



REPUBLIC OF KENYA



**Kabaiko v Republic (Criminal Petition E071 of 2023)  
[2025] KEHC 10167 (KLR) (15 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10167 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E071 OF 2023  
RN NYAKUNDI, J  
JULY 15, 2025**

**BETWEEN**

**DAVID NJUGUNA KABAICO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. What is pending before this court for determination is a Notice of Motion application dated 15<sup>th</sup> September 2023 where the Petitioner/Applicant is seeking the following orders:
  - a. That the petitioner is seeking for sentence review in accordance to Art 50 (2) (p) (q) of *the constitution* of Kenya 2010.
  - b. That the prayers are on sentence only.
  - c. That I the petitioner prays for sentence review under section 50 (2) (p) (q) of the COK 2010 in reliance to section 213, 216, 329 & 365 of the CPC.
  - d. That I beg to present during the hearing thereof
2. The Application is supported by the annexed affidavit dated 15<sup>th</sup> September 2023 sworn by DAVID NJUGUNA KABAICO who avers as follows;
  - a. That I was charged with the offence of defilement c/sec 8(1) (2) of the SOA no. 3 of 2006 at Eldoret CM's court and was convicted to serve a life sentence
  - b. That I appealed to the High court vide appeal no. 131/2019 and it was dismissed in its entirety. That I now petition the High court of Kenya to consider review of my sentence only
  - c. That I am remorseful, repentant, reformed and rehabilitated, as I have learned hard lessons while in custody and now beg for leniency



- d. That I do beg that I be accorded to benefit with the provision of Art 50(2) (q) of the constitution of Kenya 2010
  - e. That it's my humble prayer that I be granted a fair opportunity to argue my petition
  - f. That, all I have deponed herein is true to the best of my knowledge, information and belief.
3. The Application was canvassed by way of written submissions.

**Applicant's Written Submissions.**

4. In support of the application the Applicant relied on written submission on 1<sup>st</sup> July 2025 couched in the following language:
- a. That the applicant being the first time to be in conflict with the law for the first time and being a remorseful man beg for leniency
  - b. My Lordship I am now substituting and on the same grounds lodged before this honorable court that the applicant has learned and is repentant and remorseful since I have take my incarceration in prison seriously and positive way and now I am seeking for my sentence be reviewed under section 362,364, 213, 329 of CPC
  - c. That that my lordship the sentences imposed on me was too harsh considering my mitigation and factors in circumstances that when my appeals are dismissed by Hon. Court were based only on conviction where by now I beg this Hon. Court to deal with the issue of sentence only. I pray this Hon. Court to vide the jurisprudence of High Court petition no. E017/2021 at Machakos on matters of minimum maximum mandatory provision under the sexual offence Act no. 3 of 2006
  - d. May lordship its my humble submission that, this being an application that arise from judgment in criminal appeal no. 131 of 2019 at Eldoret and Criminal SOA no. 3 of 2006.
  - e. My lordship after the prosecution established a prime face case against me on the offence set and in the charge sheet and in the event I was sentenced and convicted on the same. In Republic vs. Thomas Patrick Gilbert Chelimo Deley Cr case no. 55 of 2006. The accused person was sentenced to serve 8 months' imprisonment for the offence of murder and in so doing the sitting court put into consideration the period spent in pre-trial custody and in so court considered the total circumstances of the case invoked the guiding principles to sentencing Art 27(2) (4) of the constitution 2010 provides for equal right benefits from the law. It also forbids only form of direct or indirect discrimination against citizen. And if Art 2(3) of the constitution 2010 for the promotions and advanced if the same constitution by the court and other organization. My lordship I beg that my sentence of life imprisonment be reviewed to ideal proportional terms in regard to the constitution of Kenya 2010 Art 28, 25(c) and 50 (2) (p) (q)
    - i. Maingi and 5 others vs Director of Public Prosecution and other petition E017/2021 (2022) KEHC (eKLR)
    - ii. Criminal Appeal no. 84 of 2015 (Nyeri) Joshua Guchugi and Another vs Republic (2022)
    - iii. Moses Kitui Barasa vs Republic Eldoret H/C Petition no. 7 of 2018



