



**Janet v Republic (Miscellaneous Criminal Application
E020 of 2021) [2022] KEHC 10729 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CRIMINAL APPLICATION E020 OF 2021**

JN NJAGI, J

MAY 25, 2022

BETWEEN

ANTHONY MUGAMBI JANET APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for review of sentence in Nyeri
CM's Court Miscellaneous Application No. 1085 of 2020)*

RULING

1. The applicant herein has brought an application filed on 21st June 2021 seeking for review of his sentence and seeking for consideration of the period he spent in custody before conviction to be computed in his sentence pursuant to Section 333(2) of the Criminal Procedure Code. He further urges the court to grant him a non-custodial sentence for the remainder of the sentence.
2. The applicant was charged in Nyeri Court in Sexual Offences Case No. 49 of 2016 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to 15 years imprisonment on 15th August 2017. He subsequently appealed to the High Court in Criminal Appeal No. 53 of 2017, which appeal was dismissed on 28th September 2018. The applicant further made an application for review of the sentence vide Miscellaneous Application No. 1085 of 2020 in the Chief Magistrate's Court in Nyeri which reduced the sentence to 10 years imprisonment which was to run from the day of the conviction.
3. The applicant has now sought review on sentencing and asks the court to invoke section 333(2) of the *Criminal Procedure Code* and grant him a lesser sentence.
4. The respondent opposes the application vide the submissions of the learned Principal Prosecution Counsel M/s Mwaniki who submits that the three courts that handled the various matters relating to



the applicant were alive to the provisions of Section 333(2) of the Criminal Procedure Code during resentencing. The respondent contends that the applicant was charged and convicted of a serious offence and the sentence was thus commensurate to the offence. Further, that the applicant filed a petition for resentencing in Nyeri CM's Court No. 1085 of 2020 where the court reduced the 15 year sentence to 10 years to run from the date of conviction. The respondent points out that the applicant has never filed an appeal at the Court of Appeal against the High Court judgment in HCCRA No. 53 of 2017. That this court has already upheld the sentence of 15 years and is therefore functus officio on the issue of re-sentencing. That what the applicant ought to have done was to file an appeal in the Court of Appeal.

5. The respondent submits that the applicant is serving a sentence less than the minimum mandatory sentence of 15 years contrary to Section 8(4) of the *Sexual Offences Act*. As such, the respondent submits that the applicant got off easy with a sentence of 10 years as opposed to the mandatory sentence for the offence. The respondent submits that the applicant is therefore not entitled to benefit from the provisions of Section 333(2) of the Criminal Procedure Code.
6. The respondent further submits that the applicant is not serving an excessive sentence even if the time spent in remand has not been taken into account as required under Section 333(2) of the Criminal Procedure Code. The respondent further states that it is not a mathematical exercise that this Honourable Court should engage in. That the sentence meted was adequate and calls upon this court to dismiss the application and uphold the sentence.

Analysis and Determination

7. On perusal of the Application, and the submissions, the main issue for determination herein is whether this Honourable Court has jurisdiction to hear the application.
8. Firstly, it is imperative to mention that the jurisdiction of a court of law is donated by the *constitution* and the statute was in *Samuel Kamau Macharia vs KCB & 2 Others* Civil Application No. 2 of 2011, where the court stated:-

“A court’s jurisdiction flows from either the *constitution* or legislation or both. Thus a court of law 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.”

9. It is not in dispute that the applicant herein was convicted for the offence of defilement by the Magistrate’s court and sentenced to 15 years imprisonment. He appealed against the conviction and sentence to the High Court in Nyeri which appeal was dismissed on 28th September 2018. The applicant thereafter filed a petition for review of the sentence in Nyeri CM Criminal Petition No. 1085 of 2020 where the court reduced the sentence of 15 years to 10 years. The applicant has now come back to the High Court for review of sentence by invoking the provisions of Section 333(2) of the Criminal Procedure Code.
10. The effect of the High court judgment delivered on 28th September 2018 is that it confirmed the conviction and the sentence by the trial court. Did the lower court then have the power to review the judgment of the High Court?
11. Article 50(2) of the *Constitution* provides:-
 - (2) Every accused person has the right to a fair trial, which includes the right:-
 - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.



12. Article 165(6) of the *Constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate courts. In that respect the High Court can call for any record of a subordinate court so as to satisfy itself as to the correctness or legality of any order or sentence issued by the subordinate court. However, the subordinate court has no power to call for the record of the High Court with a view to reviewing it. It is clear from the provision stated above that a person can only apply for review of an order or sentence in a criminal case to a higher court. Therefore, the magistrate's court in this case had no jurisdiction to review the sentence of the High Court, which is a court of higher jurisdiction than itself. The review was in the premises illegal and abrogated the hallowed hierarchy of court. It is incomprehensible that the magistrate's court had the temerity and audacity to review a sentence that had been confirmed by the High Court.
13. However, the state has not appealed against the illegal orders of the magistrate's court so that the original sentence can be reinstated. Section 364(2) of the Criminal Procedure Code provides the following on the power of the High Court in matters of review/revision of orders from subordinate courts:

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.
14. Since the applicant was not warned of the possibility of his sentence being enhanced, it would be prejudicial to him to reinstate the original sentence. This court has no basis of reviewing the sentence under the provisions of section 333(2) of the CPC as sought by the applicant when considering that the trial magistrate who reviewed the sentence of the High Court had no jurisdiction to do so. The applicant should count himself lucky that he has benefited from an illegality. His application is thus dismissed.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF MAY 2022.

J. N. NJAGI

JUDGE

In the presence

Mr. Mururu: for Respondent

Applicant :

Court Assistant - Kinyua

