



**Njoroge v Republic (Miscellaneous Criminal Application E260 of 2021)
[2023] KEHC 663 (KLR) (Crim) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E260 OF 2021
CW GITHUA, J
FEBRUARY 1, 2023**

BETWEEN

PETER MATHENGE NJOROGE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Peter Mathenge Njoroge, was convicted of the offence of defilement in Kibera Chief Magistrate's Court Sexual Offences Case No. 54 of 2015.
2. The particulars of the offence alleged that on September 21, 2015 at [Particulars withheld] Township in Kajiado County, he intentionally and unlawfully penetrated using his male genital organ (penis) the female genital organ (vagina) of JNO (name withheld), a girl aged 14 years.
3. Upon conviction, the applicant was sentenced to serve 30 years imprisonment. He was dissatisfied with his conviction and sentence. He lodged an appeal to this court being HCCRA No. 65 of 2018. The court record shows that the appeal was heard by Hon. Kimaru J (as he then was) who in a judgment delivered on October 8, 2018 upheld the applicant's conviction but allowed his appeal against sentence. The Hon. Judge reduced the sentence imposed on the applicant by the trial court from 30 years to 20 years imprisonment. The sentence was ordered to take effect from February 14, 2018 which is the date the applicant was convicted and sentenced.
4. The applicant has now approached this court through a Notice of Motion dated July 26, 2021 in which he principally requests this court to order that the sentence meted out by Kimaru J in Criminal Appeal No. 65 of 2018 shall take effect from the date of his arrest on September 21, 2015; that he is entitled to the right of remission, subject to the Commissioner General's direction and that in the alternative, his custodial sentence be substituted with an order placing him on probation.



5. Upon being served with the application, the respondent through learned prosecution counsel Mr. Robert Mutuma filed grounds of opposition dated February 18, 2022 in which he contended that the application lacked merit and was ill advised; that this court was functus officio having delivered its judgment in Criminal Appeal No. 65 of 2018 on October 8, 2018; that the application was before the wrong forum for determination.
6. In response, the applicant's learned counsel Mr. Brian Abiero filed a further affidavit in which he deposed that when sentencing the applicant to 20 years imprisonment, Kimaru J did not consider the time the applicant had spent in custody and that under section 333 (2) of the [Criminal Procedure Code](#) and clause 7:10 and 7:11 of the Judiciary Sentencing Policy Guidelines, the applicant was entitled to have his sentence commence from the date of his arrest.
7. At the hearing, both parties chose to prosecute the application by way of written submissions. The applicant's submissions were filed on April 19, 2022 while those of the respondent were filed on July 25, 2022.
8. In his submissions, the applicant's learned counsel while relying on several persuasive authorities including the cases of [Jamlick Njeru Ileri & another v Republic](#), [2019] eKLR and [Joseph Njenga Ngethe V Director of Public Prosecutions](#), [2019] eKLR, urged me to find that the applicant is entitled to have his 20 years sentence imposed by the High Court begin from the date of his arrest. He invited me to make an order to that effect to facilitate exercise of the applicant's constitutional right to benefit from the least severe sentence prescribed for an offence which is guaranteed under article 50 (2) (P) of the [Constitution](#); that the court has a duty to protect the applicant's right to liberty which will be violated if the order sought is not granted.

Further, counsel submitted that the applicant was entitled to the right of remission under section 46 of the [Prisons Act](#), cap 90 Laws of Kenya.
9. In her submissions, learned prosecution counsel, Ms Z. Chege, relied on the grounds of opposition filed on behalf of the respondent in opposition to the motion. In addition, she invited the court to note that the right to remission is not automatic and that the power to grant or decline remission is vested in the Commissioner of Prisons; that the offence committed by the applicant was serious and the custodial sentence imposed by the High Court should not be interfered with.
10. I have carefully considered the motion, the parties' rival written submissions and all authorities cited.

I find that the applicant's first prayer seeks revision of the sentence imposed by this court (Kimaru J) in High Court Criminal Appeal No. 65 of 2018. The applicant argued that in sentencing him, Kimaru J failed to comply with the proviso to section 333 (2) of the [CPC](#) which obligates courts to take into account the period a convict had spent in lawful custody; that I should correct that error by ordering that his sentence commences from the date of his arrest.
11. Given the foregoing arguments, the question that immediately arises for my determination is whether this court has jurisdiction to revise a sentence imposed by another judge of concurrent jurisdiction. It is trite law that a court's jurisdiction is conferred by either the [Constitution](#) or other written law. The court cannot assume jurisdiction exceeding that which is donated by the [Constitution](#) and the law and any decisions made in excess of jurisdiction amounts to a nullity. See: [Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another](#), [2012] eKLR.
12. It is also pertinent to note that the High Court's supervisory jurisdiction which includes its revisional jurisdiction is limited to revision of orders or sentences passed by subordinate courts in criminal



proceedings. A reading of sections 362 to 367 of the Criminal Procedure Code makes this legal position very clear. This position is further buttressed by article 165 (6) of the Constitution which provides that:

“(6) 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.”

13. The court record shows that when allowing the applicant’s appeal against sentence, Kimaru J set aside the sentence imposed by the trial court and stated as follows:

“... That sentence is set aside and substituted by a sentence of this court. The appellant is sentenced to serve twenty [20] years imprisonment with effect from February 14, 2018 when he was convicted and sentenced by the trial court. It is so ordered.”

14. Although it is evident from the above extract that in imposing sentence against the applicant, Kimaru J did not take into account the period he had spent in lawful custody prior to sentence by the trial court as required by the proviso to section 333 (2) of the CPC, I agree with the respondent’s submissions that having passed the impugned sentence in the exercise of this court’s appellate jurisdiction, this court cannot revisit the said sentence as it is now *functus officio*.

15. Reviewing the applicant’s sentence in the manner proposed by the applicant would in my view be tantamount to sitting on appeal against a decision made by another judge of concurrent jurisdiction which is not legally permissible. As the applicant was obviously aggrieved with the sentence imposed by this court, he ought to have filed an appeal to the Court of Appeal to ventilate his grievance instead of filing the instant application.

16. Regarding the second prayer for a declaration that the applicant is entitled to remission, a reading of section 46 of the Prisons Act clearly reveals that remission is not granted to convicted prisoners as a matter of right. Remission is earned by good conduct and industry.

17. The provision confers on the Commissioner of Prisons power and discretion to determine the appropriateness or otherwise of granting a convicted prisoner remission of one third of his or her sentence and unless it is demonstrated that the Commissioner had abused his discretion, which has not been done in this case, a court would be encroaching on the Commissioner’s statutory mandate if it were to make the kind of declaration sought by the applicant in this case.

18. For the foregoing reasons, I am satisfied that the applicant’s motion is devoid of merit and it is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY 2023.

C. W. GITHUA

JUDGE

In the presence of:

The applicant

Mr. Abiero for the applicant

Ms Ntabo for the respondent

Ms Karwitha Court assistant