- iv. William Okungu Kuttiny vs Republic 2018 eKLR where it held that: Nothing is preventing court from applying the decision of the law and ordering sentence review in cases where the penalty imposed can be challenged on valid legal ground also you can use Stephen Kimathi
  - v. Mutunga vs Republic (2019) eKLR that the High Court thus had jurisdiction to deal with the petition for sentencing rehearing
  - vi. Michael Kathawa Laichana and Another vs Republic (2018) eKLR Majanja stated “by resentencing the petition, the High Court is merely enforcing the petition and graduating relief for what is in effect a violation caused by imposition of mandatory death sentence or life sentence.”
  - vii. Makumbi Submit Wanyeso vs Republic Cr Appeal no. E110 of 2022 and the privy council in Spencers vs the queen huggles vs the Queen Spankers of Hughes (unreported 2<sup>nd</sup> April 2001)
- f. My lordship over turning the conviction and sentence mated upon out this court had jurisdiction under Art 19, 22, 23, 50 (2) and 165 of *the constitution* of Kenya 2010 to hear and determine this application further under said Article.
5. Ground three and four combined was coached in the following language:
- a. My lordship, I have been in prison for a substantial period of time since 2019 to dates that the process of incarceration has deeply humbled me taking into consideration that I have been in custody for the duration of 7 years in view of the total circumstance of my case and the quoting principle of sentencing may this court be pleased to find out that I am reformed and I beg this honorable court to impose a light sentence on regard to the power bestowed to it contemplated under section 354 of CPC chapter 75 law of Kenya in variance to Art 23(1), 15 (2) (a) (b), 165 (3) (a) (b) (d) (6) (4) (f) and 258 (1) of *the constitution* of Kenya 2010.
  - b. That *the constitution* ability of Art 28 provides for inherent individual dignity to all and which dignity must be protected. I beg that thus Hon. Court to consider the programmes the applicant have gone through while in rehabilitation prison e.g.
    - a. Christian Discipleship Programme – Jesus Alive Ministry Certificate
    - b. Project Philip Bible League International Bible Study Certificate
    - c. The Prisoners Journey Certificate
  - c. My lordship I beg that this honorable court to consider time I spent during trial pretrial custody under section 333(20) of the CPC.
  - d. May this Hon. Court find the: Mitigating factors; sentencing mated upon me be reviewed and that my Lord/Lady, if sentencing policy guideline is intent to promote transparency, consistency and fairness in sentencing thus let it be in my consideration

## DECISION.

6. The gist of the applicant application is based on Art 50 (6) (a) (b) which provides as follows:
- a. The person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and



- b. New and compelling evidence has become available
7. These provisions had to be read conjunctively with section 362 and 364 of the [Criminal Procedure Code](#) which also expressly provides as follows:

362. Power of High Court to call for records 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.

364. Powers of High Court on revision

1. In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may —
  - a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
  - b. in the case of any other order other than an order of acquittal, alter or reverse the order.
  - c. in proceedings under section 203 or 296(2) of the Panel Code (Cap. 63), the [Prevention of Terrorism Act](#) (Cap. 59B), the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) (Cap. 245), the Prevention of Organized Crimes Act (Cap. 59), the [Proceeds of Crime and Anti-Money Laundering Act](#) (Cap. 59A), the [Sexual Offences Act](#) (Cap. 63A) and the [Counter-Trafficking in Persons Act](#) (Cap. 61), where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
3. Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
5. 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.



8. Originally the initial threshold test delivered by the High Court required the applicant or petitioner to demonstrate that the impugned order was irregular, improper, incorrect, and unjust and if left to stand there is a possibility of either miscarriage of justice or that the question of law raised in the revision is of general importance to the administration of criminal justice in Kenya. It has been clearly laid down in various case law that the consideration upon which review in criminal matters will be granted differ to a material extent from those which deals specifically with the appellate jurisdiction.
9. The question before this court is on review of sentence which was imposed by the trial court for the offence of defilement of a child contrary to section 8 (1) as read with 8 (2) of the Sexual Offence [\*Act No. 3 of 2006\*](#). The brief particular was that on 16<sup>th</sup> day of February 2019 at Sokomoko village in Likuyani sub-county within Kakamega county intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (anus) of Victor Malesi a child of 7 years.
10. The applicant was tried before the Chiefs' Magistrate court where he was found guilty, convicted and sentenced to life imprisonment on 26<sup>th</sup> July 2019. The record shows that he was aggrieved with conviction and sentence necessitating him to appeal in criminal appeal no. 131 of 2019. The High court pronounced itself as follows that:

Upon considering the circumstances of the case, the aggravating factors and the mitigation of the Applicant and I find that there is no reason to disturb the sentence by the trial court. I hereby dismiss the appeal for lack of merit.

