



REPUBLIC OF KENYA



**KENYA LAW**  
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**DMK v Republic (Miscellaneous Criminal Application  
E032 of 2022) [2023] KEHC 21633 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21633 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CRIMINAL APPLICATION E032 OF 2022**

**SM MOHOCHI, J**

**JULY 31, 2023**

**BETWEEN**

**DMK ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Application for Sentence Review under section  
362 and 364 of the Criminal Procedure Code CAP7)*

**RULING**

1. By undated Notice of motion supported by the Applicant's Sworn Affidavit, the Applicant moves the Court for sentence review that:
  - a. The Court substitute the Applicant's current sentence of imprisonment with a non-custodial probation sentence.
  - b. That the Court invokes the provisions of section 362, 363 and 364 (b) of the Criminal Procedure Code and provisions under the Probation of Offenders Act and reviews the balance on the Applicant's sentence to a non-custodial sentence.
  - c. That the Court has jurisdiction to determine this application under the provisions of article I65(3) (9) of the new constitution of Kenya 2010 and the relevant provisions under the Probation of Offenders Act respectively.
  - d. That the Applicant is utterly remorseful and repentant of what really happened and if given another chance he promises not repeat such an act again.
2. The Applicant is serving two(2) fifteen (15) year imprisonment sentences, having been found guilty, convicted and sentenced for the offence of defilement contrary to Section 8(1) as read together with Section 8(4) of the Sexual Offences Act, 2006 and Deliberate transmission of HIV contrary to Section



- 26(1)(b) of the *Sexual Offences Act*, 2006 in Nakuru Children’s Court Criminal Case No 236 of 2013. Both sentences are running concurrently.
3. The Applicant challenged his conviction and sentence in High Court at Nakuru Criminal Appeal No 230 of 2014 in an appeal he withdrew before the same was set down for hearing on the 25<sup>th</sup> June 2018, by indicating he shall be seeking a sentence reduction.
  4. On 16<sup>th</sup> July 2019 the Applicant filed High Court at Nakuru Miscellaneous Criminal Application Number 117 of 2019 seeking review of his sentence and urging the Court to take into consideration the time he had spent in remand.
  5. On the 27<sup>th</sup> January 2020 the Applicant appeared before Hon Prof Ngugi J (as he then was) and, the Court accordingly allowed the Application by reviewing the sentence in accordance with Section 333(2) of the Criminal Procedure Code to have the Applicant sentence computed from the 15<sup>th</sup> November 2013.
  6. On 4<sup>th</sup> May 2022 the Applicant filed the instant Application that mirror High Court at Nakuru Miscellaneous Criminal Application Number 117 of 2019.
  7. This matter came up for hearing on the 19<sup>th</sup> June 2023 wherein the Applicant orally urged the Court to consider a non-custodial sentence for the time he has so far served and that he shall abide by the decision of the Court. When asked about the remission program in the prisons, the Applicant conceded of the existence of a remission program that he had filed his second Application for revision when Prof Justice Ngugi introduced the same for convicts remaining with two years or less in their imprisonment sentence.
  8. The Respondent opposed the motion inviting the Court to consider the Aggravating circumstances in this case, that the subject was aged sixteen (16) years old at the time the crime upon her and that as a result she was infected with HIV out of the Applicant’s deliberate act and that owing to the grave consequences upon the victim the sate opuses any non-custodial sentence.
  9. The Respondent contends that nothing has been presented to show that the Appellant has reformed and that the sentence imposed was in deterrence.
  10. The Applicant, is convicted from a process of trial and as such, a verdict of “guilty” has been entered against him, he no longer benefits from the age-long cardinal principle of “presumption of innocence”.
  11. In the case of *Masrani v R* [1060] EA 321, it was held that: -

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”
  12. This Court conforms to the school that disturbing discretion of a subordinate Court should be done sparingly and only in the most deserving of cases See *Ogolla s/o Owuor v R* {1954} EACA 270 on when the Court will interfere with discretion of trial Court in sentencing, that:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in *R v Shershowsky* {1912} CCA TLR 263 as emphasized in *Shadrack Kipkoech Kogo v R* Criminal Appeal No. 253 of 2003 thus “Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevance factor or that a wrong principle was



applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.” (See also *Sayeka v R* {1989} KLR 306)

13. Owing to the foregoing, it is important for this Court to consider its jurisdiction as was held in the case of *Samuel Kamau Macharia Vs. KCB & 2 others*, Civil application No. 2 of 2011:

“ 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.”

14. Article 50(2) of *the Constitution* provides: -

“ 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.”

15. Article 165(6) of *the Constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate Courts. The Criminal Procedure Code is the Statute that expounds on this jurisdiction. Section 362 of the Criminal Procedure provides: -

“ 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 subordinate Court.”

16. Section 364 of the *Penal Code* empowers the High Court to exercise its revisionary powers .... conferred to it as a Court of appeal by Sections 354, 357 and 358 and may enhance sentence.

17. In the case of *Prosecutor vs Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a Court when examining the issues pertaining to Section 362 of the Criminal Procedure Code as follows: -

- a. Where the decision is grossly erroneous;
- b. Where there is no compliance with the provisions of the law;
- c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
- d. Where the material evidence on the parties is not considered; and
- e. Where the judicial discretion is exercised arbitrarily or perversely if the lower Court ignores facts and tries the accused of lesser offence.

18. Whereas the Notice of Motion herein is coached in terms of Sentence Review, a clear reading of the same shows that the same is identical to the High Court at Nakuru Miscellaneous Criminal Application Number 117 of 2019 that was heard and determined on the 27th January 2020.

19. It is therefore clear that, the matter raised in the Application herein is res judicata as was stated in the case of *Satya Bhama Gandhi v DPP* (supra) where the Court stated as follows: -

“ 10. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment



or ruling is res judicata. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defense of res judicata can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

11. As Somervell L.J. stated [2] res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them. All the facts raised in this case, including the alleged violation of constitutional rights or violation of statutory provisions are matters that could have been raised in the previous proceedings. In fact, all the matters raised herein including violation of Article 47 rights were raised and considered in the said Petition. The case is founded on the same cause of action, same issues, same facts, and same circumstances.
12. It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different Courts on the same issue.[3]
13. The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a Court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.
14. Res Judicata is one of the factors limiting the jurisdiction of a Court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a Court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law. Where the Court has decided based on facts it is final and should not be opened by same parties in subsequent litigation. [4]
15. A judicial decision made by a Court of competent jurisdiction holds as correct and final in a civilized society. Res judicata halts the jurisdiction of the Court and that is why it is one of the factors affecting jurisdiction of the Court. The effect of this is that the Court is prevented from trying the case in limine i.e. from the beginning.[5] The rule of res judicata presumes conclusively the truth of the decision in the former suit.[6]
16. Also known in the US as claim preclusion, res judicata is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defense already litigated. The doctrine is meant to ensure the finality



of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.”

20. This Court thus finds that the Application is Res Judicata and that it constitutes an abuse of the process of the Court.
21. The aggravating factors warranted the Sentence imposed, which in this Court’s opinion was lawful, reasonable and not excessive, the Applicant may subject to good behavior, benefit from the Remission of sentence program.

It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 31<sup>ST</sup> JULY 2023**

.....

**MOHOCHI S.M**

**JUDGE**

**In the presence of:**

**Applicant-** Present

**Ms Mburu** Prosecution Counsel for the state

**Schola;** CA

