



REPUBLIC OF KENYA



**KENYA LAW**  
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**Musyoka v Republic (Criminal Petition E015 of 2023)  
[2023] KEHC 26711 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26711 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL PETITION E015 OF 2023  
FR OLEL, J  
DECEMBER 19, 2023**

**BETWEEN**

**DANIEL KITHIKI MUSYOKA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The petitioner was charged and convicted for the offence of defilement contrary to section 8(1) as read together with section 8(4) of the *sexual offences Act* No 3 of 2006. After trial the petitioner was sentenced to serve fifteen (15) years imprisonment for the said offence by a judgment dated 8<sup>th</sup> June 2022. The applicant thereafter subsequently filed Machakos HCCR Misc App No 042 seeking to have this court consider and include the period spent in custody as provided for under section 333(2) of the *criminal procedure Code*. This court allowed the said application and directed that the sixteen (16) months the applicant spent in custody be included as part of his sentence.
2. The applicant has subsequently filed this revision application on 18<sup>th</sup> July 2023 seeking review of his sentence and have reduce it in line with the Article 47 and 48 of *the constitution* of Kenya 2010. The applicant relied on the petition of Philip Mueke & 5 others being Machakos High court No E017 of 2021 and several other citations which he mentioned in his petition. He thus prayed for a more balanced and fair sentence.
3. The respondent, through Prosecution counsel Mr. Mangare objected to this application and stated that the offence warranted a deterrent sentence and the sentence imposed was proper.

**B. Analysis of Law**

4. I have considered the application as well as the response by the Prosecution counsel.



5. The powers of the High court in revision are contained in Section 362 through to 366 of the *Criminal Procedure Code* (cap.75). Section 362 specifically provides as follows: -

“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”.

6. What the High Court can do under its revision jurisdiction is stated under Section 364 of the *Criminal Procedure Code* Cap 5, 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 section 354, 357 and 358, and may enhance sentence;

(b) in the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through 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 arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

7. It should be noted that sentence and re sentencing is part of fair trial process and where suitable, the high court has unlimited powers to order for resentencing. Be that as it may, it should be noted that this jurisdiction is majorly applied to past cases where a determination was made before new jurisprudence had been developed with regard to mandatory minimum sentencing in *sexual offences Act*, mandatory death sentence in capital offences and/or where life imprisonment has been imposed. The supreme court did in the Muruatetu case allow the applicants to apply for resentencing and this has opened the door for other offenders to move the trial court to reconsider the mandatory sentences passed.

8. The appellant was convicted and sentenced in Mavoko CMCR (S.0) NO 28 of 2019 on 8<sup>th</sup> June 2022. By then the trial court was aware and judiciously applied the relevant sentence after considering the



gravity of the offence and mitigating circumstances. The appellant cannot be heard to complain and/or seek resentence as against such a judgment. He can only appeal as against the said sentence.

9. As aptly captured under section 364(5) "Where an appeal arises from the finding, sentence or order and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."
10. The courts hands are tied. The applicant had a right of appeal but chose not to do so. By law this court is not allowed to entertain his application. His only salvation lies in filing an appeal against the said sentence.
11. I find that this is not an application where the courts discretion can be exercised in favour of the applicant.
12. I find this application is not merited and hereby dismiss the same.
13. It is hereby so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

