Njagi v Republic (Criminal Miscellaneous Application E011 of 2025)
[2025] KEHC 13171 (KLR) (24 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13171 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL MISCELLANEOUS APPLICATION E011 OF 2025

RL KORIR, J

SEPTEMBER 24, 2025

BETWEEN

GERALD MUGAMBI NJAGI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Gerald Mugambi Njagi (Applicant) was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was alleged to have murdered one Julius Mwenda Njagi on 6th June, 2017 at Rwakinanga village, in Gituma Location, Tharaka South Sub-County, within Tharaka-Nithi County.

2. In a judgment dated 5th June, 2021, Limo J. found the Applicant guilty of murder.

3. The Applicant was subsequently sentenced by Gitari J to serve 30 years' imprisonment from the date he was first remanded in custody being 17th July 2017.

4. The Applicant has now approached this court seeking re-sentencing. In his Application dated 5th February, 2025, he cites the Muruatetu case as the new jurisprudence entitling him to be granted an opportunity to mitigate and be re-sentenced.

5. The Application is supported by the sworn affidavit of the Applicant. He states that he has spent 9 years in prison and is now rehabilitated and was ready for reintegration with his family and community.

6. He stated that he had no grudge with deceased and may have been propelled to commit the offence by the condition of hypertension which he suffered then. The Applicant prayed for this court's clemency to re-sentence him to a more lenient sentence. He annexed numerous commendation and certificates.

7. The Applicant filed submissions dated 28th May 2025. In his lengthy submissions, the Applicant set out the background to the Application stating that he was tried and convicted of the murder of his

brother. He submitted that he was remorseful and regretted the incident which had destroyed his hitherto united family. His lengthy submissions amounted to mitigation in which the Applicant states he has been rehabilitated during the nine years he has so far spent in prison and desired to go and take care of his own children and those of his deceased brother who was the victim of the offence.

8. The Applicant submitted at length on the fact that there was no prior disagreement or fight between him and his brother that the incident that erupted on the material date was beyond his comprehension. He urged the court to consider his mitigation and have mercy on him. He annexed certificates and commendations showing the theological courses he had attended.

9. The Respondents filed submissions dated 29th April, 2025. They stated that the only issue was whether the Applicant was entitled to a sentence review. They urged the court to dismiss the Application as the case had been heard and determined by a court of concurrent jurisdiction.

Analysis and Determination:

10. This court's revisionary jurisdiction is provided by Section 362 of the Criminal Procedure Code as follows:-

> " 362. 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."

11. The exercise of this jurisdiction was aptly explained by Odunga J (as he then was), in the case of Joseph Nduvi Mbuvi vs Republic (2019) eKLR, as follows:-

> " In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in PUBLIC PROSECUTOR vs. MUHARI BIN MOHD JANI AND NOTHER [1996] 4 LRC 728 at 734, 735:-
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> > "The powers of the High Court in revision are amply provided under Section 325 of the Criminal Procedure Code subject only to subsection (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice..... If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion..... This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case."

12. The revisionary jurisdiction is however limited to those cases that have been tried by a subordinate court. In this case, the Applicant was tried by the High Court the offence of murder and was convicted by Limo J and sentenced by Gitari J both Judges of equal jurisdiction.

13. This court has ruled countless times that sentence where a person was aggrieved by his convictions the correct procedure was for them to appeal their judgment to the Court of Appeal but not return to the High Court under the guise of a miscellaneous application. On this I am persuaded by the holding by Aburili J in the case of Daniel Otieno Oracha vs Republic (2019) eKLR, that:-

> " The law abhors that practice of a Judge sitting to review a judgement or decision of another Judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a Judgment of the subordinate court or if the Petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise....
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> The Judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own Judgement or of court of concurrent competent jurisdiction when the Petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.
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> Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matter falling under the exclusive jurisdiction of Supreme Court under Article 163(3) cannot be dealt with by the High court....."

14. I am disinclined to review a sentence granted by a court equal and concurrent jurisdiction.

15. The Applicant placed reliance on the case of Francis Muruatetu & Another -vs- Republic Petition No.15& 16 of 2015 [2021] KESC 31KLR, as entitling him to be resentenced. In that case, the Supreme Court held that the mandatory nature of the death sentence for murder was unconstitutional. The Supreme Court in my understanding did not invalidate the death sentence but held that it remained a valid but discretionary sentence.

16. My thinking is that the trial (Gitari J.) court departed from the sentence of death under section 204 of the Penal Code and sentenced the Applicant to 30 years' imprisonment taking guidance from the Muruatetu decision above.

17. The Supreme Court went a head in the Muruatetu decision to set out how resentencing would be done for those cases where the Accused had been sentenced to death. The Applicant herein does not fit into that category because he was not sentenced to the mandatory death sentence.

18. The sentence meted out to the Applicant may be severe. However, it is to be remembered that sentencing is at the discretion of the trial court which considers all relevant factors including both aggravating and mitigating factors. In the case of Bernard Kimani Gacheru -v- Republic [2002] eKLR where the court held as follows:-

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not

sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

19. The Applicant in this case has raised mitigation which actually would serve him well as grounds of appeal, for he insists that he did not have the mensrea to cause the unlawful death of his brother. His recourse, as I have stated lies with the Court of Appeal where he can challenge both conviction and sentence. He cannot appeal his sentence in this court under the guise of a sentence review.

20. In the end, the Application is dismissed.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 24TH DAY OF SEPTEMBER, 2025.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant acting in person and Ms Rukunga for the State; Muriuki (Court Assistant).