



**Nyangoka v Republic (Criminal Revision E103 of 2023)  
[2023] KEHC 25842 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25842 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL REVISION E103 OF 2023  
WA OKWANY, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JKN ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original Conviction and Sentence in the Chief Magistrates' Court at Nyamira, Criminal Case No. 487 of 2026 by Hon. M.O. Wambani, Chief Magistrate on 28th February 2019 and Judgement by Hon. E.N. Maina J. in HC Criminal Appeal No. 4 of 2020 on 17th September 2020)*

**RULING**

1. The applicant herein was charged with the offence defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The trial court convicted and sentenced him to serve 15 years' imprisonment. His appeal against the conviction and sentence was dismissed by this court, differently constituted.
2. The applicant now seeks order for review of the sentence of 15 years' imprisonment imposed by the trial court and upheld by this court, on appeal.
3. At the hearing of the Application, the applicant sought leniency from the Court and asked for a reduction of the sentence.
4. Mr Mwangi, learned Counsel for the respondent opposed the Application terming it as premature since the applicant had so far served only 5 years out of the 15 years prison sentence. He urged the Court to dismiss the Application.



## Analysis and Determination

5. Article 50 of the [Constitution of Kenya](#) provides for the rights of an accused person as follows: -

(2) Every accused person has the right to a fair trial, which included the right-

(q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.  
(emphasis mine)

6. This Court's powers to review sentences are premised on Article 165 of the [Constitution](#) and section 362 of the [Criminal procedure Code](#) which provide as follows: -

Article 165

1. The High Court has 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.

Criminal Procedure Code

362. Power of the High Court to Call for Records

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. (Emphasis mine)

7. Section 364 of the [Criminal Procedure Code](#) outlines the powers of the High Court under article 165 of [the Constitution](#) and section 362 of the [Criminal Procedure Code](#) and states how the powers are to be exercised as follows: -

364. Powers of the High Court on Revision

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.

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 that 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 a 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.
8. From the above provision, it is clear that the powers of the High Court on Revision are to be exercised only over subordinate courts and not over the High Court with respect to its own decisions. Furthermore, it is trite that where an accused person is aggrieved by the court's decision, he may either appeal or seek a review of the sentence. In this regard a convicted person cannot appeal and at the same time seek a review.
9. The question that arises therefore is whether this Court has jurisdiction to entertain the present Application.
10. It is trite that a court derives its jurisdiction from *the Constitution* or statute. In *Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & 2 others*, Application No 2 of 2011 the Supreme court held thus: -
 

“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...”
11. I note that neither article 165 of the *Constitution* nor the *Criminal Procedure Code* grants this Court the jurisdiction to review its own decisions. It was not disputed that the applicant herein already filed an appeal before this Court which appeal was unsuccessful. It thus follows that this Court cannot once again entertain an Application for revision of sentence with respect to the same matter. I am guided by the decision of Justice Joel Ngugi (as he then was) in *John Kagunda Kariuki vs Republic* [2019] eKLR where the Learned Judge held thus:-
  - “8. However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision in Dismas Wafula Kilwake does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences.....
  10. In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal....”.
12. Having regard to the reasoning in the above decision and having established that this Court lacks the jurisdiction to entertain this Application, I find that I must down my tools. (See *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR).
13. In sum, I find that this Application lacks merit and I therefore dismiss it.



14. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS  
30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**W. A. OKWANY**

**JUDGE**

