



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kipchumba v Republic (Criminal Petition E002 of 2023)  
[2025] KEHC 5870 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5870 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL PETITION E002 OF 2023**

**JRA WANANDA, J**

**MAY 9, 2025**

**BETWEEN**

**EZRA KIPCHUMBA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner was charged and convicted of the offence of attempted defilement in Iten Criminal Case (S.O) No. 40 of 2019. On 4/06/2021, the trial Court sentenced him to 15 years imprisonment. He states that he was sentenced to 10 years while the Respondent indicates 10 years. Be that as it may, the Petitioner filed an Appeal before this Court, namely Eldoret High Court Criminal Appeal No. 078 of 2021 which was however dismissed on 5/10/2022 by Nyakundi J.
2. The Petitioner has now returned to this Court by way of the undated Notice of Motion filed on 14/06/2023 in which he seeks for Review of sentence, and also for the time he allegedly spent in custody to be considered. In his Supporting Affidavit, he deponed that he is a first offender and is remorseful.
3. In his Submissions, the Petitioner reiterated that he is a 1<sup>st</sup> offender, and that he pleaded not guilty due to the prevailing circumstances. He also reiterated that the Court do consider the time spent in pre-trial custody and he cited the cases of Maingi & 5 others *v Director of public Prosecutions & Anor (Petition No. E017 of 2021)* (2022) KEHC 13118(KLR) and Criminal Appeal No 195 of 2019 – Robert Kimutai Cheruiyot v Republic and Moses Kitui Barasa v Republic – Eldoret Petition No. 7 of 2016. He also reiterated his remorse and urged that he has been in prison since 2019.
4. The Respondent, through Prosecution Counsel, Rachel Mwangi, cited Section 362 and 364 of the *Criminal Procedure Code* in respect to the High Court’s revisionary powers over subordinate Courts in criminal matters. She submitted that the Petitioner seeks that this Court reviews a sentence that



was passed by the lower court and later reviewed by the High Court and that this Court lacks the jurisdiction to hear the Petition as it has now become “functus officio”. She cited the case of Peter Charagu v Republic [2021] eKLR, the case of Jane Nambuye Manyonge v Republic [2021] eKLR and also the case of Telkom Kenya limited v John Ochanda [2014] eKLR.

### **Determination**

5. The issue that arises for determination is “whether this Court should review the sentence”.
6. It is evident that the Petitioner appealed to this same High Court against the decision of the Magistrate’s Court in Eldoret High Court Criminal Appeal No. 078 of 2021. As aforesaid, the Appeal was heard on merits and dismissed. The Applicant has now returned to this same Court which has already dismissed his Appeal, asking for the same sentence imposed by the Magistrate’s Court to be reviewed. The Petitioner’s recourse is to appeal to the Court of Appeal, not to come back to this same High Court. This Court cannot sit on appeal on a decision of its own. It may be argued that the Appellant only appealed against the conviction, and not the sentence but still, he ought to have brought all his grievances at once in his Appeal. He cannot litigate in instalments.
7. I therefore find that this Court, having already pronounced itself in the Appeal, is functus officio and bereft of the jurisdiction to again review the decision it had already dealt with.
8. I find persuasion in the case of Joseph Maburu alias Ayub v Republic [2019] eKLR where Kiare Waweru J held as follows:

“Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black’s Law Dictionary Tenth (10<sup>th</sup>) Edition describes defines sentence as:

“The judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.”

Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”

9. I also cite the decision of Hon. Lady Justice L. Njuguna in the case of Boniface Gitonga Mwenda v Republic [2021] eKLR, where, faced with a similar situation, she held as follows:

“However, as I have noted, the Petitioner herein appealed the trial court’s decision to this court. The court in dismissing the appeal against the sentence held that the trial court’s sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to 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. (See Section 362-364 of the *Criminal Procedure Code*).

Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction.



This court doesn't have jurisdiction in that respect and as such, the prayer to that respect ought to fail.”

10. In view of the foregoing, it is evident that Petitioner's recourse was to move to the Court of Appeal, not to return to this Court to seek a review. What the Petitioner is inviting this Court to do is to re-look at the decision of Nyakundi J in which he already reviewed the Judgment of the lower Court, an action which is untenable in law. A High Court Judge cannot sit on appeal over a decision of another Judge of equal jurisdiction. This Court having already pronounced itself, it is now functus officio.
11. The upshot of the foregoing is therefore the conclusion that this Court lacks the jurisdiction to entertain the present Application. In the premises, the same is dismissed.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 9<sup>TH</sup> DAY OF MAY 2025**

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**WANANDA J.R. ANURO**

**JUDGE**

**Delivered in the presence of:**

Petitioner present

Ms. Mwangi for the State/Respondent

Court Assistant: Edwin Lotieng

