



**Maeski v Republic (Criminal Revision Application E029 of 2024)
[2025] KEHC 6363 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARALAL
CRIMINAL REVISION APPLICATION E029 OF 2024**

AK NDUNG'U, J

MAY 15, 2025

BETWEEN

LENGUSURANGA MAESKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By way of a Notice of Motion dated 14th November, 2024, the Applicant sought orders seeking revision of sentence following his conviction and sentence for Incest contrary to section 20(1) of the [Sexual Offences Act](#) No.3 of 2006 in Criminal Case No.239 of 2013 at Maralal Law Courts where he was sentenced to serve life imprisonment.
2. The application seeks orders that;
 - a. Spent.
 - b. The mandatory minimum sentence of LIFE imprisonment prescribed by section 8(2) of the [Sexual Offences Act](#) No.3 of 2006 and imposed on the applicant is unconstitutional as it was declared by the constitutional court in *Wachira & 12 others v Republic & 2 others* (Petition 97, 88,90 & 57 of 2021 (Consolidated) [2022] KEHC 12795 (KLR) (31 August,2022) (Judgment) and by the Court of Appeal in *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7th July, 2023) (Judgment) and *Ayako v Republic (Criminal Appeal 22 of 2018 (2023) KECA 1563 (KLR) (8 December 2023) (Judgment)* since life sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentence are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of [the constitution](#).



- c. That the mandatory Minimum Sentence of Life Imprisonment Imposed on The Applicant be reviewed downwards taking into consideration the facts and circumstances of the case and the gains achieved by the applicant towards rehabilitation in the eleven (11) years he has been in lawful custody since the date of conviction.
 - d. That the court be further pleased to grant the applicant an absolute/conditional discharge on account of his age (he is now 74 years) and health complications pursuant to Section 35 of the [Penal Code](#).
 - e. That should the eventual sentence as revised result in a balance of three (3) years or less may he honourable court be pleased to order that such sentence be served under probation.
 - f. Any other order which the court deems fit in the interest of justice.
3. The application is premised on grounds that the Court of Appeal has in *Wachira & 12 Others vs Republic* declared that Sections 8(2), 8(3), 8(4), 11(1), 20(1) and 3(3) of the [Sexual offences Act](#) fall afoul of the right to a fair trial guaranteed under Article 50 of [the Constitution](#) for failing to take into account an accused persons individual circumstances and mitigation.
 4. He avers that upon his conviction, he appealed to the High Court and the appeal was dismissed.
 5. He adds that he has taken full advantage of rehabilitative programs at prison and is now ready to be reintegrated into society. He is a family man and the sole bread winner of the family in addition to his old parents who have continued to undergo untold suffering due to his absence from home for the 11 years he has been in custody. He reiterates the grounds in his supporting affidavit.
 6. The application is opposed and in a replying affidavit sworn by Martin Mwongera , a prosecution counsel, it is deponed that this court lacks jurisdiction to entertain the matter.
 7. It is averred that the High Court is functus officio and the applicant ought to move to the court of appeal.
 8. In his submissions, the applicant pleads to be reintegrated into society. He cites his ill health. He attacks a law that takes away judicial discretion.
 9. The Respondent submits that the court is functus officio and bereft of a revision jurisdiction in the matter.
 10. Granted, the Applicant was convicted and sentenced by the trial court. The conviction and sentence were upheld by the High Court on Appel. The matter is now before me sitting as the High court.
 11. The Applicant now seek the revisionary power of this court to review the sentence downward considering his mitigation and the fact that he is sickly and he has been rehabilitated. He stated that he has been in custody for a period of 11 years and he urged this court to order time served as sufficient punishment.
 12. The jurisdiction of the High court is provided for under Article 165(3) of [the Constitution](#) and includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; and any other jurisdiction, original or appellate, conferred on it by legislation. The High court further has supervisory jurisdiction over subordinate courts donated by Article 165(6) of [the Constitution](#). This jurisdiction is expounded under Sections 362 and 364 of the [Criminal Procedure Code](#).



13. The power of criminal review (called revision) of this court is provided for in Sections 362 and 364 of the *Criminal Procedure Code* and extends only to –

“...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.”

14. The details of those powers of the High Court in revision are set out in Section 364. This is a narrow jurisdiction. As per the above section, the High Court can only review or exercise revisionary powers over a subordinate court.

