



**Nduaru v Republic (Miscellaneous Criminal Application
33 of 2023) [2024] KEHC 5711 (KLR) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION 33 OF 2023**

DR KAVEDZA, J

MAY 14, 2024

BETWEEN

MICHAEL CHEGE NDUARU APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The appellant was charged and after a full trial convicted for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*, No. 3 of 2006. On 8th July 2013, he was sentenced to serve 20 years imprisonment. He challenged his conviction and sentence in Nairobi Criminal Appeal No. 134 of 2013. On 9th February 2016, Hon. Kimaru J (as he then was) dismissed the appeal for lacking in merit. He challenged the decision to the Court of Appeal in Appeal No. 39 of 2020. On 11th May 2021, he withdrew his appeal before final determination.
2. He has now filed the present chamber summons seeking resentencing. The grounds raised are that he has been in prison for ten years since his incarceration and has since been rehabilitated. That the mandatory nature of the sentence imposed by the trial court was unconstitutional. He urged the court to order that the remainder of the sentence be on probation.
3. Article 50 of the *Constitution* of Kenya provides for the rights of an accused person as follows: -
 - (2) Every accused person has the right to a fair trial, which included the right-
 - (q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.
4. This Court's powers to review sentences are premised on Article 165 of the *Constitution* and section 362 of the Criminal procedure Code which provides the supervisory jurisdiction over subordinate courts but not over superior court. Section 364 of the *Criminal Procedure Code* outlines the powers of



the High Court under article 165 of the Constitution and section 362 of the Criminal Procedure Code and states how the powers are to be exercised.

5. From the above provision, it is clear that the powers of the High Court on Revision are to be exercised only over subordinate courts and not over the High Court with respect to its own decisions. Furthermore, it is trite that where an accused person is aggrieved by the court's decision, he may either appeal or seek a review of the sentence. In this regard a convicted person cannot appeal and at the same time seek a review.
6. The question that arises therefore is whether this Court has jurisdiction to entertain the present application. It is trite that a court derives its jurisdiction from the Constitution or statute. In Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & 2 others, Application No 2 of 2011 the Supreme court held 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...”

7. I note that neither article 165 of the Constitution nor the Criminal Procedure Code grants this Court the jurisdiction to review its own decisions. It was not disputed that the applicant herein already filed an appeal before this Court which appeal was unsuccessful. It thus follows that this Court cannot once again entertain an Application for revision of sentence with respect to the same matter. I am guided by the decision of Justice Joel Ngugi (as he then was) in John Kagunda Kariuki v Republic [2019] eKLR where the Learned Judge held thus:-

“However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision in Dismas Wafula Kilwake does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences.....”

8. Having regard to the reasoning in the above decision and having established that this Court lacks the jurisdiction to entertain this Application, I find that I must down my tools. (See Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] eKLR).
9. The upshot of the above is that the application lacks merit and is dismissed.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 14TH DAY OF MAY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Applicant Present



Ms. Tumaini for the Respondent

Joy Court Assistant

