



**Ominde v Republic (Miscellaneous Criminal Application
E218 of 2021) [2023] KEHC 21214 (KLR) (7 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E218 OF 2021
RN NYAKUNDI, J
AUGUST 7, 2023**

BETWEEN

ALEX LAGAMA OMINDE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Coram: Before Hon. Justice R. Nyakundi

Mr. Mugun for the State

1. The applicant approached this court *vide* an application filed on October 28, 2018 seeking a review of his sentence. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* in Eldoret Chief Magistrate's Criminal Court Case No 358 of 2013. The trial court convicted and sentenced him to 20 years' imprisonment.
2. The applicant appealed his conviction and sentence *vide* Eldoret High Court Criminal Appeal No 23 of 2015 wherein his sentence was reduced to 15 years' imprisonment in October 12, 2018. Being aggrieved with the sentence, he filed the present application.
3. The applicant's grounds for mitigation are that he is a first offender who has reconciled with the victim's family. Further, that he is remorseful for the offence and has learnt from his experience. He has done several biblical courses and so ready to be a law-abiding citizen in the community. He has served 9 years and urges the court order that he serve the remainder of his sentence under probation.

Analysis & Determination

- 4 Upon consideration of the application, the following issue arises for determination;
 1. Whether the court should review the applicant's sentence



Whether the court should review the applicant's sentence

- 5 It is trite law that jurisdiction is everything. Without it, the court cannot adjudicate over a matter. See the famous words of Nyarangi, JA in the case of *The Owners of Motor Vessel Lilian "S" vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 at page 14:

Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

6. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others*, Application No 2 of 2011 rendered itself as follows:

A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court 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..."

6. The High Courts' revisionary jurisdiction is governed by section 364 of the *Criminal Procedure Code* which states as follows;

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
- (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (c) in proceedings under section 203 or 296(2) of the *Penal Code*, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (Control) Act*, the *Prevention of Organized Crimes Act*, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.



- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

7 The applicant had already appealed to the High Court which resulted in his sentence being reduced to 15 years' imprisonment. This court cannot review the sentence once more as it would be tantamount to sitting on appeal on a decision of its own. I am guided by the persuasive decision of Hon L Njuguna in *John Gichovi Muturi v Republic* [2021] eKLR where she expressed herself as follows;

The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb is that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves. The court which ought to deal with an issue arising out of the decision of this court is the Court of Appeal as it is the one with jurisdiction under Article 164(3) of the *Constitution* and Section 379(1) of the *Criminal Procedure Code*. This is in appreciating the provisions of Article 50(2)(q) of the *Constitution* of Kenya 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.

8 Therefore, this court has no jurisdiction to entertain the application. The upshot of the foregoing is that the application is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 7TH DAY OF AUGUST 2023

In the Presence of

M/s Mugun for the State

Applicant Present

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R. NYAKUNDI

JUDGE