15. There is no law which bestows this court with jurisdiction to review a decision by a court of concurrent jurisdiction and/or its own decision. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. The Court of Appeal in *Peter Ng’ang’a Muiruri Vs. Credit Bank Ltd & 2 Others Civil Appeal No. 203 of 2006* held that;

“It would be a usurpation of power to push forward such an approach, and whatever decision emanates from a court regarding itself as a constitutional court, with powers of review over decisions of concurrent or superior jurisdiction, such decision is at best a nullity.”

16. This court having dealt with the Applicant’s appeal on the conviction and sentence cannot again review its decision though passed by a different Judge. I have not come across any statutory provision that gives this court any criminal revisionary jurisdiction over its own findings, sentences or orders made or passed in exercise of its original or appellate criminal jurisdiction or jurisdiction over the findings of a superior court.

17. In the case of *David Mutai v Republic [2021] eKLR* where the court held that;

“Though the High Court has unlimited original jurisdiction in Criminal and Civil matters under Article 165(3)(a) of *the Constitution*, holding it that it encompasses revisiting issues dealt with by the same Court and a step higher by the Court of Appeal, is equivalent to according the High Court cosmic jurisdiction of which it doesn’t have. Litigation just like everything else bad or good, has an end. The end point in this one was at the Court of Appeal, but probably there’s a slight vent to the supreme Court. Having observed the foregoing, I do find that this Court lacks jurisdiction to re-sentence the petitioner as urged. The petition therefore lacks merit and is hereby dismissed.”

18. Further in *Stephen Mugendi Ndwiga v Republic [2021] eKLR* the court observed that;

“It is my considered view that this court cannot review a judgment of Hon. S. Chitembwe J and in doing so resentence the petitioner herein...Further this court is bereft of jurisdiction to review the said judgment as doing so would be tantamount to sitting as an Appellate court on the judgment of the Learned Judge and which act the law abhors. In the same breath, this court cannot review the said judgment and in doing so take into account the time the petitioner had spent in custody. The same ought to have been dealt by Hon. Chitembwe J as the first appellate court. Failure by the said first appellate court to consider the said period cannot be rectified by this court as the same shall be akin to reviewing the decision of a court of concurrent jurisdiction.”



19. From the foregoing, this court can only review the judgment of a subordinate court under the jurisdiction provided by Sections 362 and 364 of the [Criminal Procedure Code](#) and has no jurisdiction to review its own decision.
20. 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.
21. It is worthy to note recent developments in the law that are relevant to this matter. The Supreme recently discussed the legality of the mandatory sentences in the Sexual offences in its recent decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024). The court stated;

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law.....

68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the [Sexual Offences Act](#) remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence”.

22. The circumstances of a convict in prison, including the suffering of his family or his level of rehabilitation are not issues that are within the realm of the court to consider and review sentence that is already passed and confirmed on appeal by a court of concurrent jurisdiction. There is no lacuna in the law on the action and by who the matter would be dealt with.
23. In *Elmaindi v Republic (Criminal Revision 102 of 2023)* [2023] KEHC 22646 (KLR) (27 September 2023) (Ruling) this court addressing a similar application stated;

“It is my considered view that the application as drawn by the applicant falls under the exercise of Presidential power of mercy if circumstances of a prisoner whether on health or otherwise change while legally convicted and committed to prison.

Article 133 (1) of [the Constitution](#) on the Presidential Power of Mercy states as follows:

“On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by:

- a. granting a free or conditional pardon to a person convicted of an offence;
- b. postponing the carrying out of a punishment, either for a specified or indefinite period;



- c. substituting a less severe form of punishment; or
- d. remitting all or part of a punishment.”

Article 133 is echoed in Section 19 (1) of the Power of Mercy Act which stipulates thus;

Any person may, subject to the Constitution and this Act, petition the President, through the Committee, to exercise the power of mercy and grant any relief specified in Article 133 (1) of the Constitution.”

.....

Section 22 of the Act further provides for factors to be considered by the committee while making recommendations in accordance with Article 133 of the Constitution by stating that;

22 (1) The Committee shall, in making a recommendation under Article 133 of the Constitution and section 21(1)(c) consider—

(a). the age of the convicted criminal prisoner at the time of the commission of the offence;

...

(g). the personal circumstances of the offender at the time of making the petition, including mental and physical health and any disabilities;

- 24. The Applicant in my view ought to have persued a remedy with the above provisions of the constitution and statutory provision. This court cannot possibly assume a jurisdiction that is not conferred on it by the constitution or the law.
- 25. In light of the foregoing, the application before court is without merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF MAY 2025.

A.K. NDUNG’U

JUDGE

