



REPUBLIC OF KENYA



KENYA LAW
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**Onzere v Republic (Miscellaneous Criminal Appeal 038 of 2022)
[2023] KEHC 1835 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPEAL 038 OF 2022
SC CHIRCHIR, J
FEBRUARY 28, 2023**

BETWEEN

KENNETH I ONZERE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court is the Notice of Motion dated June 28, 2022 and filed the same day. The Applicant makes the following prayers:
 - a). That this Honourable Court be pleased to hear and determine the present Application in his favour
 - b). That this Honourable court be pleased to resentence the applicant by invoking the provisions under paragraph 118(2) of the judgment in Petition No E017/21 in case of Philip Mweke Maingi & 5 others
 - c). Any other relief this Court may deem fit to Grant
 - d). That the sentence which was meted out to him in Criminal Case No 6 of 2017 at the Lower in Vihiga was mandatory minimum sentence, hence unconstitutional.
2. The Application is anchored on the grounds appearing on the face of the application and the supporting affidavit of the applicant.

The appellant has submitted that he is remorseful, that he is entitled to discretion on sentencing, which the trial court could not exercise due to the law on mandatory minimum sentencing. He now comes back to this court based on the decision of the High court on *Machakos Petition No 017/2021: Philip M Maingi & 5 others -Vrs- Republic*. Based on the aforesaid decision, this the court should now exercise discretion and review his sentence.



Appellant's submissions

3. It is the appellant's submission that he ought to be given a chance to serve society; that he has acquired skills while in prison which he can share with the community. The has school going children who need his support. He urges the court to consider the fact that the aim of sentencing is rehabilitation, and not punishment.

Respondent's submissions

3. In response, the prosecuting Counsel opted for oral submissions. The Respondent submits that this court has no jurisdiction to entertain the present Application; that the applicant had appealed against findings of the trial court in Kakamega High court Criminal Appeal No 180 of 2018 and the high court had dismissed the appeal on both conviction and sentence. It is submitted that this court being a court of concurrent jurisdiction cannot review the said sentence.
4. The Respondent further submits that the only recourse available to the applicant is an appeal or a constitutional petition; she urged the court not to entertain such an application as it may have the effect of opening a window for similar Applications, where parties would be enticed to come back to court for review orders before exhausting the channels of Appeal.

Determination

3. I have considered the Application, and the submissions by the parties I understand the Applicant to be seeking for review of his sentence, following the decisions of the high court in interlia, the case of Philip Mueke Maingi & 5 others –versus- Republic – Machakos High Court Petition No E017/2021. In the above Decision the court held that the mandatory minimum sentences, such as provided under the [sexual Offences Act](#) are unconstitutional

Background.

3. The Applicant was charged in Vihiga Magistrate's court in PMCSO No 6 of 2015 with Sexual Assault Contrary to Section 5(1) (a) (i) (2) of the [Sexual Offences Act](#) No 3 of 2006. He faced an Alternative charge of Committing an indecent Act with a child Contrary to Section 11(1) of the same Act. He was found guilty on main charge and sentenced to 10 years in prison, being the minimum sentence prescribed under Section 5(2) of the [Sexual Offences Act](#).
4. The Appellant being dissatisfied with the Judgment of the Trial court appealed to this court under High Court Criminal Appeal No 180 of 2018. The High court dismissed the appeal and affirmed both the conviction and the sentence as passed by the Trial court. The Record shows that the judgment on the appeal was delivered on May 13, 2022, and the applicant filed the present application about two months later on July 19, 2022.
5. On review of sentences, the jurisdiction of this court is anchored on Article 165(7) and Section 362 of the [Criminal Procedure Code](#). However, I hasten to add that this review jurisdiction is only in respect to decisions passed by the subordinate courts. Indeed, Article 165 (6) expressly takes away the powers of the High court to exercise any supervisory powers over a superior court.
6. Finally, Article 50(2)(q) provides that an accused person has the right to 'If convicted; to appeal to, or apply for a review by a higher court as prescribed by law' (emphasis added). It follows that whereas the Accused has a right of review, the review can only be done by a higher court, in this case, the Court of Appeal.



7. In view of the foregoing I find that this court has no jurisdiction to review a sentence that was passed by a court of concurrent jurisdiction. Consequently, the notice of motion dated June 20, 2022 is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF FEBRUARY 2023.

S. CHIRCHIR

JUDGE

In the presence of:

