



**Mbuthia v Republic (Miscellaneous Criminal Application
E047 of 2022) [2023] KEHC 1583 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CRIMINAL APPLICATION E047 OF 2022**

JM CHIGITI, J

FEBRUARY 27, 2023

BETWEEN

JOSEPH KIAMA MBUTHIA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application against the original conviction and sentence of Hon. Justice D. S. Manjaja J. dated 6th October 2021 in Criminal Appeal no. 26 of 2020 at Kiambu High Court.)

RULING

Brief Background

1. What is before the court is the application filed on 08/11/22. The application is supported by the affidavit of Joseph Kiama Mbuthia filed on November 8, 2022.
2. The applicant wants the court to review the custodial sentence and consider a new sentence and the court to consider the period which the applicant has been in custody.
3. Ms Ngesa for republic opposes the application through her oral arguments made in court on 26/1/2023.
4. The two issues for determination are:
 - i. Jurisdiction
 - ii. Whether to review

Analysis

5. Applicant sought that:



1. That I am the applicant herein who was originally arrested charged and convicted for the offense of attempted defilement c/s 9(1)(2) of the Sexual offences act no 3 of 2006 and sentenced to serve 10 years' imprisonment by hon V Kachuodho (SRM) on the 28th day of May 2020.
 2. That I humbly seek this honourable court to review the 10 years' custodial sentence and if it finds it prudent to consider the new sentence for the remaining period to be served.
 3. That this honourable court to consider the period the applicant was in remand custody i.e from date of arrest 7/6/2017 to date of conviction and sentence on 28/5/2020 (almost 3 years) in accordance with section 333(2) of the CPC.
 4. That the applicant is very remorseful over what happened and is now a good character and for the purpose of this application a first offender.
6. The respondent argues that the crime is under the Sexual Offences Act – defilement. Court convicted and sentenced him to 10 years. She feels that the court was lenient. The court considered the 3 years spent in custody and prayed the application be released. That Kasango J dismissed an appeal on 6/10/21.
 7. I have looked at the trial court and satisfied myself that the accused was arrested on 7/6/2017 arraigned in court on 9/6/2017 facing the offence of attempted defilement contrary to section 9(1) and (2) of the Sexual Offences Act No 3 of 2006 as per the charge sheet.
 8. The applicant was convicted and sentenced to serve 10 years on 28/5/2020.
 9. From the trial file I have established that the applicant filed Cr Appeal no 26/2020 wherein he was challenging the sentence of the trial court being Criminal Case No 52/17.
 10. Justice Manjaja in his judgment that was delivered on 6/10/21 found the ten-year sentence imposed to be appropriate.
 11. This can only imply that the applicant is asking me to sit on appeal on the judgment of Justice Manjaja aforementioned. I do not have the power under any law or the Constitution to do that.
 12. Chapter 10 of the Constitution lays out the hierarchy of the courts in Kenya. The applicant has the avenue to lodge an appeal in the Court of Appeal to challenge the judgment of Justice Majanja if he so wishes.
 13. The applicant filed written submissions which i have considered with a lot of curiosity. He has drifted away from his application and he is now inviting the court to be guided by the judgment of Justice Mativo that was delivered on September 1, 2022 allowing the High Court to exercise its discretion in mitigation and re sentencing after hearing the mitigating factors which he has set out at length in his affidavit.

Disposition

14. The application before this court is not for re sentencing and i cannot determine a none existing application. The Applicant is at liberty to file an appropriate application for the orders he seems to be seeking through the submissions.
15. Justice Majanja has already dealt with the issue that the applicant is trying to sneak in through the backdoor.I have no power to reopen the findings of justice Majanja.



16. It is my finding that the application is an abuse of the court. The applicant is not candid with the court. He knew of the outcome of the Criminal Appeal no 26/2020 but intentionally decided to conceal this information from the court.
17. When he was filing the application that is before me, the applicant knew that his appeal was dismissed on 6/10/21.

Order;

18. The application filed on 08/11/22 lacks merit and the same is hereby dismissed.

DATED AND DELIVERED AT KIAMBU THIS 27TH DAY OF FEBRUARY, 2023.

JOHN CHIGITI (SC)

JUDGE

