Chandler vs. Alberta Association of Architects (1959) 2 S.C. R 848 Sopinika J. traced the origins of the doctrine as follows;***
>
> ***"The general rule that a final decision of a court cannot be re-opened demines from the decision of the English Court of Appeal in re St. Nazaire Co. (1879) 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division….."***

11. From the foregoing this Court became *functus officio* when it delivered Judgment. My authority came to an end then. Considering delving in waters of mediating between the Applicant and his daughter will be tantamount to the Court clothing itself with non-existent jurisdiction. In fact the application is before me irregularly as it is un-maintainable in law.

12. In the premises it is dismissed.

13. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **18th** day of **September,** 20**18.**

L. N. MUTENDE

JUDGE