



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Republic (Petition E005 of 2024)
[2025] KEHC 3502 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
PETITION E005 OF 2024
M THANDE, J
MARCH 14, 2025**

BETWEEN

JOHN MUHIA WAINAINA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Before me for consideration is a Petition filed on 8.5.23. The Petitioner was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* in Lamu Criminal Case No. 14 of 2019 and sentenced to life imprisonment. He appealed in Malindi High Court Criminal Appeal No. E21 of 2021, which appeal was dismissed and the conviction and sentence affirmed.
2. The Petitioner has now returned to this Court seeking review of the sentence imposed upon him and be granted a definite lenient sentence. He relied on the provisions of Article 50(2)(p) and (q) of *the Constitution* he also sought that the period spent in custody pending trial be awarded pursuant to Section 333(2) of the Criminal procedure Code.
3. The Respondent opted not to file any response.
4. As I consider this matter, it is necessary to set the record straight regarding the oft cited provisions by petitioners who approach this court for review of sentence. These include Article 50(2)(p) and (q) of *the Constitution* which provide:
 2. Every accused person has the right to a fair trial, which includes the right—
 - (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;



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

5. A plain reading of Article 50(2)(p) shows that the same relates to an offence in respect of which punishment has been changed between the time of commission of the offence and sentencing. In such event, an accused person shall be entitled to the least severe punishment. Clearly this provision does not relate to every sentence nor is it applicable in this case.
6. Article 50(2)(q) guarantees to every convicted person, the right to appeal to, or apply for review by, a higher court as prescribed by law. The Petitioner has already availed to this Court this right by appealing his conviction and sentence. The cited constitutional provisions are thus not helpful.
7. Having stated the forgoing, I now turn to the Petition before me. The Petitioner has stated in his petition that he appealed to this Court and his appeal was dismissed. In light of this, the question of jurisdiction arises.
8. The law, is that this Court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. A court cannot arrogate to itself jurisdiction that has not been conferred upon it by law nor exercise jurisdiction exceeding that which is conferred upon it by law. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly 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. 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.

9. This Court derives its jurisdiction principally from Article 165(3) of *the Constitution* which confers upon this Court unlimited original jurisdiction in criminal and civil matters. Article 165 clearly delineates and demarcates what the Court can and cannot do. The jurisdiction of this Court includes supervisory powers. By dint of Article 165(6) however, this Court cannot supervise a superior court. It provides:

“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.” (emphasis)

10. The superior courts in the court system in Kenya are listed in Article 162 (1) of *the Constitution*, which provides:

The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

11. After his unsuccessful appeal to this Court, the Petitioner now seeks is that the Court reviews its own decision. By dint of Article 165(6) therefore, this Court lacks the jurisdiction to reopen the matter to relook at his sentence that was upheld by this Court. He cannot therefore return to this Court for a review of the sentence that was affirmed by this Court. His remedy lies in an appeal to the Court of



Appeal. In this regard, I associate with the holding in John Kagunda Kariuki v Republic [2019] eKLR, where Ngugi, J, (as he then was) stated:

In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.

12. In light of the foregoing, I find that the Petition filed on 8.5.23 is incompetent for want of jurisdiction, and the same is hereby struck out.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 14TH DAY OF MARCH 2025

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M. THANDE

JUDGE

