



**Mulwa v Republic (Petition E107 of 2023) [2024] KEHC 6817 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 6817 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
PETITION E107 OF 2023**

**GMA DULU, J**

**APRIL 4, 2024**

**BETWEEN**

**KYALO MULWA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before me is an Application filed on 23<sup>rd</sup> July 2023 which is erroneously designated in the file as a petition. The applicant is Kyalo Mulwa.
2. The applicant relies on High Court Petition No. 97 of 2021 *Edwin Wachira and 9 others v Republic* consolidated with 88 of 2021, 98 of 2021 and 57 of 2021 Mombasa High Court, to pray for the following orders from this court.
  - a. That the court be pleased to review the sentence and grant the Applicant a lenient sentence informed by his mitigation and unique facts and circumstances of his case and the provisions of Article 50(2)(p)(q) of the *Constitution* of Kenya.
  - b. That the period he spent in remand custody be computed and sentence be reduced pursuant to the provisions of section 333(2) of the *Criminal Procedure Act* and also pursuant to the case of *Vincent Sila John & 87 others v the Attorney General*
  - c. That the court be pleased to grant the Applicant probation orders if his circumstances so fit
  - d. Any other orders that the court deems fit to give in the interest of justice.
3. The application was filed with a supporting affidavit in which it is emphasized that sentencing discretion permits balanced and fair sentencing consistent with enlightened Criminal Justice System, and that mandatory minimum sentence violated a person's right under Article 27 of the *Constitution*.



4. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the applicant as well as the submissions filed by the Director Public Prosecutions.
5. In deciding this application, I have perused and considered the judgment in Voi High Court Criminal Appeal No. 48 of 2016 delivered on 29<sup>th</sup> June 2017 as well as Mombasa Court of Appeal Criminal Appeal No. 109 of 2022 delivered on 26<sup>th</sup> May 2023 both of which relate to the same case which started in the Magistrates Court.
6. In request for review of sentence, the applicant has argued strongly that this Court has jurisdiction to review the life imprisonment sentence imposed on him. On the other hand the Director Public Prosecution has argued that this Court has no jurisdiction to review the sentence imposed and relied upon the case of *Daniel Otieno Oracha v Republic* (2019) eKLR (High Court Kisumu) wherein the High Court declined to review a sentence of the Magistrate which had been upheld on appeal by the High Court and Court of Appeal.
7. In the present case, I note that the applicant was convicted for defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 wherein the victim was aged 8 years, and was sentenced to life imprisonment in Wundanyi SPM Criminal Case No. 418 of 2015.
8. He thereafter appealed to the High Court and the Court of Appeal and both appeals were dismissed. He did not approach the Supreme Court, but has come back to this court seeking revision of sentence.
9. In my view, based on the reasoning in the case of *Daniel Otieno Oracha v Republic* (2019) eKLR, which I agree with, this court cannot entertain, and has no jurisdiction to entertain the present application.
10. The first reason is that this Court and the Court of Appeal have already specifically addressed the issue of sentence and upheld the sentence imposed by the trial court. Thus this Court cannot re-open this matter either in relation to the decision of the High Court which is this same Court, or the decision of the Court of Appeal, which is a Court superior to this Court to which I am bound.
11. With regard to the request that this court reconsider reduction of sentence by taking into account the time the applicant was in remand custody during trial under section 333(2) of the *Criminal Procedure Code* (Cap 75), such is not possible as the life imprisonment sentence cannot be reduced by the days one is in remand custody. Even if that was possible, this Court would not have jurisdiction to factor that period because the Court of Appeal has already substantively dealt with the sentence imposed herein in its determination on appeal when it stated under paragraph 30 of its judgment as follows:-

“ 30 sentencing is a discretion of the trial court. It is also a matter of facts. The second appeal court cannot interfere with that exercise of discretion unless it is shown that the Court passed an illegal sentence. The only challenge raised by the appellant is that his mitigation was not considered. The learned trial magistrate took into account the appellant’s mitigation circumstances as given by him. As required by law, the learned Magistrate also considered the victim, the age and the trauma caused, and found she would suffer for the rest of her life from that experience. It was his view that the mandatory sentence was called for, considering all circumstances. The first appellate Court did not interfere but upheld the sentence imposed by the trial Court. We find no reason to interfere”
12. It is also clear that the applicant herein did not raise the issue of the period he was in custody during trial to persuade the Court of Appeal interfere with the sentence. In my view, the Court of Appeal having made such a comprehensive determination of the sentence imposed as above, this Court being



a lower Court in hierarchy, cannot assign to itself jurisdiction to review the decision of the Court of Appeal. Maybe the applicant should approach the Court of Appeal to ask for review of sentence.

13. As for this application, I find that this Court has no jurisdiction to review the sentence. The application is thus herewith dismissed.

Dated, Signed and delivered this 04<sup>th</sup> day of April 2024 at Voi in the Open Court.

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred/Trizah – Court Assistants

Applicant

Mr. Sirima for State

