



**Toussain & another v Republic & another (Miscellaneous Application E077 of 2023) [2024] KEHC 700 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 700 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS APPLICATION E077 OF 2023  
RN NYAKUNDI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**MASSA TOUSSAIN ..... 1<sup>ST</sup> APPLICANT**

**MASSA TOUSSAIN ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**REPUBLIC ..... 2<sup>ND</sup> RESPONDENT**

*(Being a review on sentence in Cr. Case no. 202 of 2017 before Hon. Wekesa (PM) of Lodwar)*

**RULING**

Presentation: Mr. Okaka for the State

1. The applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#). The applicant underwent a full trial and the trial magistrate sentenced him to thirty (30) years’ imprisonment.
2. Being aggrieved by the conviction and sentence, the applicant appealed the decision and the same was dismissed by this court. This court enforced the trial court’s sentence.
3. The applicant in his application now before court seeks a sentence review pursuant to article 165 (3) (b) of the [constitution of Kenya](#) and Section 354(3)(iii), 362 and 364 of the [penal code](#) and any other enabling provisions.

**Analysis And Determination**

4. It is trite law that a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law,



and that a court cannot expand its jurisdiction through judicial craft. (See *Samuel Kamau Macharia & Another V. KCB & 2 Others* App. No. 2/2011).

5. By reviewing the said sentence, this court would be arrogating itself the appellate jurisdiction to entertain an appeal from its own decision or decision of a court of concurrent jurisdiction. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Good governance demands that cases be handled procedurally in the right forum.
6. The court can only consider applications of such nature if they have satisfied the provisions of article 50(6) of the *Constitution of Kenya* 2010.

Article 50 (6) (a) & (b) of the Constitution provides that: -

- (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if-
  - (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; and
  - (b) New and compelling evidence has become available.

7. Thus, for a new trial to be ordered under Article 50 (6) of the Constitution, the applicant herein must prove two things: first that his appeal to the highest court has been dismissed or that he did not appeal within the stipulated time allowed for appeal and secondly, he must prove that new and compelling evidence has become available.
8. I do not find the present application qualified to warrant a sentence review. In its decision, the learned judge stated as follows: -

“I am therefore unable to interfere with the exercise of the discretion on the part of the trial court in sentencing the appellant to 30 years in Jail.”

9. The right to the imposition of a similar sentence for similarly positioned offender would seem to derive from the fact that equality is one of the founding values of the Constitution that underpins the Kenyan Constitutional Democracy. Equality in sentencing has a direct impact on the manner in which courts exercise their sentencing discretion. The debate about equality in sentencing was triggered by the landmark case of *Francis Muruatetu vs Republic* (2017) eKLR which has played a pivotal role in the birth of the sentencing guidelines gazetted by the Chief Justice in 2023. The debate now places equality and individualization in sentencing at two different poles of comparison each with two different sentencing outcomes. Equality in Art. 27 of the *Constitution* in sentencing espouses like treatment for like cases, emphasizing on similar punishment for a similarly positioned convicts. Whereas the individualization of a sentence is an attempt by the trial court to exercise discretion to tailor the sentence to fit or the relevant factors that apply in the case. In the post review stage I find no compelling evidence to interfere with the discretion of the trial court as affirmed on appeal.
10. In the same breadth that being said, this court has no jurisdiction to review its own decision delivered on appeal by Hon. J. Wakiaga as the Judge is of concurrent jurisdiction.

This Application is dismissed and this file is hereby closed.

Orders accordingly.

**DATED AND SIGNED AT LODWAR THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024**

**In the presence of**

Yusuf for the state



Applicant present

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**R. NYAKUNDI**

**JUDGE**

