



**Kitela v Republic (Miscellaneous Application E020 of 2022)
[2023] KEHC 17936 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 17936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS APPLICATION E020 OF 2022
SM MOHOCHI, J
JANUARY 27, 2023**

BETWEEN

EKIDAM KITELA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is an application by way of notice of motion, supported by an affidavit filed on 27th June 2022, pursuant to the provisions Articles 20(1), 22(1), 23(1), 25c, 27(1), (2), & (3), 50(1) & (2)q, 51(1) & (2), 165 (a, b & d) and 258(1) of the *Constitution* and Sections 333 (2), 362, 364(1) and 365 of the *Criminal Procedure Code*.
2. The Applicant acknowledges his current conviction and sentence for twenty (20) years imprisonment for the offence of defilement, urging leniency of the court as a 1st offender, remorseful and repentant. He argues that his sentence was harsh and that the court needs to review the sentence while including the 1 year pretrial remand period that according to him was not included.
3. The Applicant places reliance on the *Sentencing policy guidelines* (2016) urging the reduction of his sentence.
4. At the hearing of the Application the Applicant and the Respondent both canvassed by way of oral submissions, to wit;
 - a. Applicant: That he had appealed against the conviction and sentence Criminal Appeal no 63 of 2017 in the High Court at Kabarnet and that the court dismissed the same and according to him, "I filed this Application to try once more for my sentence to be reviewed".
 - b. Respondent: That the Republic views this instant Application as an attempt at re-litigating a matter that has been properly adjudicated upon and has not been appealed against before a



superior court. That the Applicant had filed his 1st Appeal against his conviction and sentence and the Appellate court re-evaluated the evidence thereby upholding the conviction and sentence and that the High Court thus became “*functus officio*” in relation to the conviction and sentence and that the Court in this instance lacked jurisdiction to review a decision of a court of equal jurisdiction. The Republic accordingly opposed the application urging for its dismissal.

5. The Applicant was initially arraigned and charged in Senior Resident Magistrate’s Court at Kabarnet Criminal Case no 848 of 2015 for the offence of Defilement Contrary to section 8(1) as read together with Section 8(3) of the [Sexual Offences Act](#) 2006 and was convicted and sentenced to twenty (20) years imprisonment on the 4th February 2016.
6. The Applicant being aggrieved, appealed against the trial court’s sentence in Criminal Appeal no 63 of 2017 in the High Court at Kabarnet, which appeal upon hearing, was dismissed by Justice E.M Muriithi on the 17th January 2018.
7. In the 1st Appeal, the Court undertook an in-depth re-evaluation of all the evidence and concluded that the main charge of defilement, had been proved beyond reasonable doubt.
8. The 1st Appellate Court re-affirmed its jurisdiction in sentencing as is provided for Paragraph 7.17 of the Kenya Judiciary [sentencing policy Guidelines](#) on mandatory minimum sentences provides that:-

“Where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose lower than what is prescribed [see *Kennedy Munga v R* [2011] eKLR]. A fine shall not substitute a term of imprisonment where a minimum sentence is provided.”
9. The Applicant has not challenged the decision of the High Court in his 1st Appeal.
10. This Court concurs with the High court that determined his 1st Appeal that;
 - a. The sentence imposed in the Trial Court was lawful and proper; and
 - b. Nothing to the contrary has been demonstrated by the Applicant.
11. The Applicant’s affidavit in support of the application depones and explicitly accede that, he has not exhausted his appeal opportunity.
12. The Applicant contends that his trial, in the subordinate court and in the 1st Appellate Court contravened his fair trial rights on sentencing that was too harsh and excessive however no demonstration of the assertion was offered.
13. With regard to the request for review of sentence, the Supreme Court has revisited the [Muruatetu](#) Petition no 15 and 16 of 2015 (consolidated) and issued directions on 6th July 2021.
14. The Supreme Court has explicitly clarified that its decision in the [Muruatetu](#) case only related to the mandatory death sentence for murder cases under section 203 and 204 of the [Penal Code](#), and did not apply to any other statutory mandatory death sentences or minimum sentences.
15. Specifically, the Supreme Court issued the following guidelines.

“18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –



- a. The decision of *Muruatetu* and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the *Penal Code*.
- b. The Judiciary *Sentencing Policy Guidelines* to be revised in tandem with the new jurisprudence enunciated in *Muruatetu*.
- c. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
- d. Where an appeal is pending before the court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
- e. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the *Criminal Procedure Code* as well as those of the victim before deciding on the suitable sentence.
- f. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
- g. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –
 - i. Age of the offender
 - ii. Being a first offender
 - iii. Whether the offender pleaded guilty.
 - iv. Character and record of the offender
 - v. Commission of the offence in respect of gender-based violence.
 - vi. The manner in which the offence was committed on the victim.
 - vii. The physical and psychological effect of the offence on the victim's family.
 - viii. Remorsefulness of the offender.
 - ix. Possibility of reform and social adaptation of the offender.
 - x. Any other factor the court considers relevant.
 - xi. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.



- xii. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu.
16. The Application as filed seeks to invite the Court to reopen the 1st Appeal and that this Court lack jurisdiction to review a judgement on Appeal by a High Court.
17. The Court observes that, sentencing is the discretion of the Trial Court and that this Court shall only (in the 1st Appeal) interfere with a sentence, where it is demonstrated that the discretion was not exercised judiciously and that it failed to consider all relevant factors, or if it is demonstrated, that the sentence imposed is not legal, or is harsh and excessive, as to amount to miscarriage of justice.
18. Notwithstanding the want of jurisdiction by this Court the instant Application has not in any way showcased;
- i. how (if any) the Trial Court and the Appellate Court failed to judiciously exercise its discretion; or what relevant factors (if any) were disregarded during sentencing; or
- ii. How the sentence imposed is illegal or Harsh and excessive to constitute miscarriage of justice.
19. From the foregoing therefore, this being a matter where the Applicant was convicted and sentenced for offence of Defilement Contrary to section 8(1) as read together with Section 8(2) of the Sexual Offences Act 2006, He filed his Appeal that was heard and determined in the High Court, in this instance the Court has no jurisdiction to review the sentence imposed and upheld by a High court.
20. Consequently, the Application for review of sentence is hereby dismissed.

The Applicant has 14 Days Right of Appeal

RULING READ, SIGNED AND DELIVERED IN OPEN COURT BY;

MOHOCHI S.M (JUDGE)

27.1.2023

In the Presence of;

Applicant in Person

Mr. Obwanyo for the Republic

M/s Okok-S.C

Mr. N. Kemboi C.A

