



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL REVISION NO. E001 OF 2021**

**ADAN MOMBO OMWANGA .....**

**APPLICANT**

**VERSUS**

**REPUBLIC .....**

**RESPONDENT**

**RULING**

1. The Applicant was tried and convicted of gang rape contrary to Section 10 of the Sexual Offences Act and was sentenced to imprisonment of 15 years.
2. Being aggrieved with the conviction and sentence, the Applicant filed an appeal vide Kakamega HCCRA No. 51 of 2018 which was dismissed by Musyoka J.
3. Undeterred, the Applicant filed an application dated 5<sup>th</sup> March 2021 in which he sought revision of the sentence

stating that the intended effect of the sentence could be achieved by a less severe punishment and that as a first offender, he was eligible to benefit from the least severe sentence. He further urged that he had already served the required standard one-third of the prison term and had not been found culpable of any offence while in prison. He averred that he had been rehabilitated, is sickly and needs medication.

4. The Respondent opposed the application and submitted that the court is functus officio.
5. As a general rule, once a court renders its final decision, it cannot re-open, revisit, or revise the merits of that decision. Hence the court is held to be functus officio. The doctrine of functus officio exists to ensure finality of judicial matters by forestalling the repeated filing of applications by any of the parties in a matter that could create an unending cycle of re-hearings.
6. The exception of the functus officio doctrine is limited to the correction of errors apparent on the record.
7. Whereas this court has the power to review an order by virtue of Article 165 of the Constitution and Section 362 of

the Criminal Procedure Code, the power is limited to reviews of orders from the subordinate court. This court cannot sit on review of its own orders. Article 50 (2) (q) of the Constitution is clear. It provides that:-

**“2. Every accused person has the right to a fair trial, which includes the right—**

**(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”**

8. Considering the Applicant’s appeal against conviction and sentence was already heard and dismissed, the current application is an attempt to relitigate the appeal on its merits and offends the doctrine of functus officio. This court already made its decision and if the Applicant was not satisfied with it, his remedy lay in an appeal to the Court of Appeal.
9. It is my understanding that once the court becomes functus officio, it is no longer seized with jurisdiction over the matter. Having had his appeal against conviction and sentence dismissed by this court, the Applicant cannot have a second bite at the cherry. In **George Boke Kisiawo v. Republic [2022] KEHC 1200 (KLR)**,

Chepkwony J. while considering a similar application rendered herself as follows:

**“8. Further, in the case of Joseph Maburu alias Ayub -vs- Republic [2019] eKLR, where the learned Judge stated that:-**

***“Sentencing is a judicial exercise. Once a Judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black’s Law Dictionary Tenth (10<sup>th</sup>) Edition describes defines sentence as: The Judgement that a court formally pronounces after finding a criminal Defendant guilty; the punishment imposed on a criminal wrongdoer. Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”***

**9. The rule of the thumb is that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction, much less those courts higher than themselves.”**

10. Flowing from the above, I find that this court lacks jurisdiction to review Justice Musyoka’s Judgement which was delivered after hearing the parties.

11. In regard to the prayer that having served one third of his sentence and demonstrated good behaviour the court should release him, the court does not have jurisdiction to order a remission of sentence. That is the preserve of the Commissioner-General of Prisons under Section 46 (1) of the Prisons Act which provides:-

**“(1)Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.”**

(See **Francis Opondo v. Republic [2017] eKLR, Sammy Kitonga Mukusya & 2 others v. Republic [2019] eKLR**).

12. In the end, the court finds the Applicant's application for review of sentence devoid of merit and the same is hereby dismissed.

Dated, signed and delivered at Kakamega this 19<sup>th</sup> day of December 2025.

**A. C. BETT  
JUDGE**

**In the presence of:**

Applicant present at Kakamega Prison

Ms. Chala for the Respondent

Court Assistant: Polycap