



**Indeche & another v Republic (Miscellaneous Criminal Application
E027 of 2023) [2023] KEHC 27199 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E027 OF 2023**

PJO OTIENO, J

DECEMBER 21, 2023

BETWEEN

JOSEPH AKHWEYWA INDECHE 1ST APPLICANT

JOSHUA MBOYA ASHIKHANGA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants have moved this court vide an application filed in court on 12/6/2023 seeking to serve the remaining term of their sentences under probation.
2. They assert that they were convicted of the offence of murder by the High Court of Kenya at Kakamega in Criminal Case No 7 of 2005 and sentenced to death. They then petitioned for resentencing at the High Court in Kisumu vide Petition o. 12 of 2020 and resentenced to thirty years' imprisonment. They claim that they have served 18 years so far and are requesting to complete the remaining two years and three months under probation.
3. The 1st applicant in a supplementary affidavit sworn on 13/7/2023 has averred that he has rehabilitated and is a person of good character which has led to his promotion as a trustee in prison. He has further averred that he has gained financial literacy skills, skills in making sanitary products and has obtained a diploma in biblical studies which skills will help him fit into the society and earn a living. His daughter by the name of Faith Anjella Indeche also swore a supplementary affidavit on 20/9/2023 in support of the subject application in which she avows that her father was put in prison when she was six years old leaving her under care of her mother together with her two siblings and that the continued absence of her father in their lives has altered the trajectory of their family and that she is praying that the subject application be allowed for his father to reconstruct his family.



4. Ms Chala for the prosecution opposed the application arguing that since the sentence was reviewed from the initial death sentence to 30 years' imprisonment, the court became functus officio and it thus lacks the jurisdiction to entertain the subject application.
5. Mr Nyimboma for the applicants submitted that they are relying on article 165(5) (d) & (e) of the Constitution and sections 4&5 of the Probation of Offenders Act which allows the court to sentence offenders to probation and does not prohibit resentence after a sentence on appeal and in this regard, they place reliance on the case of Elleana Rono v R.
6. The question that arises for my determination is whether this court has the jurisdiction to review the sentence meted on the applicants.
7. The background of the subject application is that the applicants were convicted of offence of murder in Kakamega HC Cr. Case No 7 of 2005 by Lenaola J (as he then was) and sentenced to suffer death. They then filed for an appeal at the Court of Appeal in Criminal Appeal No 371 of 2012 and the court dismissed their appeal and upheld their conviction and sentence.
8. In light of the Supreme Court decision in Francis Kioko Muruatetu & another v R Petition No 15 of 2015, the applicants sought a review of their sentence on the ground that the mandatory nature of death sentence was unconstitutional, inhumane and degrading and in a judgment by J. Kamau J, their sentence was commuted to 30 years' imprisonment.
9. Can this court again review the sentence of J. Kamau J? the jurisdiction of this court was enunciated in the case of John Gichovi Muturi v Republic [2021] eKLR where it was held as follows;

“The jurisdiction of the High Court is provided for under article 165 of the Constitution of Kenya 2010 and it includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; any other jurisdiction, original or appellate conferred on it by legislation and supervisory jurisdiction. The supervisory jurisdiction in criminal matters is expounded under Section 362-364 of the Criminal Procedure Code. Under the said sections, this court has jurisdiction to 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. It is therefore clear that this court cannot and does not have jurisdiction to review the decision of a court of concurrent jurisdiction. Once this court delivered its judgment on appeal (though differently constituted), it became functus officio over the matter herein.”
10. Therefore, the high court in Kisumu having reviewed the applicants sentence takes away this court's jurisdiction to again the review the sentence.
11. The applicants have further argued that section 4 and 5 of the Probation of Offenders Act CAP 64 allows this court to sentence offenders to probation. That is the position. However, the provision envisages the sentence of probation as the sentence of first instance and the same is in relation to offences which recognize probation as the appropriate sentence which is not the case in this instance.
12. That said, I find the subject application for resentencing to lack merit and the same is dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF DECEMBER, 2023

PATRICK J O OTIENO



JUDGE

