



**Ochoro v Republic (Miscellaneous Criminal Application
E019 of 2023) [2024] KEHC 5032 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E019 OF 2023**

JRA WANANDA, J

MAY 15, 2024

BETWEEN

JACOB ODHIAMBO OCHORO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant approached this Court vide the undated Notice of Motion filed in Court on 22/03/2023 seeking review of the sentence imposed upon him by the trial Court.
2. The background to the matter is that the Applicant was charged in Eldoret Chief Magistrate's Court Criminal (Sexual Offence) Case No. E084 of 2019 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on 13/10/2019, in Kapseret sub-County, within Uasin Gishu County, he defiled a 5 years old girl. He was convicted and sentenced to serve 25 years in prison.
3. The Applicant pleaded that he is seeking for sentence review in accordance with Article 50(2)(p) (q) of the *Constitution*, that he is seeking for a lesser sentence and also for consideration of the time spent in custody to be included as part of his sentence in accordance with Section 333(2) of the *Criminal Procedure Code*. He also deponed that he is a first offender, he is remorseful, repentant and rehabilitated.
4. The State (Respondent) did not file a formal Response but Ms. Okok, Prosecution Counsel opted to address the Court orally. In her address, she submitted that the Magistrate's Court jailed the Applicant for 25 years on 28/07/2022, that the Applicant filed an Appeal to this Court, namely, Eldoret High Court Criminal Appeal No. E084 of 2022, that the Appeal was only on sentence and it was dismissed on 16/02/2023 by Hon. Lady Justice J. Mon'gare who upheld the sentence as proportionate. Ms. Okok submitted that in his Judgment, the trial Magistrate expressly stated that he had considered the



period spent in custody and that Hon. Lady Justice Mon'gare having already determined the same and being a Judge of concurrent jurisdiction, the Application is for dismissal.

Determination

5. The issue for determination herein is “whether the sentence imposed upon the Applicant by the trial Court should be reviewed by this Court.
6. Upon perusing the record, I have established that indeed the Applicant filed Eldoret High Court Criminal Appeal No. E084 of 2022 in this very same Court in which he challenged the sentence of 25 years imprisonment imposed on him by the trial Court. The Applicant has in fact attached a copy of that Judgment to the instant Application. In the Appeal, he also raised the issue of Section 333(2) of the Criminal Procedure Code not having been considered by the trial Court in computation of the prison sentence imposed and also that he is a first offender, he is remorseful, repentant and rehabilitated. The grounds that he raised in the Appeal are therefore basically, word-for-word, the same that he has again raised in his instant Application
7. In reading out the sentence, the trial Magistrate, Hon. B. Kiptoo (SRM) stated as follows:

“The offence is serious. The child is aged 5 years at the time of the offence. The children of this nature need to be protected. The provisions for a sentence of life imprisonment, the Superior Courts have handed down a decision against mandatory sentences. The spent (*sic*) in custody by the accused considered, his age factored in, the accused is hereby sentenced to serve 25 (Twenty-Five) years in prison. Right of Appeal 14 days”
8. On her part, in her Judgment in the Appeal, Mon'gare J made the following statements:

“10. Therefore, upon considering the circumstances of the case, the grounds of appeal, the aggravating circumstances, the mitigation of the Appellant and the submissions of the parties, I find no reason to review the sentence meted out by the trial Court. The victim was a child of tender years and will be affected by the acts of the Appellant for the entirety of her life. It is my view that the sentence was commensurate with the offence committed and I find no reason to disturb the same. The appeal is dismissed. Orders accordingly.”
9. It is therefore clear that the question of computation and length of the sentence was raised on appeal before a Judge of equal jurisdiction presiding over this very Court and who conclusively dealt with and determined the same. In the circumstances, this Court is now *functus officio* and cannot purport to interrogate the decision of Mon'gare J.
10. The upshot of the foregoing is that the Application is without merit as the issues it purports to raise were finally and conclusively determined by a Judge of concurrent jurisdiction. If this Court was to interfere with the decision which conclusively dealt with the issue of sentence, such action would be tantamount to sitting on appeal on the decision of a Judge of equal standing, a position that is untenable in law.
11. Regarding the principle of “*Functus officio*”, the Court of Appeal in Telkom Kenya Limited vs John Ochanda [2014] eKLR, stated as follows:

“*Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...”



The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

12. Further, 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.”

Final Orders

13. In the premises, the Applicant’s undated Notice of Motion filed herein on 22/03/2023 is dismissed.

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

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WANANDA J.R. ANURO

JUDGE

