



Mwayele v Republic (Petition E013 of 2023)
[2024] KEHC 12284 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12284 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
PETITION E013 OF 2023
M THANDE, J
OCTOBER 11, 2024

BETWEEN

KESI KOI MWAYELE PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. By a Petition filed on 28.7.23, the Petitioner seeks review of the sentence imposed upon him by the trial court.
2. The Petitioner stated that he was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and sentenced to life imprisonment. He appealed both the conviction and sentence in Malindi HCCRA No. 19 of 2015, which appeal was dismissed. Not being satisfied, he filed Criminal Appeal No. 8 of 20019 in the Court of Appeal which was also dismissed vide a judgment dated 20.1.23.
3. Citing *Baraka Safari v Republic* and Articles 25, 27, 28 and 48 of *the Constitution*, the provisions of the Criminal Code as well as the Sentencing Policy Guidelines, the Petitioner challenged the mandatory life sentence imposed by the *Sexual Offences Act*. He pleaded that he has already spent 11 years in incarceration is enough and was that he eligible for parole. Further that he was a peaceful and law-abiding citizen. He urged the Court to review his sentence.
4. The Petition is opposed by the Respondent vide a replying affidavit sworn on 12.1.24 by Joseph Mwangi, prosecution counsel. The Respondent averred that the Petitioner has readily admitted that he appealed to this Court and the Court of Appeal without success. Further that there is no law supporting the prayers sought in the Petition. He added that litigation must come to an end and that allowing the Petition would open the flood gates as every imprisoned convict shall approach the Court with similar applications leading to endless litigation.



5. The first issue that this Court must determine is whether it has the jurisdiction to entertain the Petition. The law, is that this Court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

6. This Court derives its jurisdiction principally form Article 165(3) of *the Constitution* which confers upon this Court unlimited original jurisdiction in criminal and civil matters, the provision clearly delineates and demarcates what the Court can and cannot do. The jurisdiction of this Court includes supervisory powers. By dint of Article 165(6) however, this Court cannot supervise superior courts. It provides:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

7. The superior courts in the court system in Kenya are listed in Article 162 (1) of *the Constitution*, which provides:

The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

8. At the helm of the Court system in Kenya is the Supreme Court followed by the Court of Appeal. This Court falls below the Court of Appeal. After the Petitioner's appeal in this Court was dismissed, he appealed to the Court of Appeal and the same was dismissed. That decision of the Court of Appeal is binding on this Court. In light of this, to entertain this matter in respect of which the Court of Appeal has pronounced itself, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm. In this regard, I am guided by the holding in the case of Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR, where the Court of Appeal stated:

As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice...Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. *The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts.

Moreover, under Article 164(3) of *the Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court



could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere.

9. This finding of the Court of Appeal was affirmed by the Supreme Court in *Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020)* [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment), which stated:
55. We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves.
10. The Petitioner's appeals were heard and dismissed by this Court and the Court of Appeal, a fact that he admits. What he now seeks is that this Court reviews its own decision and that of the Court of Appeal, a jurisdiction it does not have. As the Supreme Court stated in the cited case, a superior court cannot reopen or review decisions of its peers of equal and competent jurisdiction much less those of a court higher than itself.
11. Duly guided by Article 165(6) of *the Constitution* and the authorities cited, this Court lacks the jurisdiction to reopen the matter to relook at the Petitioner's sentence that was upheld by the 2 superior courts. This would defy the constitutional hierarchical system of the courts.
12. In light of the foregoing, I find that the Petition filed on 28.7.23 is incompetent for want of jurisdiction, and the same is hereby struck out.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 11TH DAY OF OCTOBER 2024

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M. THANDE

JUDGE

