



**Masake v Republic (Miscellaneous Criminal Application
E001 of 2022) [2023] KEHC 662 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2022**

F GIKONYO, J

FEBRUARY 1, 2023

BETWEEN

BENARD REUTA MASAKE APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision from Original Sentence in Kilgoris SRMCR NO. 388 of 2009,
Kisii HCCRA NO. 50 of 2008, Kisii HCCRA NO. 119 of 2011, Kisumu
COA CRA NO. 26 of 2015, Kisii Constitutional Petition no. 102 of 2019)*

JUDGMENT

Right to Less Severe Sentence

1. In a notice of motion dated February 2, 2022 and filed in court on February 4, 2022, the applicant is seeking the sentence of 40 years' imprisonment to be reduced to a less severe punishment or the period already served.
2. The application is expressed to be brought under the provisions of articles 2(5)(6), 3(1),19,20(1), (3) (b), 22(1),23(1), 25(a) (c), 27(1)(2), 28, 29(d) (f), 50(2) (p) (q), 133(1)159(2) (a) and 165(3) (a) (b) of the Constitution and section 19(1), 21(1) (a) (2) (a) (b) of the Power of Mercy Act 2011.
3. The grounds of the application are stated in the applicant's supporting affidavit sworn on February 2, 2022. He avers that he is currently serving a sentence of 40 years imprisonment for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code. He has exhausted all other avenues of appeal. He also stated that, before the determination of his appeal in high court while on bail pending appeal, he sought reconciliation and successfully with the deceased's family.



Applicant's Submission

4. The applicant augmented his position and submitted that the 40 years of imprisonment did not take care of the provisions of article 50(2) (p) of the Constitution which guarantees the benefit of the least severe of the prescribed punishments for an offense.
5. The applicant submitted that the court should interpret the constitutional provisions broadly and liberally with a view of favoring enforcement and enjoyment of rights by individuals.
6. The applicant submitted that during trial after conviction in 2011 and generally since the occurrence of the offence in 2007 he has undertaken various reformation and rehabilitative programs. Due to his exemplary behavior and high standard of discipline in prison he was promoted to the special stage (trustee).
7. The applicant urged this court to order a review by reduction of 40 years' imprisonment and consider the period served to be commensurate.
8. The applicant has relied on the following authorities;
 - i. Articles 50(2) (p), 2(5) (6), 28,19 ,29(d) (f), 20(1)(3) (b), 25(a) (c) 278(1), 27(1), 3(1), 165(3) (a) (b), 159(2) (a) (c) of the Constitution.
 - ii. Article 3 of the European convention of human rights (ECHR).
 - iii. Laslo Magyar vs Hungary (application no 73593/10).
 - iv. TP And AT vs Hungary (application no 37871/14 and 7398/14).
 - v. Section 21(2) (a) (b) of the Power of Mercy Act.

Respondent's Submission

9. The respondent submitted that this court has no jurisdiction to review a sentence imposed by a court of concurrent jurisdiction.
10. The respondent submitted that this court has no power to exercise the power of mercy which is reserved to the executive; the president. The application, therefore, lacks merit and is misconceived. The respondent urged this court to dismiss the application.
11. The respondent has relied on the following authorities;
 - i. Benard Reuta Masake v Republic [2020] eKLR.
 - ii. Section 19(1) (a) 2(a) (b) of the Power of Mercy Act, 2011.
 - iii. Elkana Rono Kirui v Republic [2021] eKLR.

Analysis and Determination

12. In light of the application, the relevant law as well as the submissions by the parties, I see two issues for determination;
 - a. Whether this court has jurisdiction in this matter.
 - b. Whether the application has merit in so far as it is founded on Article50(2) (p) of the Constitution.



13. The application herein is a request for consideration of a less severe sentence under the provisions of Articles 50 (2) (p) of the [Constitution](#).
14. Before I delve into the application, a brief background of this case is necessarily connected to this decision.

