



**Changwony v Republic (Miscellaneous Criminal Application
4 of 2023) [2024] KEHC 16114 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
MISCELLANEOUS CRIMINAL APPLICATION 4 OF 2023
JRA WANANDA, J
DECEMBER 20, 2024**

BETWEEN

DANIEL KIPROP CHANGWONY PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant is seeking sentence review. He was charged in Iten Magistrate’s Court Criminal Case No 179 of 2014 with the offence of rape contrary to Section 3(1) as read with Section 3(3) of the [Sexual Offences Act](#). The victim/complainant was an 80 years old woman.
2. The trial Court convicted the Applicant and on 29/09/2016, sentenced him to 15 years’ imprisonment. Aggrieved with the decision, he appealed vide Eldoret High Court Criminal Appeal No 113 of 2016 against both conviction and sentence. The Appeal was however dismissed on 4/09/2019 by Wakiaga J.
3. The present Application is expressed to be brought under Sections 362, 364(1) and 365 of the [Criminal Procedure Code](#) and Articles 27(1), (2), (4), 28, 22(1), 25(c), 50(1), (2) and 51(1), (2) of the [Constitution](#) of Kenya. The Petitioner seeks resentencing on the grounds that he is a first offender, he is sick and that he is remorseful and is reformed. He also alleges that he has lost his wife and daughter while in prison. He urges the Court to be lenient and reduce his sentence.
4. The issue that arises for determination is “whether the Court should review the sentence”.



5. Regarding sentence on the charge of rape, Section 3(3) of the *Sexual Offences Act* provides that:

“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”

6. In answering the issue herein, I note that in respect to sentence, Wakiaga J, in his Judgment in the said Eldoret High Court Criminal Appeal No 113 of 2016, stated as follows.

“On sentence, the complainant was aged eighty (80) years old, she was a neighbour of the Appellant who deceived her that he had sugar to deliver to her only for him to attack her and rape her. Having analyzed the evidence of PW2 who found the complainant in bad shape and the evidence of the Investigating Officer PW5 to the effect that the complainant started to cry immediately she saw the Appellant, I am satisfied that the sentence was justified and legal. The complainant was an old woman of eighty (80) years who had forgotten about the issues of sex and the act of the Appellant ought to be condemned through a deterrence sentence as the trial Court did.

The upshot of this is that the appeal has no merit and is therefore dismissed and the trial Court’s finding on both conviction and sentence affirmed.”

7. It is therefore evident that the Applicant appealed to this same High Court against the decision of the Magistrates Court, both on conviction and sentence. As aforesaid, the Appeal was heard on merits and dismissed. The Applicant has now returned to this same Court which has already dismissed his Appeal, asking for the same sentence imposed by the Magistrate’s Court to be reduced. The Applicant’s recourse is to appeal at the Court of Appeal, not come back to this same High Court. This Court cannot sit on appeal on a decision of its own.

8. I therefore find that this Court, having already pronounced itself on both conviction and sentence, is functus officio and bereft of the jurisdiction to again review the sentence it had already dealt with in Eldoret High Court Criminal Appeal No 113 of 2016.

9. I find persuasion in the case of *Joseph Maburu alias Ayub v Republic* [2019] eKLR where Kiare Waweru J held as follows:

“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.”

10. 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.”

11. In view of the foregoing, it is evident that Applicant's recourse was to move to the Court of Appeal, not to return to this Court to seek a review in disguise. What the Applicant is inviting this Court to do is to interfere with the sentence already reviewed 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 issue of sentence, it is now functus officio and the issue of sentence is now also Res Judicata.
12. The upshot of the foregoing is therefore the conclusion 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 20TH DAY OF DECEMBER 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

N/A for the State

Petitioner present virtually from Tambach Prison

Court Assistant: Brian Kimathi

