



**Lisengere v Republic (Criminal Petition E001 of 2021)  
[2022] KEHC 14503 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14503 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL PETITION E001 OF 2021  
WK KORIR, J  
OCTOBER 27, 2022**

**BETWEEN**

**JOSEPHAT MUHAVI LISENGERE ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Through the notice of motion application lodged on October 27, 2021, the applicant, Josephat Muhavi Lisengere, has moved this court for sentence review. His application is premised on section 39(2) of the *Sexual Offences Act*, 2006; sections 362, 364(1) and 365 of the *Criminal Procedure Code*; and articles 1, 2(4), 19(3), 23(1), 25(c), 27, 28, 29, 48, 165(3)(a), (b) & (d) and 258(1) of the *Constitution*. In the body of the application, the applicant indicates that he seeks sentence review in accordance with article 50(2)(p) & (q) of the *Constitution*. The application is supported by an undated affidavit sworn by the Applicant.
2. The applicant's case is that he was convicted of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* in Kabarnet SPM Court Criminal Case No 145 of 2016. He was sentenced to life imprisonment. His appeal to this court against both the conviction and sentence in Kabarnet High Court Criminal Appeal No 90 of 2017 (formerly Eldoret HCCRA No 233 of 2016) was partially successful resulting in the reduction of his sentence to 20 years' imprisonment. There is no indication from the applicant's pleadings as to whether he pursued an appeal at the Court of Appeal. Through this application, the applicant prays that his sentence be reduced to the period already served.
3. On April 27, 2022, the applicant filed a document titled amended/supplementary grounds of the petition. In the document he states that he is a remorseful first offender who has since reformed and learnt to take responsibility for his actions. He also avers that the sentence meted on him is harsh and that while in custody, he has attained a certificate in theology. He urges this court to invoke section



333(2) of the [Criminal Procedure Code](#) and the [Sentencing Guidelines 2016](#) to reduce his sentence to the period already served.

4. The applicant filed submissions on April 27, 2022 through which he submits that despite his sentence being reduced on appeal to 20 years' imprisonment from life imprisonment, the sentence is still harsh and excessive. He argues that it is in the interest of justice that sentencing should serve to salvage and rehabilitate an offender. In his view, the five years already served has achieved that goal. He relies on the case of [Republic v Thomas Patrick Gilbert Chomondeley](#) [2009] eKLR to support this argument. He urges this court to invoke articles 27 and 28 of the [Constitution](#), and sections 364 and 365 of the [Criminal Procedure Code](#) as well as the Judiciary [Sentencing Policy Guidelines](#) in reviewing and imposing a shorter prison sentence on him. The applicant further submits that while under incarceration he has reformed, is remorseful, repentant, rehabilitated and has learned new skills and the importance of taking responsibility for his actions. He calls upon this court to take those factors into account and allow his application.
5. The respondent through the Office of the Director of Public Prosecutions filed submissions dated February 17, 2022. In the submissions, the respondent argues that this court having rendered itself on the appeal by the applicant is functus officio. It is further submitted that the applicant ought to have appealed to the Court of Appeal if he was dissatisfied with the sentence of 20 years imposed on appeal. It is the respondent's position that this court is barred by section 364(5) of the [Criminal Procedure Code](#) from entertaining this matter. This court is therefore urged to dismiss the application.
6. The respondent has raised the issue of jurisdiction which must be addressed before the court can delve into the substance of the application. From the submissions of both parties, the jurisdiction of this court to hear and determine this petition is contentious. Whereas the applicant argues that this court has jurisdiction under the [Constitution](#) to entertain this matter, the respondent on the other hand argues that this court is functus officio and therefore bereft of the power of review granted to it under section 364(5) of the [Criminal Procedure Code](#).
7. As is often stated, jurisdiction is everything and a court without jurisdiction has no power to determine the issues placed before it by the parties. This principle of law was stressed by the Supreme Court in [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR when it held that:

“(68) 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the [Constitution](#) exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...”
8. The respondent's position in the instant application is that this court no longer has jurisdiction to reconsider the sentence imposed on the applicant in Kabarnet HC Criminal Appeal No 90 of 2017 by a judge of coordinate jurisdiction. The main issue therefore is whether this Court can indeed be possessed of jurisdiction to review its own order and sentence. In essence, the petitioner is asking this



court to review its previous judgment in relation to sentence. On the power to review its own decisions, the Supreme Court stated in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR that:

“[90] Flowing from the above analysis, and taking into account the elaborate submissions by counsel, and the practice in the Commonwealth and beyond, the inescapable conclusion to which we must arrive, is that this court, being the final court in the land, has no jurisdiction to sit on appeal over, or to review its own judgments, rulings, or orders, save in the manner contemplated by section 21(4) of the *Supreme Court Act*. The court becomes functus officio once it has delivered judgment or made a final decision. The stamp of finality with which this court is clothed should not be degraded except in exceptional circumstances as determined by the court itself. Were we to hold otherwise, there would be no end to litigation, thus, severely compromising the integrity of the judicial process, and the integrity of this court...”

[92] Taking into account the edicts and values embodied in chapter 10 of our *Constitution*, we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this court may, upon application by a party, or on its own motion, review, any of its judgments, rulings or orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

- i. the judgment, ruling, or order, is obtained, by fraud or deceit;
- ii. the judgment, ruling, or order, is a nullity, such as, when the court itself was not competent;
- iii. the court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto;
- iv. the judgment or ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.

These principles are no doubt informed by various judicial authorities, in other jurisdictions, such as the ones we have cited from Nigeria, United Kingdom, India and South Africa.”

9. Going by the grounds for review provided by the Supreme Court, it is apparent that the applicant has not established any of those grounds in order to make this court review the sentence imposed on him when he appealed to this court. The applicant has therefore failed to demonstrate that this court has jurisdiction to entertain his application for the review of his sentence.

10. The applicant, however, has gone ahead to invoke article 50(2)(p) & (q) of the *Constitution*. It is important to reproduce the cited article in order to appropriately answer the applicant. It states:

“50. (2) Every accused person has the right to a fair trial, which includes the right-

- a. ...
- p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and



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

11. A reading of the cited provisions will show that they will not come to the rescue of the applicant. Article 50(2)(p) can only be invoked where a less severe sentence is legislated in the course of the trial. In the applicant’s case he has not shown that a less severe sentence had been passed by the time the trial court was passing sentence on him. His invocation of that provision is therefore superfluous as it brings no fruit to his door. As for article 50(2)(q), it is clear that an appeal or review can only lie to a higher court. This court having dealt with the applicant’s appeal, the only higher court he ought to have moved to was the Court of Appeal. The provision does not grant this court the jurisdiction to sit on appeal against its decisions or to review them. The applicant cannot therefore benefit from that provision.
12. I need not say more in order to agree with the respondent that this court has no jurisdiction to entertain the applicant’s prayer for review of the sentence that was imposed on him after he appealed to this court. I therefore find the application without merit and dismiss it.

**DATED AND SIGNED AT NAKURU THIS 24<sup>TH</sup> DAY OF OCTOBER, 2022.**

**W KORIR, JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT KABARNET THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022.**

**HK CHEMITEI, JUDGE**

