



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

Constitutional Petition No. 5 Of 2018

(CORAM: R. E. ABURILI - J.)

DANIEL OTIENO ORACHA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner **DANIEL OTIENO ORACHA** filed this petition dated 29th May 2018 under **Article 159(1)(c) (9) of the Constitution** seeking for review of sentence of 21 years imprisonment to one (1) year or for Probation Report in consideration of his mitigating factors.
2. The grounds upon which the petition is premised are similar to the orders sought as stated in the petition and summarized below, and are also replicated in the Petitioner's written and oral submissions made in court.
3. The Petitioner claims that he was initially convicted and sentenced to serve 21 years imprisonment under **Section 8(2) of the Sexual Offences Act No. 3 of 2006** and that (currently) he has completed serving 11 years hence he urges the court to reduce for him one year to enable him provide for his wife and children, under **Article 53(1)(c) of the Constitution**. That he has reformed and rehabilitated to maximum and begs that if placed on Probation Order, it will promote reconciliation as stipulated under **Article 159(1)(c) of the Constitution** and he relied on the case of **Philip Makokha Keya vs Republic [2014] eKLR**. He further claims to be of good character and that he lodged the Petition in good faith for the court to consider his mitigating factors as a first offender. The Petition was supported by an affidavit sworn by the Petitioner on 29th May 2018 wherein he reiterates the grounds stated above.
4. The background to this Petition is that vide **Siaya PM Criminal Case No. 30/2007**, the Petitioner was charged, tried, convicted and sentenced to serve 21 years imprisonment for the offence of defilement of a child contrary to **Section 8(1) as read with 8(3) of the Sexual Offences Act**.
5. After his conviction and sentence, the Appellant challenged that judgment before **Kisumu HCRA No. 79 of 2008** and vide a judgment delivered on 23/7/2010 by Hon. Abida Ali-Aroni, the High Court dismissed the appeal and upheld the conviction and sentence of 21 years imprisonment meted out on the Appellant (now Petitioner). On 11/4/2014, the High Court at Kisumu resubmitted the original trial court records to Siaya PM's Court.
6. What is clear from the trial court records returned to Siaya PM's Court and submitted to this court on request I this petition, is that, the Petitioner did not challenge the judgment of the High Court on appeal. He did not file any appeal to the Court of Appeal. Instead, in 2018, he filed this Petition seeking for reduction of sentence and setting out very touchy persuasive mitigations. He also filed detailed written submissions and documents involving his life's skills acquired while in prison, and seeking the exercise of discretion by this court.
7. The petitioner claims that he is remorseful, is a first offender, has serious family constraints as the sole breadwinner; he has children in secondary schools and with no one to fend for them as his mother is a single mother; that life in prison is difficult as the food is not good at all, that he has been behind bars for now 11 years; he has undergone various reform programmes in various fields including; upholstery grades III and II; he is now born again and baptized on 22/1/2011, has a diploma in Discovery Bible speaks through correspondents; 1st and 2nd year diplomas in biblical studies at AFCM International Training Centre; a certificate in Health Education from the voice of prophecy and grade III, in tailoring.
8. Further, that he has outstanding character traits as he has never been disciplined while in prison; that he is remorseful and that he has sought forgiveness from the complainant who is now an adult and married and promises never to commit any such or other offence in his life time. He prays for leniency, that the remainder sentence be reduced, set aside or even he be given a non-custodial sentence. He laments that life in prison is difficult as the food is unpleasant.

9. The Respondent represented by Mr. David Okachi, Senior Principal Prosecution Counsel vehemently opposed the Petition and submitted that the sentence being served is lawful. The offence is serious, calling for deterrent sentence as it causes trauma to the victim and the family and society. That he should complete the remainder sentence and that there is no justification for commuting of the sentence.

Determination

10. I have carefully considered the petition, the grounds in support, submissions for and against the Petition and the applicable law. Albeit the Petitioner is seeking for review of sentence under **Article 159(1)(c)(9) of the Constitution of Kenya, 2010**, that provision is nonexistent in the 2010 Constitution. What is available is **Article 159(2)(c)** which stipulates that in exercising judicial authority, the courts and tribunals shall be guided by the following principles: -

(a) justice shall be done to all irrespective of status;

(b) justice shall not be delayed;

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to Clause 3.

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this constitution shall be protected and promoted.

11. What, therefore, the petitioner seems to be urging this court to do is to exercise discretion and promote Alternative Dispute Resolution mechanisms under **Article 159(2)(c) of the Constitution**.

12. However, this court observes in reiteration that the Petitioner was an appellant in **Kisumu HCCRA No. 79 of 2008** which appeal was dismissed and conviction and sentence of the trial court upheld. The Petitioner, instead of appealing to the Court of Appeal to exhaust the appeal mechanisms, filed this Petition seeking for review of sentence.

13. This court and the High Court at Kisumu are courts of concurrent jurisdiction. That being the case, this court is devoid of any jurisdiction in the exercise of its judicial authority under **Article 159 of the Constitution**, to review a judgment of a court of concurrent jurisdiction. To do so would be tantamount to sitting as an Appellate court on the judgment of my sister Judge Hon. Abida Ali - Aroni, J.

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.

15. This court's jurisdiction is derived from various statutes and **Article 165 of the Constitution**. In **Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011**, the Supreme Court of Kenya made it clear that a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft.

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 A 163(3)** cannot be dealt with by the High Court.

18. For the above reasons of want of jurisdiction, I must, as was held in the owners of **Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**, down my tools and say no more, for, without jurisdiction, a court of law acts in vain.

19. Accordingly, this Petition is found to be frivolous, vexatious and an abuse of this court's process and without jurisdiction. The same is hereby struck out for want of jurisdiction.

Dated, Signed and Delivered in Open Court at Siaya this 25th day of June, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Petitioner in person

Mr Okachi Snr Pr. Prosecution Counsel for the State