11. In determining review or an appeal on sentence it is trite law in Kenya that an applicant/appellant must satisfy existence of new or compelling evidence in order to impugn the sentence of an appeal judge or in any event the trial court.

It follows that a court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in appointing the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not. See *Skinner V The King* (1913) 16 CLR 336

12. The other important aspect of this application is that the appeal so filed was conclusively determined on the merit. The sentence arrived at by the Trial Magistrate was confirmed by the session judge who heard and made a decision on both conviction and sentence. It appears from the judgment on appeal there are no further new grounds or evidence to incorporate in determining the revisional jurisdiction. The High court dismissed the applicant appeal and found that the sentence imposed was not excessive, punitive or harsh in all of the circumstances of the charge as framed and proved by the state. I reiterate the key principles in the case of *House v King* (1936) 55 CLR 499, 504-505 in which the court made the following observations that:

.... the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion, if the judge acts upon a



wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure to properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

13. For the applicant to succeed in having his sentence reviewed by this court he must bring his application within the scope of the principles in *Rose Kaiza vs. Mpanju Kaiza* (2009) eKLR in which the court outlined the principles that a litigant must satisfy the court in claiming new and compelling evidence the court outlined the principles as:
  - a. The materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged.
  - b. That the existence of the evidence was not within his knowledge;
  - c. The applicant acted with due diligence.
14. Similarly, in *Ramathan Juma Abdalla & 2 Others vs. Republic* (2012) eKLR in which Lenaola, J noted that:

‘Black Law Dictionary, 8<sup>th</sup> edition defines ‘new’ as ‘recently discovered, recently come into being’ and the concise oxford dictionary defines compelling as ‘powerful evoking attention or admiration’. It follows therefore that the evidence must have been recently discovered or has just come into being and is evidence that will evoke attention and arouse a great deal of interest’.
15. The supreme court in *Lawrence Nditu & 600 others vs. Kenya Breweries Limited and Another* Petition 2013 N0. 3 of 2012 eKLR had this to say:

“This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of *the constitution* can be entertained by the supreme court... Towards this end, it is not the mere allegation in leadings by a party that clothes an appeal with the attributes of the constitutional interpretation or application... the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of *the constitution*. In other words, an appellant must be challenging the interpretation or application of *the constitution* which the court of appeal used to dispose of the matter in that forum. Such a party must be faulting the court of appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of *the constitution*, it cannot support a further appeal to the supreme court under the provisions of article 163[4] (a).” [Emphasis provided].
16. The doctrine of “new and compelling evidence” generally refers to the legal principle that allows for the introduction of fresh evidence in a court case, even after a judgement has been made, under specific circumstances. This principle is often invoked in appeals or reviews of previous decisions. In Kenya, the concept is addressed in *the constitution* and the *evidence act*, particularly in relation to fair hearing rights and the admissibility of evidence. The key elements of the doctrine:



New Evidence:

This refers to evidence that was available or known to the applicant at the time of the original trial or decision, despite the exercise of due diligence

Compelling evidence

The evidence must be significant and have the potential to alter the outcome of the case

Due Diligence

The applicant must demonstrate that they could not have discovered the evidence earlier, even with reasonable effort. See *National Bank of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR) and *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2019] KECA 594 (KLR)

17. Given this legal background the affidavit file by the applicant provide no tangible or credible evidence for this court to exercise discretion to entertain a new trial on sentence. In the result I have come to the conclusion that the application falls to be dismissed for want of merit under section 382 of the [\*Criminal Procedure Code\*](#).

**DATED SIGNED AND PUBLISHED VIA CTS AT ELDORET ON THIS 15<sup>TH</sup> JULY 2025**

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**R. NYAKUNDI**

**JUDGE**

