



**Hassan alias Ali Kinyozi v Republic (Miscellaneous Criminal Application
8 of 2020) [2023] KEHC 21281 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CRIMINAL APPLICATION 8 OF 2020**

RB NGETICH, J

JULY 27, 2023

BETWEEN

ALI HASSAN ALIAS ALI KINYOZI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

BACKGROUND

1. The applicant was charged before the Magistrates court at Eldama Ravine with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual offences Act No. 3 of 2006. The particulars of the charge being that the accused on the 13th day of March, 2013 in Koibatek District within Baringo County committed an act which caused the penetration of his penis into the vagina of EK a child aged about 5 years old.
2. The applicant was charged with alternative count of indecent Act with a child contrary to section 11(1) of the Sexual offences Act No.3 of 2006. The particulars of the charge were that on the 13th day of March, 2013, in Koibatek District within Baringo County the accused committed an act which caused his penis to come in contact with the vagina of EK a child aged about 5 years old.
3. The applicant denied all the charges and the matter was set down for full trial where the prosecution called a total of 5 witnesses in support of the charges facing the accused. The accused in his defence gave unsworn statement. He denied the offence.
4. By judgement delivered on the April 8, 2014, the trial court found the Applicant guilty of the offence and convicted him and sentenced him to life imprisonment.
5. Dissatisfied with the conviction and the sentence of the trial court, the Applicant lodged an appeal on both conviction and sentence in the High court at Nakuru vide criminal being Criminal Appeal



No.90 of 2015 which appeal was transferred to Kabarnet High Court and give a new number being Kabarnet High court criminal Appeal No. 112 of 2017. The appeal was dismissed. The conviction and the sentence were upheld.

6. Still dissatisfied with the decision of the High court, the Applicant lodged an appeal to the court of appeal.

Application for review of sentence

7. The applicant has now petitioned this court vide an undated application seeking orders for review of sentence in view of petition No. E017/2021 Philip Mueke Maingi & others vs DPP at Machakos and section 362, 364(1) & 365 of the CPC cap 75 laws of Kenya and in reliance to Article 27(1)(2)(4), 22(1), 23(1), 25c, 50(1)(2) and 51(1)(2) of the Constitution of Kenya 2010 among other enabling laws.
8. In his application, the applicant is seeking for sentence re-hearing, the Applicant argues that the High court is seized of competent jurisdiction under articles 165(3)(b) of the Constitution of Kenya, 2010 to hear and determine this matter.
9. The applicant seeks this honourable court to consider the provisions of the sentencing policy guidelines of 2016 published by the Kenya judiciary and invoke the provisions of Article 165(3) a, b, d and 258(1) of the Constitution of Kenya, 2010 and reduce his sentence to more reasonable terms. He says he has served in prison for 8 years since 2015.
10. His argument is that the sentence is harsh. He says he has acquired life skills while in prison and he holds certificate in tailoring Grade iii. He seeks to be released for him to join the community.

Response by State

11. The state counsel submitted that this court lacks jurisdiction to entertain the application for sentence review because the applicant appealed to this court on both conviction and sentence which appeal was determined and dismissed.
12. She argues that the applicant's review for sentence should be by the court of appeal and that the court will only entertain the application for sentence review if the applicant has exhausted all appeal mechanisms. The respondent relies on the case of Daniel Oracho Otieno v Republic [2019] eKLR which provides that this court cannot review a sentence by a court of concurrent jurisdiction and urge this court to dismiss this application.

Analysis and Determination

13. I have considered the application and the submissions made by both parties. The issues for determination in this matter are:-
 - i. Whether this honourable court has jurisdiction to handle this application.
 - ii. Whether Applicant is entitled to the orders sought.
 - i. Whether this Honourable court has jurisdiction to handle this application.
14. The applicant argues that this court has jurisdiction under sections 354, 364 and 365 of the C.P.C to hear and determine his application for sentence review. The respondent on the other hand contends that this court lacks jurisdiction to handle this matter having earlier on determined the appeal.
15. It is not disputed that the applicant had his appeal heard and determined by this court and his appeal before the court of appeal is pending hearing and determination. The Supreme Court considered the



issue of review of judgements and orders in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR and held that:

“...we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

- (i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
- (ii) the Judgment, Ruling, or Order, is a nullity, such as, when the court itself was not competent;
- (iii) the court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
- (iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”

16. The applicant has not demonstrated any of the above conditions. There is therefore no exceptional reason to warrant review of sentence upheld by this court. The applicant has appeal pending before the court of appeal. The applicant should either pursue the appeal pending before the court of appeal or seek review of this court decision before the court of appeal.

17. **Final Orders:** -

1. Application for review of sentence is hereby dismissed
2. Applicant to pursue appeal in the court of appeal or seek review of this court’s decision in the court of appeal.

RULING delivered, dated and signed Virtually at **Kabarnet**

This 27th Day of July 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Applicant present.

