



**Musila v Republic (Criminal Revision E119 of 2023)  
[2023] KEHC 1866 (KLR) (Crim) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1866 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E119 OF 2023  
DR KAVEDZA, J  
FEBRUARY 27, 2023**

**BETWEEN**

**TITUS NGAMAU MUSILA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was charged under section 204 of the *Penal Code* for the offense of Murder. The particulars are that he murdered one Kenneth Kimani Mwangi on March 14, 2013 at Githurai 45 Bus stage in Nairobi County. He was then sentenced to serve 15 years, being 12 years' imprisonment and 3 years thereafter on probation.
2. Dissatisfied with the trial court's judgment he appealed against both the conviction and sentence in Nairobi Court of Appeal Criminal Appeal No. 124 of 2018. In a judgment delivered on April 24, 2020, the appeal was dismissed in its entirety.
3. The applicant did not further appeal to the Supreme Court. Instead, he has approached this court in which he prays that the court to review his sentence by putting him on community service order.
4. Upon receipt of the request for revision of sentence, this court directed that a Sentence Review Report be filed on the convict for consideration by the court.
5. The Probation/Community Service Officer did file her report in court. The report shows that the applicant is aged 49 years old. He is currently serving his 12-year prison term at Kamiti Medium Prison and recommends a non-custodial sentence. The report does not however indicate the duration already served nor that remaining time.



6. Before I render myself, let me state that this application is in the nature of a revision of sentence. I therefore called for the original trial court's file to verse myself with the original record. I have since confirmed that indeed the Applicant was convicted for the offence of murder under section 204 of the Penal Code. He was sentenced to serve 12 years imprisonment and the following 3 years on probation, as provided by the law. Inside the trial court record is a judgment that was delivered by the Court of Appeal dismissing the first appeal.

### **Analysis of Law**

7. The only issue for determination herein is whether the Application is merited.
8. The jurisdiction of this court is provided for under article 165 of the Constitution and includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretive jurisdiction; any other jurisdiction, original or appellate conferred on it by any legislation; and supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. The said Article does not also clothe this court with a jurisdiction to review a decision of a court of concurrent jurisdiction. Further, the revisionary jurisdiction of this court under sections 362 and 364 of the Criminal Procedure Code is only limited to proceedings from subordinate courts. (See Peter Charagu v Republic [2021] eKLR).
9. The powers of the High court in revision are contained in section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows: -

“The High Court may call for and examine the 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”
10. The sentence which the applicant now seeks to review was imposed by the trial court, which was the high court, a court of concurrent jurisdiction with this court, and further reconsidered at appellate level by the Court of Appeal which is a court of superior jurisdiction to this court. For emphasis purposes, it is important that the applicant understands that on appeal, the Court of Appeal considered the merit of the conviction and the sentence. It was therefore at that level that he would have urged that court to relook into the sentence, he did not. It was noted in the judgment that the applicant both in his memorandum of Appeal and submissions thereof did not challenge the sentence imposed.
11. That means that this court cannot therefore review the said sentence as doing so would amount to sitting on appeal against the decision of a court of superior jurisdiction which is unacceptable under the law. Clearly, this court became *functus officio* the moment the Court of Appeal Judges pronounced themselves on the appeal against the conviction and the sentence.
12. I find persuasion in the case of Joseph Maburu alias Ayub v Republic [2019] eKLR where the court stated that:-

“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.

13. The trial court in this matter was a court of concurrent Jurisdiction as this court. Nonetheless, the Court of Appeal already pronounced itself on the conviction and sentence in this matter. This court therefore lacks jurisdiction whatsoever to review the sentence imposed thereof. The court shall be acting ultra vires in the circumstances.
14. In the end, I find this application unmerited and the same is hereby dismissed in its entirety.
15. It is hereby so ordered.

**RULING READ, DELIVERED AND SIGNED THIS 27<sup>TH</sup> DAY OF FEBRUARY 2023**

.....

**D. KAVEDZA**

**JUDGE**

**In the presence of:**

