



**Gitau v Republic (Miscellaneous Criminal Application E017 of 2020)  
[2022] KEHC 16984 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16984 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS CRIMINAL APPLICATION E017 OF 2020  
GWN MACHARIA, J  
DECEMBER 20, 2022**

**BETWEEN**

**SIMON KIMANI GITAU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein has approached this court seeking a review of sentence. He was charged in the Chief Magistrate's Court at Naivasha in *Criminal Case No 2986 of 2010* with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*, No 3 of 2006 and an alternative count of indecent act contrary to section 11(1) of the same Act. He was found guilty of the main count and convicted accordingly. He was sentenced to serve 20 years imprisonment.
2. I hasten to add that, although the application is premised as a miscellaneous application, the applicant indeed seeks a revision of his sentence, praying that the period he spent in remand custody be considered to constitute part of the sentence.
3. The applicant admitted that he had instituted an appeal against the judgment of the trial court *vide* Naivasha HC *Criminal Appeal No 56 of 2014* which was dismissed. It is on record this court severally called for the record in the said High Court criminal file but even as at the time of hearing this application, the same had not been availed.
  1. Be that as it may, it is well settled law that as a first appellate court, the High Court considers both matters law and fact. This means that both the questions of conviction and sentence were addressed by the first appellate court. The appeal having been dismissed, the only recourse the applicant herein had was to appeal, even if on sentence alone, to the Court of Appeal. I am persuaded by the case of *Daniel Otieno Oracha v Republic* [2019] eKLR where the petitioner



had applied for review of a sentence imposed by a court of concurrent jurisdiction and the court observed that:

- “ 14. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a judgment of the subordinate court or if the petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.....
16. The judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own judgment or of court of concurrent competent jurisdiction when the petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.
17. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matters falling under the exclusive jurisdiction of Supreme Court under Article 163(3) cannot be dealt with by the High Court.....”

4. Furthermore, reliance on the [Muruatetu](#) decision by the Supreme Court as in the instant case, is no longer applicable as the said court clarified that minimum mandatory sentences were unconstitutional only in so far as they related to murder cases. If this court were to seize itself of jurisdiction to hear this application, no doubt it would be sitting on appeal of a court of concurrent jurisdiction which is untenable.
5. I agree that a trial court ought to take into account the period an accused person was in remand prior to sentencing. However, in as much as I am *functus officio* to this matter, as earlier stated, I am not seized of the first appeal record that would inform me as to the correctness of the applicant’s submission.
6. For the foregoing reasons, this application lacks merit and the same is hereby dismissed.

**DATED AND DELIVERED AT NAIVASHA THIS 20<sup>TH</sup> DECEMBER, 2022.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

Applicant in person.

Mr.Michuki for the Respondent.

