



REPUBLIC OF KENYA



**Kinyaga v Republic (Criminal Revision E163 of 2024)
[2025] KEHC 5676 (KLR) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5676 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL REVISION E163 OF 2024**

AK NDUNG’U, J

MAY 7, 2025

BETWEEN

KUNONA KINYAGA APPLICANT

AND

REPUBLIC RESPONDENT

(From the Original conviction Nanyuki CM’s CR Case No. 792 of 2013)

RULING

1. The Applicant moved this court in a Notice of Motion dated 2nd May 2024 seeking the following orders;
 - i. That, the Honourable Court be pleased to certify this matter urgent.
 - ii. That, the Honourable court be pleased to take into account that he served in remand pending trial.
 - iii. That he be exempted from paying costs as he is a pauper.
2. The application is based on the grounds that:
 - a. That, he was charged before CM’s Magistrate’s Court at Nanyuki with the offence of Defilement Contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No. 3 of 2006 vide CR 792 of 2013.
 - b. That, he was tried, convicted and sentenced to serve twenty (20) years imprisonment by Hon. C. Teresia Wachuku, SPM on 19/03/2015.
 - c. That, the sentence of Twenty (20) years imprisonment confirmed in HCCRA No. 10 of 2015 by Hon. Lady Justice Mary Kasango on the 07th Day of April, 2016.



- d. That, the trial magistrate during sentencing failed to consider the time that he spent while in remand during the pendency of the hearing of the suit.
 - e. That, he spent about and 1 year 6 months in remand during trial.
3. The application is further supported by his annexed Affidavit sworn on 2nd May 2024. It is deponed:
- i. That, he is the Applicant herein and he is well informed about the matter hence competent to swear the affidavit.
 - ii. That, he was charged before Chief Magistrate's Court in Naivasha with the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*, No. 3 of 2006 vide CR 792 of 2013.
 - iii. That, he was tried, convicted and sentenced to serve Twenty (20) years imprisonment.
 - iv. That, the trial magistrate during sentencing failed to consider the time he spent while in remand during the pendency of the hearing of the suit.
 - v. That, during the Appeal Learned judge as well failed to take into account Section 333 (2) of the *Criminal Procedure Code* as well.
 - vi. That, he has spent about one (1) year six (6) months in remand during the hearing of the main suit.
 - vii. That, what he has deponed herein is true to the best of his belief and knowledge.
4. In response to the application, the Respondent raised a preliminary objection dated 15th January, 2025 based on the following grounds:-
- i. That, this court lacks the jurisdiction to entertain, here and/or determine the Notice of Motion application.
 - ii. That, the Application is an abuse of the Court process and should accordingly be dismissed.
5. The preliminary objection was canvassed by way of written submissions.
6. I have considered the preliminary objection and the response thereto. I have taken into account the submissions made. Of determination is whether this court has jurisdiction to entertain the application.
7. The applicant confirms that upon sentence by the trial court, he moved by way of an appeal to the High Court and the sentence of the lower court was affirmed.
8. The consideration of the time spent in remand is a requirement anchored in law vide Section 333(2) of the *Criminal Procedure Code*.
9. Where a party is dissatisfied with the sentence and an appeal is lodged, such an appeal must address all the grouses a party has including the sentence. When an appeal is raised in a court of competent jurisdiction and the sentence is affirmed, the Appellant cannot approach the same court for review of the sentence. Anything to the contrary would be a sure recipe for disorder in the hierarchy of courts. It is tantamount to allowing litigation piece meal.
10. The Applicant has cited the Case of *Nicholas Ratio v the Republic*. Narok Criminal Revision No. E031 of 2021 where the court reviewed the sentence even though the Appellant therein had filed an appeal.
11. That decision is of a court of concurrent jurisdiction and is not binding on this court. Suffice to note that in the hierarchy of courts, this court cannot review the orders of a court higher than it.



Similarly, the court has no jurisdiction to sit on appeal or review orders made by a court of concurrent jurisdiction. If the High Court did not find fault in the sentence in its findings in the appeal, I retain no jurisdiction to revisit the matter and the Applicant's recourse is through an appeal to the Court of Appeal.

12. In 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 while holding that the court did not have jurisdiction to review the said Judgment 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.....”

13. The law is clear and it is established beyond peradventure that this court cannot sit on appeal of its own Judgment or of a court of concurrent competent jurisdiction. Any aggrieved party has recourse to the Court of Appeal.
14. 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 prevails.
15. It is worth buttressing that a court of law can only exercise jurisdiction as conferred upon it by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
16. With the result that the Application before court is without merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF MAY 2025

A.K. NDUNG'U

JUDGE

