



**Wafula v Republic (Criminal Petition E001 of 2023)
[2024] KEHC 4955 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E001 OF 2023**

JRA WANANDA, J

MAY 15, 2024

BETWEEN

NELSON WAFULA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Application before Court is the Petitioner's undated Notice of Motion filed on 21/01/2023 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 Petitioner was charged in Eldoret Chief Magistrate's Court Criminal Case No. 93 of 2016 with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on 23/04/2016, at Milimani area, Eldoret West district, within Uasin Gishu County, in association with another not before Court, he defiled a 16 years old girl. He was also charged with the alternative charges of committing an indecent act with a child and also assault causing actual bodily harm. By the Judgment delivered on 23/08/2019, he was convicted and subsequently sentenced to 20 years imprisonment on Count I and 18 months for Count II, to run concurrently.
3. Aggrieved with the decision, the Petitioner filed an Appeal, namely, Eldoret High Court Criminal Appeal No. 143 of 2019 against both conviction and sentence. The Appeal was however dismissed on 27/01/2022 by Hon. Justice E. Ogola. A copy of the Judgment has been supplied.
4. The Petitioner has now returned to this High Court seeking review of the 20 years sentence. The grounds of the Application are that the Courts has pronounced itself concerning the minimum-maximum mandatory sentences, that he is a first offender, he is remorseful, repentant and reformed and thus begs for leniency, that he is a born-again Christian, and that he has undergone various rehabilitation programmes offered in prison and has acquired skills.



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 in the Appeal to the High Court, Ogola J found that the 20 years imprisonment was proportionate and confirmed the same, that therefore the issue of sentence was conclusively dealt with and this being a Court of concurrent jurisdiction, cannot review the same, and that the Petitioner's recourse lies to the Court of Appeal.
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 Petitioner 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, E. Ogola J stated as follows:

"34. In the premises, it is evident that the offence of defilement was proved to the required standard. Further, the sentence meted out is proportionate to the offence as provided by statute and I find no reason to disturb the same. The appeal is dismissed in its entirety."

8. It is therefore clear from the foregoing, that the Petitioner'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 Petitioner has now returned to this same Court which had 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 E. Ogola J. I agree that the Petitioner'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 that it had already affirmed in Eldoret High Court Criminal Appeal No. 143 of 2019.
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 Petition herein is dismissed.

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

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WANANDA J.R. ANURO

JUDGE

