



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**MISCELLANEOUS CRIMINAL APPLICATION NO. E161 OF 2021**

**PATRICK KIHARA MWANGI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. In this application, the Applicant is making a second attempt to have his sentence revised after losing an appeal in the same Court vide HCCRA No. 64 of 2015.

2. In Chamber Summons application filed on 21<sup>st</sup> October, 2021, he states that the period in which he was in prison custody between 19<sup>th</sup> September, 2013 and 31<sup>st</sup> March, 2015 was not computed in considering the sentence he ought to have served pursuant to **Section 333 (2)** of the **Criminal Procedure Code** and in the case of **Francis Opondo v Republic [2017] eKLR**. He thus prays that the period of six (6) months he was in remand custody be credited to his sentence.

3. The Applicant was charged and convicted for the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act**. He was sentenced to serve 15 years imprisonment on 4<sup>th</sup> October 2013.

4. As per his admission, the appeal to this court was dismissed on 22<sup>nd</sup> September, 2015 by Hon. C. Meoli, J. He then filed **High Court Miscellaneous Application No. E002 of 2020** in which he sought a resentencing whereby he urged the court to reduce his sentence upon offering his mitigation. The resentencing was pursuant to the famous Supreme Court decision in **Francis Karioko Muruatetu & Another v. Republic [2017] eKLR**. Learned Judge, Hon. Mwongo dismissed the application on 19<sup>th</sup> July, 2021 stating that the Supreme Court had further clarified its judgment in **Francis Muruatetu Case** expressing that resentencing only applied to murder trials. I will not highlight the decision in that case as Hon. Mwongo, J. espoused on it in his ruling.

5. Whereas the learned trial magistrate did not consider the period the Applicant was in remand custody prior his sentence, this factor ought to have been considered on his first appeal to the High Court. This is because, in an appeal, the appellate court considers the merits on conviction and sentence. This is a court of equal jurisdiction to the court that heard the appeal, implying that it cannot sit to review the judgment of a court of concurrent jurisdiction. I am *functus officio* in that regard.

6. In the same spirit, the Applicant's plea for resentencing was overtaken by the Supreme Court's further direction that resentencing only applies to murder trials. Respectively, the Applicant must be contented with his situation that the High Court cannot revisit the issue of the sentence having failed in the appeal.

7. However, all is not lost. He can appeal against the sentence to the Court of Appeal where he can ventilate that the period he was in remand custody be considered.

8. Consequently, this application cannot see the light of the day. It lacks merit and the same is hereby dismissed. I order that this file and in High Court Miscellaneous Application No. E002 of 2020 be forthwith closed. The High Court Criminal Appeal file as well as the Trial Court file should be remitted to respective registry and court for proper filing.

9. It is so ordered.

**Dated and Delivered at Naivasha this 31<sup>st</sup> Day of January, 2022.**

**G. W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Ms Maingi for the State
2. Patrick Kihara Mwangi – Applicant in person
3. Court Assistant – Quinter Ogutu



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