



**PK v Republic (Criminal Revision E060 of 2023)
[2024] KEHC 2503 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2503 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL REVISION E060 OF 2023
RB NGETICH, J
MARCH 13, 2024**

BETWEEN

PK APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with the offence of Incest contrary to section 20(1) of the [Sexual offences Act](#) No. 3 of 2006 where he was sentenced to life imprisonment. The Applicant lodged an appeal to the court of appeal which was dismissed.
2. The applicant has moved this court seeking for sentence revision of criminal case No. 442 of 2011 where he was sentenced to serve life imprisonment. He states that under Article 50(2)(p)(q) of the [constitution](#), an applicant has a right to benefit from the least severe sentence and have his sentence reviewed.
3. The Applicant’s argument is that the life sentence contravenes Section 216 and 389 of the [Criminal Procedure Code](#) on mitigation and the values of sentencing as in the [Sentencing Policy Guidelines](#) 2016. He states that the High court has competent jurisdiction to hear and determine this Application under Article 165(3)(b) of the [constitution](#) of Kenya,2010. That under the provisions of the [constitution of Kenya](#),2010 and [Practice Procedure Rules](#) 2010, this court has power to hear and determine infringements of fundamental rights and award remedies. He prayed for a non-custodial sentence or a determinate sentence.
4. The respondent filed written submissions dated 14th February,2024. They submit that the application placed before the court urges this honorable court to make a determination and possibly reduce the sentence imposed by the Trial court which upon appeal vide Eldoret High Court HCCRA No 32 of 2012 (P K v Republic [2015] eKLR) conviction and sentence was confirmed; that Judgment in Eldoret



High Court HCCRA No 32 of 2012 was delivered on the 19th February, 2015 by Hon. Judge George Kanyi Kimondo and this honorable court does not have Jurisdiction to sit and or review a judgment or decision of another Judge of Concurrent Jurisdiction.

5. They submit that review of sentence can only be handled by the Court of Appeal or if this honorable court was sitting on appeal of the judgment from the lower court or if the applicant was seeking for resentence after exhausting all appeal mechanisms and not otherwise.
6. That the applicant has never moved the Court of appeal challenging the decision of the high court at Eldoret and therefore has not exhausted all appellate option to warrant him to come back to the high court for resentencing and relied on the decision in *Daniel Otieno Oracha vs Republic* 2019 eKLR.
7. She further submit that this court cannot sit on appeal of its own judgment 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.
8. When this application came up for hearing, the applicant informed court that his appeal to the court of appeal was dismissed.
9. The prosecution counsel Mr. Abwajo submitted orally that they oppose the application as the same is brought under review. He submitted that this court had already exercised its appellate jurisdiction where it dismissed the appeal. That the court must exercise its mind in severity of the sentence and applicable law and find the same not merited to warrant the court to interfere with it. That the mandatory sentence under offence of incest is still good law and the supreme court has pronounced as such in *Muruatetu 2* where the supreme court clarified that application in *Muruatetu 1* is not applicable to sexual offences matters. He argued that considering this application will amount to re-opening the appeal and the only appropriate court if the court of appeal has pronounced itself is the supreme court.
10. A social inquiry report filed indicate that the applicant is HIV+ (positive). He admits having committed the offence while intoxicated and mistook the victim for his wife and committed the offence. He pleads for forgiveness blaming alcoholism for the offence.
11. The area chief indicated that the community were shocked when the incident occurred though they did not show hostility towards the applicant and having stayed in prison for long, the community are ready to receive him and he believes he will be safe if he is released from prison.
12. The applicant prayed for a second chance by revision of his sentence and if possible, a non-custodial sentence. He says he has learnt tailoring course while in prison. His sister who is a teacher said she has been assisting in paying school fees for the inmate's children and if the inmate is released at least, he will be able to take up his parental, duties. She said they are willing to assist in the reintegration and resettlement of the inmate back into the community.
13. The victim who is the inmate's daughter indicated that she is now 22 years old and she is doing well. She sat for her KCSE in 2021 and is still waiting to join college due to financial constraints. She said she has forgiven her father in totality and she does not object to his sentence being reviewed as he will assist in taking care of the family and paying school fees for her and her younger siblings. She stated that health-wise, she is doing well both mentally and physical. She added that as a family they are ready to assist in Applicant's reintegration and resettlement back into the community.



Determination

14. The State counsel challenged jurisdiction of this court to revise sentence herein. The law on jurisdiction was stated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others*, Application No. 2 of 2011 thus:

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court 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...”

15. Supreme Court considered the issue of review of judgements and orders in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR and held that:

“...we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

- a. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
- b. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
- c. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
- d. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”

16. I take note of the fact that after this court made determination on appeal filed by the applicant, there has been change of jurisprudence in respect to life sentence following the decision by court of appeal in Malindi Court of Appeal Criminal Appeal No. 12 of 2021, *Julius Kitsao Manyeso v Republic* where the court declared life sentence unconstitutional. The applicant herein was sentenced to life imprisonment. In view of repeal of law in respect to life sentence by caselaw, the applicant herein is entitled to resentence so as to comply with the law as it is now. I will therefore set aside life sentence and impose determinate sentence.

17. I take note of the fact that the applicant has been in prison for 13 years. The community and the family are also ready to welcome him back home. I am inclined to impose sentence of 20 years and period served in prison from the date of arrest to be computed from sentence.

18. Final Orders: -

1. Life sentence is hereby set aside.
2. The applicant to serve 20 years imprisonment.
3. Period served in prison both remand period and after sentence be computed in sentence in order 2 above.



RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 13TH DAY OF MARCH 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

- Applicant present.
- Ms Ratemo for State.
- E. Kibet, Court Assistant.

