



**NTN v Republic (Criminal Revision E053 of 2023)  
[2024] KEHC 1041 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1041 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL REVISION E053 OF 2023**

**M THANDE, J**

**FEBRUARY 2, 2024**

**BETWEEN**

**NTN ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By an Application filed on 12.6.23, the Applicant seeks review of the sentence imposed upon him. The facts are that the Applicant was convicted of the offence of incest contrary to Section 20(1) of the Sexual Offences Act in Criminal Case No. 366 of 2012 sentenced to 30 years imprisonment. He appealed both the conviction and sentence in Malindi High Court Criminal Appeal No. 6 of 2015, which appeal was dismissed on 1.3.18. Not being satisfied, he filed Court of Appeal at Mombasa Criminal Appeal No. 40 of 2020 which was dismissed vide a judgment dated 17.12.21. He has now asked the Court to take into account that he is a first offender and that being 63 years old, he shall be 81 years old at the time of his release, which amounts to his entire remainder of his life. Further that his wife and 8 children are living in destitution owing to his absence for a period of 11 years he has been in custody.
2. In support of his Application, the Applicant relied on the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) in which Odunga, J. (as he then was) found that the mandatory sentences prescribed in the SOA which affords no discretion to the trial court fall foul of Article 28 of the Constitution. The learned Judge went on to state that courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. The Applicant further relied on the case of Al Ali Abdalla Mwanza v Republic [2018] eKLR where the Court of Appeal considered the import of the 40-year sentence imposed on the appellant therein and found that the same would go beyond the life expectancy of 67 years (according to W.H.O.) and was manifestly excessive.



3. The Application is opposed by the Respondent vide a replying affidavit sworn on 27.12.23 by Joseph Mwangi, prosecution counsel. He deposed that the Applicant readily admits that he appealed to this Court and the Court of Appeal without success. Further that the Applicant pleaded guilty to the charges in the trial court. Additionally, that the authorities cited were not applicable as he was sentenced to 30 years imprisonment for an offence that carries the maximum of a life sentence which the trial court did not impose. It was argued that this Court does not have jurisdiction to review the sentence imposed upon the Applicant, and that litigation must come to an end.

4. Article 165(3) of the Constitution confers this Court with unlimited original jurisdiction in criminal and civil matters, the provision clearly delineates and demarcates what the Court can and cannot do. By dint of Article 165(6) however, this Court cannot supervise superior courts. It provides:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

5. The superior courts in the court system in Kenya are listed in Article 162 (1) of the Constitution, which provides:

The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

6. It is common ground that the Applicant has unsuccessfully appealed to both this Court and the Court of Appeal. What he now seeks is that this Court reviews its own decision and that of the Court of Appeal, a jurisdiction it does not have. In this regard, I associate with the holding in John Kagunda Kariuki v Republic [2019] eKLR, where Ngugi, J, (as he then was) stated:

10. In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.

7. At the helm of the Court system in Kenya is the Supreme Court followed by the Court of Appeal. This Court falls below the Court of Appeal. After the Applicant's appeal in this Court was dismissed, he appealed to the Court of Appeal and the same was dismissed. That decision of the Court of Appeal is binding on this Court. In light of this, to entertain this matter in respect of which the Court of Appeal has pronounced itself, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm. In this regard, I am guided by the holding in the case of Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR, where the Court of Appeal stated:

As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice...Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. the Constitution itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts.



Moreover, under Article 164(3) of the Constitution, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere.

8. This finding of the Court of Appeal was affirmed by the Supreme Court in Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment), which stated:

55. We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves.

9. The Applicant's appeal was heard and determined by this Court and the Court of Appeal, a fact that the Applicant admits. He cannot therefore invite this Court to tread on forbidden ground by reopening the matter, thus defying the constitutional hierarchy of the courts.

10. In light of the foregoing, the Application filed on 12.6.23, being devoid of merit, is hereby dismissed.

**DATED AND DELIVERED VIA MS TEAMS THIS 2<sup>ND</sup> DAY OF FEBRUARY 2024**

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**M. THANDE**

**JUDGE**

In the presence of: -

..... for the Applicant

..... for the Respondent

..... Court Assistant

