



**JM v Republic (Miscellaneous Criminal Application  
E055 of 2022) [2023] KEHC 1662 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1662 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS CRIMINAL APPLICATION E055 OF 2022**

**GL NZIOKA, J**

**MARCH 1, 2023**

**BETWEEN**

**JM ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide criminal case No. 473 “4B” of 2017, with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*, and an alternative charge of handling stolen goods contrary to section 322 (2) of the *Penal Code*. The particulars of each charge are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. At the close of the trial, the learned trial Magistrate found him guilty on the main count and sentenced him to serve thirty (30) years imprisonment.
3. However, he now seeks for review of that sentence vide a chamber summons application filed in court n August 15, 2022, in which he prays the time he spent in custody while on trial be considered. He further relies on his supporting affidavit wherein he avers as follows:
  - a. That, he was charged and convicted for an offence of robbery with violence contrary to section 296 (2) of the *Penal Code* in criminal case number 473 “4B” of 2017 at SPM’s court Engineer and sentenced to thirty (30) years imprisonment.
  - b. That, his first appeal in HCCRA No. 7 of 2020 at Naivasha High Court was dismissed, and that he has never appealed to the Court of Appeal of Kenya, hence his application for sentence review only in this matter.



- c. That, the High Court has competent jurisdiction to hear and determine this application under Article 165 (3) (b) of the Constitution of Kenya .
  - d. That, the period he spent in remand custody was never computed into the sentence awarded by the trial court as provided by section 333 (2) of the *Criminal Procedure Code*.
  - e. That he is a convict hence a pauper who cannot incur any costs for preparation of this application thus pray that such cost be waived.
4. The respondent did not file any response to the application. However, the Probation Department filed a sentence review report dated, January 31, 2023, that indicates, that the applicant is 42 years old. That, his first wife died due to HIV leaving behind one child aged 10 years' old who is under HIV management and in the custody of his mother.
  5. That, he re-married but at the time of the interview she had moved back home though she visits him in custody. Further, his father is deceased while the mother is elderly. Moreover, he has nine (9) siblings of which two (2) are deceased.
  6. The report further states that he attended primary school up to class 6 and dropped out due to lack of interest in education. He then trained in carpentry and joinery. He was working as a farmer and a small businessman within Kinangop before his conviction. Further he used bhang and alcohol though it did not affect his normal functioning.
  7. That he has previously been sentenced to six (6) months' probationary sentence for the offence of assault and has been reformed while in prison and seeks his sentence is reviewed downwards. Similarly, his family members seek for a favourable sentencing indicating that, miss his presence at home and have been visiting him in prison since 2016 and believe he has reformed.
  8. The Full Gospel Church Tulasha who were the victim of crime stated through Bishop Kuria that they have forgiven the applicant and as they recovered the stolen goods and are not opposed to his sentence review. The area chief stated the applicant's morals had been ruined by bad company and engaged in drug and substance abuse. That he visited him in prison and found him well kempt and reformed and advocates for a favourable review.
  9. The Prison Authority states that, the applicant was in remand custody for two (2) years seven (7) months and in prison for two (2) years ten (10) months That, he has trained in carpentry, joinery and tailoring. Further, he has acquired several certificates in bible studies, prison project, focus on the family and health studies and is doing a diploma in Theology. That, he does not have an ill record while in prison and is a preacher and block leader.
  10. Be that as it may, I have considered the application and note that, after the applicant was convicted and sentenced vide the Senior Principal Magistrate's criminal case No. 473 "4B" of 2017 at Engineer, he appealed to the High Court vide High Court criminal case No. 7 of 2020. The judgment therein was delivered on July 14, 2022, wherein the appeal was dismissed in its entirety.
  11. In the given circumstances the court herein is functus officio and cannot entertain the matter again. Even then, the applicant has filed an appeal in the Court of Appeal and the trial court and the High Court files have been called for and forwarded thereto.
  12. In that case, the applicant cannot litigate in two different courts over the same subject matter. The duplicity of the matter amounts to an abuse of the court process. I therefore strike out the application for want of jurisdiction and being an abuse of the court process.



13. It is so ordered.

**Dated, delivered and signed this 1<sup>st</sup> day of March, 2023.**

**GRACE L. NZIOKA**

**JUDGE**

**In presence of:**

Appellant present in person, in court virtually

Mr Atika for the Respondent

Ms Ogutu: Court Assistant

