



**Mutembei v Republic (Miscellaneous Criminal Application
E099 of 2024) [2025] KEHC 2857 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E099 OF 2024**

**PN GICHOHI, J
MARCH 13, 2025**

BETWEEN

PETER MBAABU MUTEMBEI APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision of Sentence imposed by Mumbua T. Matheka, J on
9th November, 2022 in Nakuru HCCR. Appeal No. 11 of 2020)*

RULING

1. Vide a Notice of Motion filed on 22nd October, 2024, the Applicant urged this Court to review the sentence of 30 years imprisonment imposed on him on 9th November, 2022 in Nakuru Criminal Appeal No 11 of 2020, to a non-custodial sentence based on medical grounds. He relied on Section 362 of the Criminal Procedure Code, Article 50 (2) (p) and (q) and 165 (3) and (7) of the Constitution of Kenya.
2. The background of this application is that the Applicant and another were arraigned before the trial court on 10th September 2012 in Nakuru CMCCR. No 3101 of 2012 where they were charged with the offense of Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.
3. They also faced an alternative count of handling stolen motor vehicle. The Applicant was found guilty on the main charge and sentenced to life imprisonment.
4. Aggrieved by both conviction and sentence, he appealed to this Court and T.M.Matheka, J upheld the conviction and reduced the sentence to 30 years imprisonment to run from 2019.
5. The current application is based on the grounds that the Applicant is suffering from hernia which has caused his health to deteriorate since his incarceration in prison. He stated that treatment of hernia



requires medical surgery to return the tissue to normal and reduce the bulge together with constant monitoring. It is his position that this Court has jurisdiction to grant his prayer for a more lenient sentence or a non-custodial sentence.

6. In support of his application, he produced medical reports dated 27th January, 2021, 2nd October, 2024 and 15th October, 2024, from Dr. Thaithi of Nakuru PGH, and Clinician in-charge Nakuru main prison, which reports indicate that the Applicant is suffering from Retroviral Disease(RVD) and that in 2020, he was diagnosed with Asthma and Ischemic Heart disease, which requires urgent heart surgery for effective management of his condition.
7. He also furnished the Court with Nutrition Certificates dated 21st February, 2022 and 7th October, 2024, advising him on special diet to be taken when managing the medical condition aforementioned.
8. The Prison Department, through the Deputy Officer in Charge, wrote recommendation stating that the Applicant was not subjected to Vocational Technical Training due to his ill health, and that instead, he was placed on behaviour change program which has transformed him and that he is ready to be absorbed back to the society. The Officer added that the Applicant has shown remorse.
9. Further, the Officer stated that the Applicant's health continues to deteriorate as the care requirements exceed medical resourced available in the Correctional Facility and that his further detention will pose a significant burden on Government resources. On that basis, he recommended that the Applicant's sentence be reviewed as further imprisonment will not be beneficial.
10. The application is opposed by the State, vide Replying Affidavit sworn on 25th November, 2024 by James Kihara, the Learned Prosecution Counsel. While citing Section 39 of Prison Act Cap 90, he depones that Prison Facilities are required to provide medical support to an extend that the facility allows and in the event they are unable to provide such medical services, then the Prison is enjoined to facilitate such prisoner to obtain such treatment from the local hospitals.
11. It is his position that since an Appeal was preferred before this Court on both conviction and sentence, the Court lacks jurisdiction to order for further review of sentence by Court of concurrent jurisdiction and therefore, the Applicant should appeal to the Court of Appeal on the sentence. He added that seeking permission to obtain medical attention outside prison is an administrative issue and not a legal issue.
12. He emphasised that by granting the prayers sought, the Court will in essence be reviewing the sentence meted, which issue can only be determined in the Court of Appeal and therefore, this application lacks merit.

Analysis and Determination

13. After considering the application and the Response therefore, it is apparent that the basis of this application is primarily his health which is his right under Article 43 of the Constitution on economic and social rights. In particular, sub-Article (1) (a) and 2 which provides that :-
 - (1) Every person has the right—
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; ...
 - (2) A person shall not be denied emergency medical treatment.
14. Regarding the Applicant's ill health while in prison, Section 39 of the Prisons Act provides that :-



- (1) In the case of the illness of a prisoner detained in a prison in which there is not suitable accommodation for such prisoner, the officer in charge, on the advice of the medical officer, may order his removal to a hospital, and in case of emergency such removal may be ordered by the officer in charge without the advice of the medical officer.
 - (2) Any prisoner who shall have been removed to a hospital under the provisions of this section shall be deemed to be under detention in the prison from which he was so removed.
 - (3) Whenever the medical officer in charge of a hospital considers that the health of a prisoner removed to that hospital under this section no longer requires his detention therein, he shall notify the officer in charge of the prison from which the prisoner was removed and the officer in charge of that prison shall thereupon cause such prisoner to be returned to the prison if he is still liable to be confined therein.
 - (4) Every reasonable precaution shall be taken by the medical officer in charge of a hospital and the persons employed therein to prevent the escape of any prisoner who may at any time be under treatment therein, and it shall be lawful for such officer and person to take such measures for the preventing of the escape of any such prisoner as may be necessary:

Provided that nothing shall be done under the authority of this section which, in the opinion of the medical officer in charge of such hospital, is likely to be prejudicial to the health of such prisoner.
 - (5) The period during which the prisoner has been detained in a hospital under this section shall be reckoned as part of his term of imprisonment.
15. Therefore , it is clear that the Prison facility where the Applicant is held has the responsibility to take a sick prisoner to hospital. From the foregoing, the issue for determination in the application herein is whether this Court should review the sentence of this Court differently constituted.
 16. There is no doubt that Article 50 (2) (p) (q) of the Constitution of Kenya relied on by the Applicant provides for the rights of an accused person including: -
 - “(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.”
 17. However, Section 362 of the Criminal Procedure Code which he relies on is in regard to powers of revision by this Court as far as subordinate courts are concerned . Specifically, it provides that:-

“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.”
 18. From that provision, the jurisdiction of this Court on revision is to correct manifest irregularities and illegalities. Additionally, the powers of this Court on Revision are to be exercised therein not envisage revision over the High Court with respect to its own decision in the circumstances herein.



19. Further, Section 364 of the *Criminal Procedure Code* provides as follows:-

- “(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) 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: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

20. It is therefore trite that where an accused person is aggrieved by the court’s decision, he may either appeal or seek a review of the sentence. A convicted person cannot appeal and seek a review at the same time as he is trying to do here.

21. Further, though the Applicant relies on High Court powers under Article 165 (6) of the *Constitution*, that sub Article provides that:-

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial, or quasi-judicial function, but not over a superior court.”

22. In the present case, it is not disputed that the Applicant herein had previously appealed to this Court on both Conviction and Sentencing, where the Court upheld the Conviction and reduced the sentence from life imprisonment to 30 years imprisonment. In the circumstances, Article 165 above does not support the Applicant . The Applicant’s recourse lay in an appeal to the Court of Appeal and not through a revision.

23. In conclusion therefore:-

1. This Court has no jurisdiction to review the sentence herein issued by a Court of concurrent jurisdiction.



2. The application herein be and is hereby struck out.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF MARCH, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Peter Mbaabu Mutembei -Applicant

Mr. Kihara for the Respondent

Ruto, Court Assistant

