

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL REVISION NO. 126 OF 2018

SIMON MUCEE KAUNJUGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**(FROM ORIGINAL AND CONVICTION AND SENTENCE IN CRIMINAL CASE NO.620 OF 2012 OF THE RESIDENT
MAGISTRATE'S COURT AT MARIMANTI)**

R U L I N G

1. **SIMON MUCEE KAUNJUGI**, the applicant herein was charged and convicted of the offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2016** vide ***Marimanti Principal Magistrate's Court Criminal Case No. 620 of 2012***. H was sentenced to serve life imprisonment in accordance with **Section 8 (2)** of the **Sexual Offences Act** as the victim he defiled was aged 9 years old.

2. The applicant has now moved this court under the provisions of **Section 362** and **364** and has asked this court to call for the lower court file (***Marimanti Principal Magistrate's Court Criminal Case No.620 of 2012***) and also look at his Criminal Appeal No. 7 of 2016 which was determined by this court, with a view to reviewing his sentence. The grounds for his application is that he has served 7 years in prison and therefore should be considered for a non custodial sentence.

3. The respondent through the Director of the Public Prosecution has opposed this application contending that the law does not in the circumstances allow for a review given the nature of offence committed.

4. This court has considered this application and though this court notes that the applicant is quite advanced in age, the court's hands are tied. This court considered his appeal and found no merit on the same. The applicant's grievance lay on appeal and the provisions of **Section 364(5)** of the **Criminal Procedure Code** does not allow this court to review a matter where an appeal lies. The applicant ought to have appealed against the decision of this court because having rendered itself the court became **functus officio**. I can recall a file from a lower court under **Section 362** in order to satisfy myself on the correctness, legality, regularity and propriety of a sentence from a lower court but the law does not allow me to do the same over a matter/file in this court.

5. Secondly, the Sexual Offences Act was passed by parliament for the purposes of prevention and protection of all persons especially young persons from harm and unlawful sexual acts from sexual predators such as the applicant herein. It is for that reason that penalties provided are harsh and punitive with a view to attaining the very purpose for which the statute was enacted to protect children from harm. **Section 8(2)** of the cited statute provides that a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to life. That is the position of the law and the applicant was properly convicted upon full trial. His conviction and sentence was upheld by this court and the only avenue opened for the applicant was to pursue an appeal in the Court of Appeal if he was dissatisfied or aggrieved about the decision of this court. The option the applicant has taken for review is not tenable in law and for that reason this application is disallowed.

Dated, signed and delivered at Chuka this 17th December, 2018

R.K. LIMO

JUDGE

17/12/2018

Ruling signed, dated and delivered in the presence of applicant in person and Momanyi for Respondent.

R.K. LIMO

JUDGE

17/12/2018