



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CRIMINAL APPLN. NO. E059 OF 2021**

**FATMA MOHAMED OKOTH ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. In her undated Notice of Motion filed on 25<sup>th</sup> January 2021, the applicant, *Fatma Mohamed Okoth*, approached this court seeking review of the sentence meted out on her by *Hon. Lesiit, J* (as she then was) in Milimani Criminal Case No. 9 of 2017.
2. In the above case, the applicant was charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. The particulars were that on the night of 5<sup>th</sup> February 2017 at about 8:30pm at Golden Gate, South B in Nairobi County, she murdered *John Flugence Mwakidua*.
3. The court record shows that after a full trial, the applicant was convicted of the lesser offence of manslaughter contrary to *Section 202* as read with *Section 205* of the *Penal Code* and was sentenced to serve six years imprisonment.
4. It is the above sentence that the applicant implores this court to revise and substitute it with a non custodial sentence on grounds that; she was deeply remorseful for causing the deceased's death and that due to her youthful age, she should be granted a second chance in life to enable her pursue a masters' degree; that during the period of her incarceration, she has learnt various skills including cross stitch, bead work, fashion and design which will assist in her integration into the society if her application was allowed.
5. During the hearing, both the applicant and the respondent chose to prosecute the application by way of oral submissions. In her submissions, the applicant re-iterated the grounds premising her application and noted that given her young age of 28 years and considering that she had reformed and was now a different person, she deserved a non- custodial sentence to achieve her dream of attaining a master's degree which she cannot do if she remained in prison; that she has undergone many rehabilitation programmes while in prison and because of her level of education, she was currently teaching other inmates in prison and will continue to advance the cause of education to other deserving persons if her application was allowed.
6. In contesting the application, learned prosecuting counsel *Ms. Kimaru* submitted that the applicant has only served two years of the six year jail term and was not suitable for a non custodial sentence noting that the life of a young, resourceful man who had a promising future was lost as a result of the applicant's criminal action; that the applicant did not deserve any mercy as the sentence was quite lenient given the seriousness of the offence and the circumstances in which the offence was committed. In a nutshell, Counsel urged the court to dismiss the application for lack of merit.
7. I have carefully considered the application and the submissions made by the parties in support and in opposition thereto.

I have also considered the contents of the presentence report filed on 16<sup>th</sup> December 2021 and the court record in criminal case no. 9 of 2017.

I find that it is common ground that the sentence the applicant implores this court to review was imposed by *Hon. Lesiit J* in the exercise of the High Court's criminal jurisdiction. This in my view raises a preliminary issue regarding whether this court being a court of concurrent jurisdiction as the court which passed the sentence sought to be reviewed has jurisdiction to entertain and determine the application. This issue was not raised by the respondent during the hearing. As jurisdiction is everything, I will seek to first establish whether I have jurisdiction to entertain the application before considering its merits or otherwise.

8. I will start my consideration of the above preliminary issue by noting that although the High Court under *Article 165 (3)* of the *Constitution* has unlimited jurisdiction in both civil and criminal cases and it also has supervisory jurisdiction over all subordinate courts and tribunals, *Article 165 (6)* of the *Constitution* makes it clear that the court's supervisory jurisdiction cannot be exercised over a superior court. *Article 162 (1)* defines superior courts as the Supreme Court, the Court of Appeal, the High Court and the courts of equal status established

under Article 162 (2).

9. Article 50 (2) (q) of the Constitution is also relevant. Article 50 (2) of the Constitution guarantees an accused person the right to a fair trial and states as follows:

**“(2) Every accused person has the right to a fair trial, which includes the right—**

**(a) .....**

**(b) .....**

**(c) .....**

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

10. It is clear from Article 50 (2) (q) of the Constitution that a sentence passed by the High Court can only be reviewed by a higher court which is the Court of Appeal.

11. It is also instructive to note that this application invokes the revisional jurisdiction of the High Court which is donated by Section 362 of the Criminal Procedure Code which is in the following terms:

**“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.”**

12. My reading of the above provision leaves no doubt in my mind that the High Court only has jurisdiction to review orders or decisions made in criminal proceedings by subordinate courts and not decisions made by courts of concurrent jurisdiction or other superior courts.

13. In ***Samuel Kamau Macharia & Another V Kenya Commercial Bank***, the Supreme Court held that a court of law can only exercise jurisdiction conferred on it by either the constitution or other written law or both. The Supreme Court emphasized that a court cannot arrogate to itself jurisdiction which is not conferred on it by the law nor can it expand its jurisdiction through judicial craft.

14. Having demonstrated that the Constitution and the Criminal Procedure Code does not give the High Court power to review its own decisions in criminal proceedings and in the same vein decisions of other superior courts, I have come to the conclusion that I do not have jurisdiction to review the applicant’s sentence as prayed as doing so would be tantamount to reviewing the decision of a court of concurrent jurisdiction or sitting on appeal against the decision of another High Court Judge which is not permissible in law.

15. If the applicant was aggrieved by the sentence imposed by this court which appears to be the position, her only recourse was to file an appeal against her sentence to the Court of Appeal under Articles 164 (3) and 50 (2) (q) of the Constitution as well as Section 379 (1) of the Criminal Procedure Code.

16. In view of the foregoing, I decline to grant the orders sought and instead strike out the application for want of jurisdiction.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

The applicant in person

Ms Chege for the respondent

Ms Karwitha: Court Assistant