



**Kosgei v Republic (Miscellaneous Criminal Application
E194 of 2021) [2024] KEHC 4954 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E194 OF 2021**

JRA WANANDA, J

MAY 15, 2024

BETWEEN

JOSEPH KITE KOSGEI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Application before Court is the Applicant's undated Notice of Motion filed on an unspecified date and which seeks that the Court reviews the prison sentence imposed upon him by the trial Court.
2. The background of the matter is that the Applicant was charged in Eldoret Magistrate's Court Criminal Case No. 802 of 2012 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on diverse dates between 12th and 16th February 2012, at Ilula Farm, Eldoret East, within the then Rift Valley Province, he defiled a 14 years old girl. By the Judgment delivered on 12/02/2015, he was convicted and subsequently sentenced to serve 20 years in prison.
3. Aggrieved with the decision, the Applicant filed an Appeal *vide* Eldoret High Court Criminal Appeal No. 21 of 2015 against both conviction and sentence. The Appeal was however dismissed on 24/01/2019 by Hon. Lady Justice O. Sewe. A copy of the Judgment has been supplied.
4. The Applicant has now returned to this High Court seeking reduction of the 20 years sentence. The grounds of the Application are that he has now served 2/3 of the sentence, that he has acquired a lot of experience while in prison, including, tailoring, carpentry and mechanics which skills will enable him to earn a living once he is released.
5. The State (Respondent) did not file a formal Response to the Application but Prosecution Counsel, Ms. Okok opted to make oral submissions. In her address, she submitted that the Applicant has not cited any provisions of the law in support of the Application, that in the Appeal to the High



Court, Sewe J found that the 20 years imprisonment was a lawful sentence and that being a Court of concurrent jurisdiction, this Court cannot reopen the same matter.

6. The issue for determination is “whether the Court should review the sentence imposed by the trial Court”.
7. In answering the said issue, I reiterate that the Applicant appealed to this High Court against the decision of the Magistrate’s Court, both on conviction and sentence. As aforesaid, the Appeal was dismissed. In dismissing the Appeal, Sewe J stated as follows:

“(28) in the result therefore, I am satisfied that the conviction of the Appellant for the offence of Defilement was based on sound evidence, and that the sentence of 20 years imposed by the lower Court is also lawful. I would accordingly affirm the Appellant’s conviction and sentence and dismiss his appeal in its entirety, which I hereby do.”

8. It is therefore clear that the Applicant’s grievances on the issue of the sentence imposed were raised on appeal before a Judge of equal jurisdiction presiding over this very Court and who conclusively dealt with and determined the same. The Applicant has now returned to this same Court which has already dismissed his Appeal, asking for the same sentence imposed by the Magistrate’s Court to be reduced. This, the Court cannot do since this Court cannot sit on appeal on a decision of its own. In the circumstances, I find that this Court is now *functus officio* and cannot purport to interrogate the decision of Sewe J. The Applicant’s recourse is to appeal to the Court of Appeal, not to come back to this same High Court
9. I therefore find that this Court, having already pronounced itself on both conviction and sentence, is bereft of the jurisdiction to again review the sentence it had already affirmed in Eldoret High Court Criminal Appeal No. 21 of 2015.
10. I find persuasion in the case of [Joseph Maburu alias Ayub v Republic](#) [2019] eKLR where Kiare Waweru J held as follows:

“Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes *functus officio*. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. [Black’s Law Dictionary](#) Tenth (10th) Edition describes defines sentence as:

“The judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.”

Remitting a matter to the trial court which had become *functus officio* after sentencing flies in the face of the doctrine of *functus officio*. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”

11. I also cite the decision of Hon. Lady Justice L. Njuguna in the case of [Boniface Gitonga Mwenda v Republic](#) [2021] eKLR, where, faced with a similar situation, she held as follows:

“However, as I have noted, the Petitioner herein appealed the trial court’s decision to this court. The court in dismissing the appeal against the sentence held that the trial court’s sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review



is limited to record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. (See Section 362-364 of the *Criminal Procedure Code*).

Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn't have jurisdiction in that respect and as such, the prayer to that respect ought to fail.”

12. In the premises, the Application herein is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF MAY 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Ms Limo for State

Petitioner/Applicant in person

