



**Makurathi v Republic (Miscellaneous Application E019 of 2023)  
[2024] KEHC 10450 (KLR) (21 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10450 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
MISCELLANEOUS APPLICATION E019 OF 2023  
AK NDUNG’U, J  
AUGUST 21, 2024**

**BETWEEN**

**STEPHEN NJAMBUYA MAKURATHI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This ruling revolves the undated Notice of Motion Application filed in court on 30<sup>th</sup> June, 2023 seeking the following orders-
  - i. Spent.
  - ii. That this Court be pleased to invoke its powers and grant the prayers sought of sentence review downwards for the sake of interest of justice.
  - iii. That the Applicant is a pauper and cannot be able to afford to pay for the costs of this suit.
  - iv. Any other orders that the court may deem fit.
2. The application is supported by the affidavit of Stephen Njambuya Makurathi the Applicant herein. The gist of which is that the Applicant was charged and convicted of the offence of Murder contrary to Section 203 as read with 204 of the *Penal code*. He was convicted and sentenced to serve a 40 year sentence. He avers that since his arrest in 2011 he has continuously been in custody and that in the interest of justice, he prays that the court exercise its powers to consider and to apply section 4(2) of the *Probation Offenders Act* since it has jurisdiction to do the same taking into account his mitigation and the rehabilitation record. He also stated that he has served a substantial part of his sentence, and he is rehabilitated and remorseful for his own actions.



3. The application is opposed and Esther Kimani, a Prosecution Counsel has filed a Notice of Preliminary Objection dated 12<sup>th</sup> February, 2024. Counsel indicated that they intend to raise an objection in limine on points of law and seek the striking out of the application against it on the following grounds –
  - a) That the Application is misplaced, ill-advised and incompetent since it is unsupported in law.
  - b) That the court lacks the jurisdiction to entertain, hear and/or determine the Notice of Motion application.
  - c) That the application is an abuse of the Court process and should accordingly be dismissed.
4. I have considered the preliminary objection raised. It is borne out of record that the Applicant was tried, found guilty and sentenced to 40 years imprisonment by this court (Waweru J).
5. Though not specifically stated, the review of sentence application before me seeks to have this court (Ndung'u J) review the sentence passed by my predecessor in this station, Waweru J (now retired).
6. My reading of the law, both of the Constitution and statutes vests no such jurisdiction upon me. Not even Section 4(2) of the probation of offenders Act cited by the applicant. That section is for application at the initial sentencing stage.
7. Section 364(1) will show that this Court's power of revision is exercised in respect of proceedings in a subordinate Court. The Court exercises this power after the record of proceedings in a subordinate court has been called for or which has been reported for orders, or which otherwise comes to its knowledge. This power of revision is an aspect of the supervisory jurisdiction conferred upon this Court under Article 165(6) and (7) of the Constitution, which provides:
 

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
8. The power of revision does not apply to proceedings in the High Court. Additionally, by dint of the explicit provisions of Article 165(6), this Court does not have supervisory jurisdiction over a superior court.
9. What the Applicant seeks is that this Court exercises the power of revision over proceedings in this Court. It is trite law that this Court has no jurisdiction to revisit a matter that was determined and settled by a Court of concurrent jurisdiction. In the case of Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR, Kiage, JA stated;
 

“I have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of the Constitution in these terms; “The High Court has supervisory jurisdiction over the subordinate courts and over



any other person, body or authority exercising a judicial or quasi judicial function, but not over a superior court.” (Our emphasis)The learned Judge reasoned, correctly in my view, that an enquiry into the complaints in the appellant’s petition against the Judges called upon him to determine the lawfulness or good faith basis of both their decisions and their conduct, and he could not purport to arrogate to himself the power to review their decisions over which he had no authority. Such an undertaking would have been a plain nullity as had been stated by this Court in *Peter Ng’ang’a Muiruri Vs. Credit Bank Ltd & 2 Others* Civil Appeal No. 203 of 2006 which the learned Judge cited. The Court in dispelling the notion that a judge of concurrent jurisdiction could supervise fellow judges had stated as follows;“It would be a usurpation of power to push forward such an approach, and whatever decision emanates from a court regarding itself as a constitutional court, with powers of review over decisions of concurrent or superior jurisdiction, such decision is at best a nullity.”This position is so well established that it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncements of judges of the same status as himself, a task that is left to courts and judges of higher status in the hierarchy, by way of appeals”.

10. It is thus clear that this Court cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The constitutional supervisory jurisdiction and statutory revision jurisdiction of this Court is limited to subordinate courts and cannot be extended to superior courts.
11. In light of the foregoing, I decline the invitation by the Applicant to scrutinize and interrogate the sentence imposed by the Honourable judge. The Applicant’s recourse lay in filing an appeal against sentence in the Court of appeal which is of higher status in the hierarchy of courts.
12. In the end, the preliminary objection succeeds and it disposes of the Notice of Motion which is hereby dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>st</sup>DAY OF AUGUST 2024**

**A.K. NDUNGU**

**JUDGE**

