



Mutuku v Republic (Petition E013 of 2023) [2024] KEHC 6937 (KLR) (16 April 2024) (Ruling)

Neutral citation: [2024] KEHC 6937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
PETITION E013 OF 2023
GMA DULU, J
APRIL 16, 2024**

BETWEEN

STEPHEN JOHN MUTUKU PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. These proceedings are headed Petition, but were actually commenced through a Miscellaneous Criminal Application filed on 20th February 2023 in which the main prayer is for review of the sentence imposed to a lesser sentence, and that the period the applicant was in remand custody during trial from 27th November 2009 to 27th July 2010 (8 months) be computed into the sentence.
2. The applicant complains that his appeal to the High Court resulted in his sentence of 30 years imprisonment to be wrongly enhanced to life imprisonment, and that his appeal to the Court of Appeal was dismissed, but that this court has jurisdiction under Article 165 of the *Constitution* to entertain this present application to reconsider and review his sentence. I note that the High Court and Court of Appeal judgments were filed herein.
3. A supporting affidavit was filed with the application, as well as copies of certificates which the applicant acquired in prison custody.
4. The application was canvassed through written submissions, and I have perused and considered the mitigation submissions filed by the applicant, as well as the submissions filed by the Director of Public Prosecutions. I note that the Director of Public Prosecutions maintains that this court cannot presently review the sentence imposed, as it has no jurisdiction to do so.
5. In considering the request by the applicant, note that the applicant has relied on several decided court cases including Petition 97 of 2021 – *Edwin Wachira & 9 Others v Republic* and the Court of Appeal decision in *Mwangi v Republic* – Criminal Appeal No. 84 of 2015, as well as the provisions of Article 50 of the Constitution regarding the requirements of fair hearing.



6. Indeed, the 30 years imprisonment sentence meted on the applicant by the trial court in Taveta SRM Criminal Case No. 575 of 2009 was enhanced by the High Court to the statutory mandatory sentence of life imprisonment in Mombasa High Court Criminal Appeal No. 454 of 2010 – *Stephen John Mutuku v Republic*. The Court of Appeal thereafter upheld that enhanced sentence in Mombasa Criminal Appeal *S.J.M v Republic* (2016) eKLR.
7. Though the applicant feels that this court can constitutionally reconsider the sentence, in my view, the jurisdiction of this court is ousted by the facts and circumstances of this matter.
8. First of all, this is not a case of murder where the mandatory sentence of death applies, and where the Supreme Court in the case of *Karioko Muruatetu v Republic* (2015) eKLR directed courts to reconsider and review the mandatory death sentences for murder, taking into account relevant mitigating factors.
9. Secondly, the issue of enhancement of sentence herein was substantively considered and determined by the Court of Appeal, and this court being of lower rank to the Court of Appeal, cannot purport to sit and review the considered decision of the Court of Appeal. In this regard the Court of Appeal in Mombasa in *S.J.M v Republic* (2016) eKLR stated as follows:-

“While we agree that it is a good practice for the court to warn an appellant before the hearing of the appeal that should the appeal fail it would be obliged to substitute an illegal or unlawful sentence with a proper sentence prescribed by the law, the duty of the appellate court to impose the lawful sentence as prescribed by law is not undermined by the failure to issue such warning or caution.”
10. As such, this court has no powers or jurisdiction to vary or reconsider the above substantive decision and finding of the Court of Appeal on sentence, as I am bound by legal principles to comply with the above orders of the Court of Appeal.
11. I thus agree with the Prosecuting Counsel that this court lacks jurisdiction to entertain this application for review of sentence, or to review the sentence herein.
12. As a consequence, I strike out the application.

**DATED, SIGNED AND DELIVERED THIS 16TH DAY OF APRIL 2024 IN OPEN COURT AT VOI.
GEORGE DULU**

JUDGE

In the presence of:-

Alfred – Court Assistant

Applicant

Mr. Sirima for State

