



**Wafula v Republic (Criminal Petition 42 of 2018)
[2024] KEHC 9210 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 42 OF 2018
JRA WANANDA, J
JULY 31, 2024**

BETWEEN

RICHARD EVAN WAFULA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was charged in Eldoret Chief Magistrate’s Court Criminal Case No. 4229 of 2009, with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the charge were that on diverse dates between June and July 2009, at (Particulars withheld) village in Uasin Gishu District, he intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of CJ, a girl aged 7 years. He was also charged with an alternative count of committing an indecent act with the same child on the same dates and place, contrary to Section 11(1) of the [Sexual Offences Act](#).
3. The Petitioner was then convicted on his own plea of guilty and was sentenced to life imprisonment.
4. Dissatisfied with the decision, the Petitioner filed Eldoret High Court Criminal Appeal No. 113 of 2009 which was dismissed on 14/10/2010 by Hon. Lady Justice P.M. Mwilu (as she then was) and the conviction and sentence upheld. The Petitioner then filed Eldoret High Court Petition No. 7 of 2019 seeking re-sentencing on the strength of the Supreme Court decision in [Francis Karioko Muruatetu & Another v Republic](#) [2017] eKLR. Hon. Lady Justice H. Omondi (as she then was), in declining to review the sentence observed that the Petitioner robbed the young girl of her innocence and that the sentence meted out was well deserved.
5. The Applicant has now returned to this Court with the instant undated Application but filed on 05/09/2018. As drawn, the same is quite incomprehensible but it is clear that what the Petitioner is



seeking is, once again, review of the sentence. From what I can decipher, the grounds preferred by the Petitioner is, again, that a minimum or maximum mandatory sentence is unconstitutional as is an indefinite life sentence which, according to him, infringes on his right to human dignity. He cited Article 28 of *the Constitution*.

6. In opposing the Application, Prosecution Counsel, Mark Mugun, opted to respond to the Application orally. He submitted that the Petitioner having earlier filed a similar Application which was dismissed by Lady Justice Omondi, J. on 07/09/2019 as aforesaid, this Court cannot reopen the judgment already rendered by a Judge of corresponding jurisdiction. According to him, the Petitioner's only recourse is to move to the Court of Appeal and urged that the Petition be dismissed.

Determination

7. The issue that arises for determination is "whether this Court should review the sentence of life imprisonment when the issue of the sentence imposed had already been in issue in the Appeal and also in the subsequent Petition both filed by the same Petitioner".
8. Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* under which the Applicant was charged provides as follows:
 - "8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."
 - "8(2) a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."
9. It is not in doubt that the Applicant was convicted and sentenced by the Magistrate's Court. He appealed to this Court against both conviction and sentence in Eldoret High Court Criminal Appeal No. 113 of 2009 which was dismissed. Undeterred, he returned to this Court and filed Eldoret High Court Petition No. 7 of 2019 whereof he sought re-sentencing. As herein, the Petitioner came under the same Muruatetu principle that mandatory and minimum sentences are unconstitutional. That Petition, too, was dismissed.
10. The Petitioner has yet again come to this Court, once more seeking re-sentencing. Apart from citing the same Muruatetu principle that mandatory and minimum sentences are unconstitutional and which he had already raised in the said Eldoret High Court Petition No. 7 of 2019, this time he has added the ground that an indefinite life sentence is unconstitutional.
11. What the Applicant is inviting this Court to do is to interfere with the sentence already affirmed by this very Court, an action which is untenable in law. A High Court Judge cannot sit on appeal over a decision of another Judge of equal jurisdiction. This Court having already pronounced itself on the same issue of sentence, it is now *functus officio* and the issue of sentence is now also *Res Judicata*. Such a decision cannot be revoked or varied by the decision-maker; finality.

An enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.} *functus officio*} and the issue of sentence is now also *Res Judicata*.

12. I echo the words of Kiarie Waeru Kiarie J made in the case of *Joseph Maburu alias Ayub v Republic* [2019] eKLR, in which he stated the following:

"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 (10th) 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.”

13. I also cite the decision of Hon. Lady Justice L. Njuguna in the case of *Boniface Gitonga Mwenda v Republic* [2021] eKLR, where, faced with a similar situation, she held as follows:

“However, as I have noted, the Petitioner herein appealed the trial court’s decision to this court. The court in dismissing the appeal against the sentence held that the trial court’s sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to 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. (See Section 362-364 of the *Criminal Procedure Code*).

Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn’t have jurisdiction in that respect and as such, the prayer to that respect ought to fail.”

14. The upshot of the foregoing is that this Court lacks the jurisdiction to entertain the present Application. In the premises, the same is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY 2024

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Petitioner in person

Ms. Limo for the State

Court Assistant: Brian Kimathi

