



**Wambua v Republic (Miscellaneous Criminal Application  
E137 of 2024) [2025] KEHC 7000 (KLR) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7000 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CRIMINAL APPLICATION E137 OF 2024**

**RC RUTTO, J**

**MAY 26, 2025**

**BETWEEN**

**JOSHUA WAMBUA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By way of a Notice of Motion application dated 24<sup>th</sup> September 2024, the applicant moved Court seeking the following orders;
  - a. That this Honourable Court be pleased to grant a mitigation and resentencing hearing.
  - b. Any further orders as this Court may deem fit just grant
  - c. That this application be certified as urgent and be heard on priority basis.
  - d. That the Honourable Court be pleased to call for a review orders regarding Criminal Case No. 15 of 2017 at Machakos Law Court, High Court Appeal No. 08 of 2019 at Machakos as the sentences imposed by trial court were excessive, punitive and against Section 7 of the Criminal Procedure code.
  - e. That the Applicant is exempted from paying costs as he is a pauper.
  - f. And such other orders that the court may deem fit and just.
2. The application is premised on the grounds that the Applicant is serving 30 years imprisonment imposed in Machakos Magistrate's Court in Criminal Case No. 15 of 2017 and upheld by the Machakos High Court Criminal Appeal No. 008 of 2019.
3. The Applicant seeks to substitute the punitive excessive sentence imposed to a lenient non-custodial to run from the date of arrest under section 333(2) of the *Criminal Procedure Code*; that the trial



- court failed to consider the plausible mitigations that the Applicant adduced; that he has undergone rehabilitation programs in prison and that it is in the interest of justice that the application be allowed as prayed.
4. The application was opposed by the Respondent on grounds that the Applicant was convicted for the offence of rape contrary to Section 3(1)(a)(b)(3) of the *Sexual Offences Act* and a 2<sup>nd</sup> count of robbery with violence and was sentenced to serve 30 years cumulatively. The Respondent proceeded to give a chronology of events as follows; that following the decision of the lower court, the Applicant appealed the decision to convict him in Machakos High Court Criminal Appeal No. 008 of 2019, this appeal was heard and determined by Hon. Justice Kemei J. who delivered judgment on 28<sup>th</sup> January 2020 upholding the conviction and sentence. That later, the applicant petitioned the Machakos High Court in Criminal Petition No.004 of 2022 whereby the sentence was ordered to start from the date of arrest.
  5. The Respondent further submitted that this Court is being called upon to review the findings of a court of concurrent jurisdiction. It was their submission that the holding of the Supreme Court case of Francis Muruatetu was limited to murder cases and cannot extrapolate to fit the charges the applicant was charged. In addition they stated that the offence of robbery with violence attracts a death sentence and so the trial court was very lenient in awarding a 30 years jail term. They urged that the application be dismissed.
  6. In response to the Respondent's submissions, the Applicant urged the court to reduce the 30 years to at least 15 years to enable him see his children since there is no one at home, his wife having been held in custody, facing murder charges.
  7. I have considered the application, the supporting affidavit, as well as the parties' submissions. The Applicant is seeking to have a review of the sentence meted upon him on grounds that it was punitive. This court notes that the Applicant has had two opportunities to have his sentence reviewed by this Court. First, when the Court was exercising its appellate jurisdiction when it heard the appeal on both the conviction and sentence by the trial Court. Secondly when the Court determined the petition brought under section 333(2) of the *Criminal Procedure Code* seeking for the period spent in custody to be factored in the computation of the sentence.
  8. It is clear the Applicant first exercised his right to appeal to the High Court by filing High Court Criminal Appeal No. 008 of 2019. Upon hearing the appeal, the High Court proceeded to render judgment which dismissed the appeal and upheld the conviction and sentence. Later the applicant exercised his right under the revision jurisdiction of the Court and filed Machakos Criminal Petition No. 004 of 2022 wherein the Court ordered that his sentence start from the date of arrest in accordance with Section 333(2) of the *Criminal Procedure Code*. The Applicant now seeks to have a third bite of the cherry by seeking that this Court reviews his sentence to a lesser sentence.
  9. I do note that this Court has no jurisdiction to review a matter already determined by a Court of concurrent jurisdiction. The Court is functus officio in the matter. The Applicant's remedy, if at all, now lies with the superior court, the Court of Appeal. Alternatively, the Applicant may also petition the President under Article 133 of the *Constitution* as well as under the *Power of Mercy Act*. See the case of *Sianyo Atembe versus Republic* (Criminal Revision 194 of 2023) (2023) KEHC 26456 (KLR ) 5<sup>th</sup> December 2023 Ruling.
  10. In view of the above this Court has not powers to interfere with a decision rendered by a court of concurrent jurisdiction. It may only interfere with sentence of a subordinate court on appeal or revision.
  11. The upshot is that the application is dismissed for lack of merit.



**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 26<sup>TH</sup> MAY OF MAY, 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

Applicant present from Kamiti Maximum Prison

Mangare for ODPP

Sam Court Assistant

