



REPUBLIC OF KENYA



**Wakape v Republic (Criminal Revision E515 of 2024)  
[2025] KEHC 7141 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7141 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL REVISION E515 OF 2024**

**REA OUGO, J**

**MAY 14, 2025**

**BETWEEN**

**SIMON KITUI WAKAPE ..... APPLICANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**RULING**

1. Simon Kitui Wakape is serving a sentence of 15 years having been convicted of the offence of defilement. He has come before this court seeking orders that the court exercise its revision powers under sections 362 to 364 of the *Criminal Procedure Code* (CPC). He also states that his application is benched on the rights of all accused persons for the consideration of the period stayed in custody in line with section 333(2) of the *CPC* and as rooted under Article 50 of the *Constitution*.
2. The applicant avers that he has served 8 years of the imprisonment term and is left with two years and six months for his sentence to expire. He feels aggrieved that he has been in custody since his arrest in 2011. Upon computation of the period already served together with the remission of sentence his case falls within the category envisaged for revision of sentences. He has been subjected to an excess and unfair sentence.
3. He has cited the provisions of Article 10 (1) (a) (b), Article 25, Article 27, Article 50, Section 362 of the *CPC*. He seeks that the court be pleased to commute the remainder of the period left to be served under probation.
4. In his affidavit in support of the application he depones that this court should enforce and apply the Chief Justice directives dated 7<sup>th</sup> December 2022 and that the court should also consider the eight (8) years he has already served.
5. Attached to his application was a medical report dated 5<sup>th</sup> December 2022. It states that he has prostate cancer that is metastatic, diabetes mellitus type2, and hypertension. In a report dated 6<sup>th</sup> February



- 2025, Doctor Antony Ndiritu states that the applicant was first seen at Kenyatta National Hospital Urology Clinic on the 10/01/2020 having presented with urinary symptoms. He is a known diabetic and hypertensive on medication. The patient was referred from Jaramogi Oginga Odinga referral hospital where he had been diagnosed with cancer of the prostate with metastasis on the bones. He was subsequently referred to the cancer Treatment Centre due to the rising of the PSA where he has been initiated on Chemotherapy. On examination he was found to be in fair general condition and not pale and the rest of the systems. He concludes that the applicant is going on with hormonal therapy, bisphosphonates, antihypertensive, antidiabetic medication, and chemotherapy with good response.
6. At the hearing of this application, the applicant told the court that his treatment in prison was not good. He seeks to be forgiven and to serve from outside. He has served seven years, with two and a half years to go.
  7. The application was opposed. The respondent submitted that the grounds raised by the applicant did not deserve the orders he was seeking, that he serves the remainder of his sentence on Community Service Order. There is no merit in the application because justice must be both ways regardless of age, gender and health status at the time of committing the offence. The applicant confirmed that he has been before the High Court before and his appeal was dismissed and based on that the court has no jurisdiction to re-sentence the applicant.
  8. The applicant engaged a lawyer who filed submissions. I have read the said submissions. It has been submitted that the applicant's health has drastically deteriorated since his last medical report and that the prison authorities have acknowledged their inability to provide him with the specialised care he urgently needs. This submission was not supported by any documentary evidence. The applicant relied on the case of *RF v Public Prosecution & Another* [2025] eKLR where the High Court released a 67-year-old patient serving a 15-year sentence at Vihiga Prisons. I have read the decision, and in my view, it is not binding to this court. It is only persuasive. Similarly, the decision in *Mutembei v Republic* MCA E099 OF 2024 is also persuasive.
  9. The High Court is vested with inherent power to do justice and grant appropriate relief. In this matter, the applicant has cited the provisions of sections 362 and 364 of the CPC. Section 362 of the CPC, which he relies on, provides that the High Court may call and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying as the correctness, legality or propriety of any finding, sentence or order recorded or passed and as the regularity of any proceedings of any subordinate court. The applicant has failed to explain how this section relates to his case; he has failed to point out any irregularities or illegalities. He has also failed to demonstrate how section 364 applies to his case. Section 364 of the Criminal Procedure Code provides for the powers of the Court on Revision. I know that under Section 39 of the Prisons Act, the prison facility where the Applicant is held has the responsibility to take any sick prisoner to the hospital. There was no evidence from the applicant that the lower court and High Court failed to consider the provisions under section 333(2) of the Criminal Procedure Code as alleged.
  10. It is not in dispute that he has been before the High Court, and his appeal was heard and determined. This court lacks the jurisdiction to rehear the applicant again because he is sick and deserves a review of his sentence to serve the remainder of it on CSO. In my view, the only approach the applicant can take regarding his current condition is to apply to the Power of Mercy Committee created under the consider his case. Under section 19 of the said Act, the applicant can petition the President to exercise the power of mercy and grant any relief specified in Article 133(1) of the Constitution. I, therefore, decline to grant the orders sought and dismiss the application. it is so ordered.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 14<sup>TH</sup> DAY OF MAY 2025.**



**R.E.OUGO**

**JUDGE**

In the presence of:

Simon Kitui Wakape/ Applicant

Miss Njeri - For the Applicant

Miss Matere -For the Republic

Wilkister - C/A

