



REPUBLIC OF KENYA



**Gitigi v Republic (Criminal Petition E004 of 2022)
[2023] KEHC 17910 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 17910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E004 OF 2022
F GIKONYO, J
MARCH 23, 2023**

BETWEEN

JULIUS MAINA GITIGI APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction and Sentence in Narok
CMCR No. 21 of 2015 and Nakuru HCCRA 53 of 2017)*

JUDGMENT

Sentence review

1. Before me is an undated application received in court on 1st February 2022.
2. The application is seeking sentence review pursuant to Articles 22(1),23(1),(3), (f),25(c),26(1),27,50(2)(q), 159, 160(1),165,259 and the sixth schedule (article 22 of the Constitution).
3. The applicants pray for a lenient sentence.

Brief Background

4. The applicant herein was charged with an offence of robbery with violence contrary to section 295 as read with 296 (2) of the Penal Code in Narok CMCR No. 21 of 2015. The applicant was convicted of the offence and sentenced to death.
5. The applicant dissatisfied with the decision of the trial court filed an appeal in Nakuru HCCRA 53 of 2017(Julius Maina Gitigi & another v Republic [2017] eKLR). The applicant's appeal was dismissed.
6. The applicant did not appeal to the Court of Appeal.



Directions of the Court.

7. The application was canvassed by way of written submissions.

Applicants Submission

8. The applicant orally submitted that he appealed to the high court and court of appeal. He however withdrew his appeal to the Court of Appeal in order to seek a sentence review. He stated that the second appeal had not been assigned any number.
9. The applicant urged this court to give him a chance to serve his family. That he has stayed in prison for a long period, he has reformed and is ready to serve Kenya.
10. The applicant submitted that he has made peace with himself, he is remorseful of the act that led to arrest, trial conviction and sentencing. That he has also taken advantage of the rehabilitation courses that are within the prison.
11. The applicant submitted that this court has jurisdiction and discretion to mete out appropriate sentence under section 296(2) of the [Penal Code](#).
12. The applicant has relied on the following authorities;
 - i. *Joseph Nduvi Mbuvi v Republic* [2019] eKLR
 - ii. *Musa Lesbore Lemunke v Republic* [2021] eKLR
 - iii. *Samuel Kamau & Another v Kenya Commercial Bank Limited & 2 Others*[2012] eKLR
 - iv. *Stephen Kimathi Mutuga v Republic* (2019) eKLR
 - v. *Michael Kathewa Lichena & Another v Republic* [2018] eKLR
 - vi. *Thomas Mwambu Wenyi v Republic*[2017] eKLR Cited The Decision Of The Supreme Court Of India In *Alister Pereira v State Of Maharesbtra* [2017] eKLR
 - vii. *Reuben Muange Ndambuki v Republic* [2020] eKLR
 - viii. *Minister Of Home Affairs And Another v Fisher And Another* [1979] All ER
 - ix. *Ismael Hamisi Ndirangu & Another v Republic*[2021] eKLR

Respondent's Submission

13. The respondent opposed the application.
14. The respondent submitted that persons whose appeal have already been heard by the High Court are not entitled to file fresh applications for re-sentencing. This would lead to reaching a different conclusion which will in turn lead to ungovernable situation where all previously sentenced prisoners would seek review of their sentences.
15. The respondent submitted that the applicant ought to pray for re-sentencing in his appeal in a bid to get lower sentences and no more. He cannot bring new application for re-sentencing. In the present case, the applicant's appeal had already been heard by the high court. He cannot return to the court for review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.



16. In the end, the respondent urged the court to dismiss the application for re-sentencing as it is unmeritorious.
17. The respondent has relied on the cases of *John Kagunda Kariuki Versus Republic* [2019] eKLR and *Disnas Wafula Kilwake Versus Republic* [2018] eKLR.

Analysis and Determination

18. I have considered the applications herein and the rival parties' written submissions. The issues for determination are:
 - i. Whether this court has jurisdiction to adjudicate upon this application; and
 - ii. Whether the applicant should be granted a definite sentence.

Nature and Scope of Re-sentencing

19. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentences only. It does not consider conviction. In re-sentencing, the court will ordinarily check the legality or propriety, or appropriateness of the sentence. Thus, it will be concerned with inter alia, the penalty law, mitigating or aggravating factors, and the objects of punishments.
20. The challenge on the jurisdiction of this court to conduct a re-sentencing will, therefore, be treated within the scope or re-sentencing curved above.

Of Jurisdiction

21. A court's judicial authority to adjudicate a dispute is given by the *Constitution* or legislation or both (The Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others*, Application No. 2 of 2011,). Thus, jurisdiction is *sine qua non* adjudication of a case by a court of law- which makes jurisdiction a matter of great preliminary importance (Nyarangi, J.A. in *The Owners of Motor Vessel Lilian "S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1 at page14)
22. In this case, the Applicant filed appeal number HCCRA No. 53A of 2017 which was heard and dismissed. The applicant filed an appeal to the Court of Appeal. But, although he stated that he withdrew it, there is no proof of withdrawal of the appeal. Curiously, he stated that his appeal at Kenya Court- by which name the prisoners call the Court of Appeal- has not been assigned a number.
23. I will treat the application herein before me for review within the above context.
24. The prosecution counsel argued that this court pronounced itself on the sentence.
25. Does this court have jurisdiction to hear the applications?
26. Although the applicant has brought his case as an application for redress of violation or alleged violation of a right and fundamental freedoms enshrined in the Bill of Rights, it will not be a responsible way of taking jurisdiction where there is a pending appeal before the Court of Appeal. I have expressed doubts on whether the appeal in the Court of Appeal was withdrawn especially in the absence of proof of such withdrawal. Accordingly, I declare that this court does not have jurisdiction in this matter. I should observe however, that, nothing prevents the applicant from arguing for reduced sentences in the Court of Appeal on the basis of the mandatory nature of the death sentence in section 296(2) of the *Penal Code*.
27. Accordingly, I dismiss the applications herein.



**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 23RD DAY OF MARCH, 2023**

F. GIKONYO M.

JUDGE

In the presence of:

Petitioner

Ms. Mwaniki for DPP

Mr. Kasaso - CA

