



**Maina v Republic (Miscellaneous Criminal Application
E021 of 2022) [2023] KEHC 328 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CRIMINAL APPLICATION E021 OF 2022
FN MUCHEMI, J
JANUARY 26, 2023**

BETWEEN

JOSEPH KIAMA MAINA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination filed on August 25, 2022 is undated and brought under Section 333(2) of the *Criminal Procedure Code* seeking for orders to consider the time spent in custody from the date of arrest during the pendency of the trial.
2. The applicant was convicted by the Senior Principal Magistrate's Court at Karatina in Sexual Offence Case No. 17 of 2018 with the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* in which he was sentenced to serve twenty (20) years in prison. He was also convicted of the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* and was sentenced to serve ten (10) years in prison. The sentences were to run concurrently. He lodged an appeal Nyeri High Court Criminal Appeal No. 68 of 2019 where he was acquitted on the main count and the conviction and sentence on the alternative count were affirmed.
3. The applicant has now sought rehearing on sentencing and asks the court to invoke section 333(2) of the *Criminal Procedure Code* and grant him a lesser sentence and/or to serve a non-custodial probationary sentence for the remaining part of the reviewed sentence.
4. The parties canvassed this application by way of written submissions.



The Applicant's Submissions

5. The applicant seeks the court to invoke the provisions of Section 333(2) of the *Criminal Procedure Code* and consider the 4 years he spent in remand custody to be remitted from the 10 years imprisonment. He submits that he was arrested on May 18, 2018. He urges the court to review his sentence and compute it from the date of his arrest as the sentence imposed of 10 years commenced from the date of conviction and sentence. To support his contentions he relies on the cases of *Abmed A. Mohammed & Another vs Republic* [2018] eKLR; *Elizabeth Mwiya Thi Syengo vs Republic* Misc. Application No. 62 of 2018; *Vincent Sila Jona & 87 others vs Kenya Prisons Service & 2 others* [2021] eKLR; *Philip Mueke Maingi & 5 others* Petition No. E017 of 2021 and *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR.
6. The applicant submits that during the period he has been incarcerated he has learnt his lesson the hard way and he has engaged himself in meaningful rehabilitation programmes.

The Respondent's Submissions

7. The respondent opposes the application and submits that the application is misconceived as the sentence was reviewed in High Court Criminal Appeal No. 68 of 2019 from 20 years to 10 years imprisonment. Therefore, this application for review is based on the decision of the High Court in HCRA No. 68 of 2019 and not from the decision of the trial court during sentencing. The respondent submits that the appeal was heard and determined by a judge of the High Court of equal jurisdiction as the learned judge handling the current application. As such, this honourable court has no power to interfere with the sentence imposed by another judge of equal jurisdiction. The respondent further argues that the applicant is not entitled to approach this court for review of sentence when he has already exercised his right of appeal. As such, the respondent submits that the court has no jurisdiction to revise its own orders regarding sentence.

Whether this Honourable Court has jurisdiction to hear the application.

8. Firstly, it is imperative to mention that the jurisdiction of a court of law is donated by *the constitution* and the statute. This was enunciated in *Samuel Kamau Macharia vs KCB & 2 Others* Civil Application No. 2 of 2011, where the court stated:-

“A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

9. It is not in dispute that the applicant herein was convicted of the offence of defilement in the Magistrate’s court and sentenced to 20 years imprisonment and an alternative charge of committing an indecent act with a child and was sentenced to 10 years imprisonment. He appealed against the conviction and sentence to the High Court in Nyeri *vide* Criminal Appeal No. 68 of 2019, which was allowed on the main count by quashing the conviction for defilement and setting aside the sentence of twenty (20) years. The court further upheld the conviction on the alternative count and sentenced the applicant to ten (10) years imprisonment on September 10, 2020. The effect of the judgment delivered on September 10, 2020 confirmed the conviction and sentence by the trial court on the alternative charge. The issue herein is whether a court can review a sentence meted out by a court of equal jurisdiction.
10. Article 50(2) of *the Constitution* provides:-



- (2) Every accused person has the right to a fair trial, which includes the right:-
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.
11. Article 165(6) of *the Constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate courts. This provision is clear that a person can only apply for review of an order or sentence in a criminal case to a higher court. The issue arises whether this court can entertain an application for review where a court of equal jurisdiction has already confirmed the sentence of the trial court. The wording of Article 50(2)(q) of *the Constitution* and Article 165(6) of *the Constitution* is quite clear that an applicant ought to approach a higher court for review of an order or sentence. I have perused the judgement of the learned judge and noted that the High Court on appeal dealt with both conviction and sentence.
12. It is my considered view that this court lacks jurisdiction to review the applicant's sentence. The applicant ought to have raised the issue at hand before the High Court during the hearing of his appeal.
13. For the above reasons I find that this application is incompetent and therefore strike it out accordingly.

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF JANUARY, 2023.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 26TH DAY OF JANUARY, 2023.

