Odhiambo v Republic (Criminal Revision E037 of 2024)
[2025] KEHC 7123 (KLR) (26 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7123 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL REVISION E037 OF 2024

JN KAMAU, J

MAY 26, 2025

BETWEEN

SIMON ODHIAMBO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with two (2) others for the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*, No 3 of 2006. He was also charged with an alternative offence of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*. He was tried and convicted of the main charge and sentenced to fifteen (15) years imprisonment.

2. Being aggrieved by the said decision, he lodged an appeal before this court in HCCRA No E006 of 2022. In its decision of 20th December 2023, this court dismissed his appeal and upheld his conviction and sentence.

3. Being aggrieved by the said decision, he filed the application herein dated 25th April 2024 seeking review of his sentence. It did not bear a court stamp. However, in view of the fact that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood that the Registry may have omitted to stamp the same.

4. He pleaded for a second chance promising to be a law-abiding citizen. He averred that he was rehabilitated, reformed and could be easily be re-adapted upon release.

5. His Written Submissions were dated 9th September 2024 and filed on 2nd October 2024 while those of the Respondent were dated and filed on 10th January 2025. The Ruling herein is based on the said Written Submissions that the parties relied upon in their entirety.

Legal Analysis.

6. Right from the onset, this court noted that the Applicant submitted on the brief facts of his case and the evidence on trial at the Trial Court which was not relevant at this stage as the same were extensively dealt with at the appellate stage. It therefore disregarded the same and only focused on his mitigation.

7. He contended that he was a first offender and was thirty-six (36) years old. He pointed out that he was the sole breadwinner of his family of a wife and four (4) children who were undergoing difficulties in schooling during his incarceration. He pleaded with court to grant him a second chance to go back home and manage his family.

8. He expressed remorse. He further asserted that he was rehabilitated and reformed and could easily be re-integrated back to the society. He pointed out that he had enrolled in educational and theological training and had been awarded a number of certificates namely, Discover Bible School, Health Education, Baptismal Certificate, a Recommendation Letter from Prison Authority, Certificate and Diploma in Emmaus Bible School, Certificates in Nuru Lutheran and Safari ya Mfungwa.

9. He urged the court to consider Section 333(2) of the *Criminal Procedure Code* and placed reliance on the case of *Bethwell Wilson Kibor v Republic*[2009]eKLR where it was held that courts should take into account the period spent in custody by accused persons while sentencing them. He pleaded with the court to consider that his sentence should run from the date of his arrest. He argued that a long sentence like the one he was serving could make one forget the essence of a prisoner under reformation and rehabilitation.

10. On its part, the Respondent submitted that it was trite that sentencing was the sole discretion of the trial court which discretion had to be exercised in accordance with set standards and principles of law. It invoked Section 10 of the *Sexual Offences Act* No 3 of 2006 and Section 329 of the *Criminal Procedure Code* and submitted that the Trial Court took into account the evidence, nature of the offence and the circumstances of the case in arriving at the sentence.

11. It placed reliance on the cases of Benard Kimani Gacheru v Republic [2002]eKLR where it was held that an appellate court would not interfere with sentence unless that sentence was manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong principle. It further cited the case of *Republic v Jagani & Another* (2001) KLR 590 where it was held that the purpose of sentence was to assist in rehabilitation of the offenders.

12. It also relied on the case of *John Kagunda Kariuki v Republic*[2019]eKLR where it was held that the applicant had already been heard by the High Court on appeal and he could not return to the same court for a review of the sentence imposed.

13. It was emphatic that the sentence meted out by the Trial Court and upheld by this court was lawful and that the Applicant had not demonstrated why this court should interfere with the same. It added that this court could not review its own verdict but that the Applicant could approach the Court of Appeal for reduction of the sentence. It urged this court to dismiss the Applicant's application.

14. The *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides the High Court with jurisdiction to revise criminal matters decided by lower courts under Section 362 in the following terms:-

> " 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."

15. The court's revision is, therefore, limited to ensuring the correctness, legality, and propriety of any findings, sentences, or orders made by the subordinate court.

16. Section 364(5) of the *Criminal Procedure Code* restricts the revisional jurisdiction as follows:-

> " 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."

17. The above provisions gave this court jurisdiction to exercise revisionary powers in respect of orders of the subordinate courts. This court, therefore, had no jurisdiction to revise its own decision as in the instant case, the Applicant lodged an appeal which it determined and upheld the Trial Court's decision on conviction and sentence.

18. Notably, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR where the Court of Appeal had reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR to the effect that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence. The Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

19. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce sentences for sexual offenders. In any event, the issue of re-sentencing was res judicata have been dealt with by this court. If the Applicant was still aggrieved, he had the right to approach the Court of Appeal for redress.

20. Indeed, Article 50(2)(q) of the *Constitution of Kenya*, 2010 was clear that:-

> " Every accused person has the right if convicted to appeal to, or apply for review by, a higher court as prescribed by law(emphasis court)".

Disposition.

21. For the foregoing reasons, the upshot of this decision was that the Applicant's Notice of Motion Application dated 25th April 2024 was not merited and the same be and is hereby dismissed.

22. It is so ordered.

DATED AND DELIVERED AT VIHIGATHIS 26TH DAY OF MAY 2025

J. KAMAU

JUDGE