Background of the case

15. The applicant was charged with manslaughter contrary to section 202 of the [Penal Code](#). He pleaded guilty to the said charge. He was convicted on his plea of guilty and sentenced to a term of Kshs 12,000/= in default to serve one-year imprisonment. The applicant paid the fine.
16. The attorney general was dissatisfied with the lenient sentence that was passed by the trial court and filed an appeal Kisii HCRA No 50 of 2008. The appeal was allowed, the conviction was quashed, and the sentence passed by the senior resident magistrate at Ogembo was set aside. The matter was then sent back for retrial before any magistrate with competent jurisdiction other than JD Kwena SRM. See [Republic V Benard Reuta Masake](#) [2009] eKLR.
17. Upon retrial, the applicant was convicted and sentenced to life imprisonment.
18. The applicant was dissatisfied with the conviction and sentence. He filed Kisii HCCRA No 119 of 2011. The appellate court (Wakiaga J) dismissed the appeal on conviction but allowed the appeal on sentence. The sentence was quashed and substituted for a sentence of 40 years' imprisonment. see [Benard Reuto Masake V Republic](#) [2015] eKLR.
19. The applicant was dissatisfied with the decision of Wakiaga J. He filed a second appeal to the Court of Appeal vide Kisumu COA CRA No of 2015. The Court of Appeal dismissed the appeal on the ground that the applicant had had the benefit of his sentence being reduced from life imprisonment to a term of 40 years in prison. See [Benard Reuta Masake V Republic](#) [2019] eKLR.
20. Subsequent to the decision of the Court of Appeal, the applicant filed Kisii Constitutional Petition No 102 of 2019. Ougo J dismissed the petition for want of merit. The judge noted that the applicant's appeal has already been heard by the High court. The judge further noted that the Court of Appeal had also noted that the applicant had had the benefit of his sentence being reduced from life imprisonment to a term of 40 years in prison and that his mitigation was taken into account by the judge and therefore the issue of resentencing did not arise. The applicant cannot return to the High court for a review or reduction of his sentence. See [Benard Reuta Masake V Republic](#) [2020] eKLR.

Jurisdiction

21. With this background, I am ready to decide the question of jurisdiction.
22. Jurisdiction is *sine qua non* to adjudication of any matter by a court of law. And, "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..." (The Supreme Court of Kenya, [Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others](#), Application No 2 of 2011)
23. The application herein is expressed to be brought under the provisions of Articles 2(5)(6), 3(1),19,20(1), (3)(b), 22(1),23(1), 25(a) (c), 27(1)(2), 28, 29(d) (f), 50(2) (p) (q), 133(1)159(2) (a) and 165(3) (a) (b) of the [Constitution](#) and Section 19(1), 21(1) (a) (2) (a) (b) of the [Power of Mercy Act 2011](#).



24. The application is essentially for a redress of denial or violation of a right and or fundamental freedom in the Bill of Rights. It is also speaking to the *Power of Mercy Act*.
25. The question is; whether in the history and circumstances of this case, the court has jurisdiction to entertain the application?
26. The Applicant acknowledges, and the record shows that; i) his sentence was reduced to 40 years in Kisii HCCRA No 119 of 2011 by Kisii High Court; ii) his second appeal was dismissed by the Court of Appeal; iii) he then came back to this court for resentencing under these same provisions of the *Constitution* and his petition was dismissed.
27. Issues he is raising here formed part of the decisions; of this court at Kisii; and of the Court of Appeal. He raised them again in a previous constitutional petition- at Kisii High court- which was dismissed.
28. In light thereof, resorting to this court for 'constitutional reliefs' again, is an abuse of court process. Again, this court does not have jurisdiction in the matter of the *Power of Mercy Act* which is a preserve of the executive and institutions established in the said Act. Any relief grantable under, must be processed within the stricture of the *Power of Mercy Act*
29. In my considered opinion, this court lacks jurisdiction to review the sentence of 40 years imposed by a court of equal jurisdiction and affirmed by the Court of Appeal.
30. The application is therefore misconceived and an abuse of process of the court. It is hereby struck out.
31. It is so ordered.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH THE MICROSOFT TEAMS ONLINE APPLICATION, THIS 1ST DAY OF FEBRUARY, 2023.

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F. GIKONYO M.

JUDGE

In the Presence of:

Mr. Okeyo for DPP

Applicant

Mr. Kasaso - CA

