



REPUBLIC OF KENYA



**Muchiri v Republic (Criminal Revision E036 of 2022)
[2023] KEHC 3322 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL REVISION E036 OF 2022**

LW GITARI, J

APRIL 20, 2023

BETWEEN

NELSON KIMATHI MUCHIRI APPLICANT

AND

REPUBLIC RESPONDENT

(Judgment of Limo J, dated February 19, 2020)

RULING

1. The applicant Nelson Kimathi Muchiri has moved this court via an application dated January 18, 2023 seeking the following orders:-
 - a. That this honourable court be pleased to exercise judicial authority, consider the mitigating factors and grant the applicant the prayers sought.
 - b. That this honourable court be pleased to review the sentence awarded with a non-custodial sentence in the above stated criminal case.
 - c. That the applicant be heard on priority basis.
2. The application which is stated to be brought under the provisions of Section 362 and 364 of the Criminal Procedure Code Cap 75 of the Laws of Kenya is based on the following grounds:
 1. That the petitioner before you was arrested on July 25, 2015 and charged before the magistrate's court at Chuka vide Criminal Case No 14 of 2015 for the offence of Rape Contrary to Section 3(1) (a) and (b) as read with section 3(3) of the Sexual Offence Act No 3 of 2006. 2015 and sentenced to serve 10 years' imprisonment.



2. That after the sentence exercised my right of appeal in the High Court of Kenya at Chuka vide Criminal Appeal No 22 of 2019 which was heard, determined and consequently the same was dismissed on February 19, 2020.
 3. That I am a resident of Maara Location Iruma Sub County within Tharaka Nithi County.
 4. That I am a family man blessed with two kids (2) a boy and a girl who are in class 3 & 8 respectively but now they are at home due to financial issues
 5. That the applicant has suffered severe fractures on her both legs which is as a result of fragile bones due to the lack of adequate treatment.
 6. That I am a first offender.
 7. That I am rehabilitated and elderly enough now at my 35th birthday.
 8. That it is my prayer that this honourable court may review the remaining part of my sentence of 10 years to none custodial sentence.
 9. That I beg for leniency and plead to this honourable court of justice to review my sentence on medical grounds and accord me a non-custodial sentence that I can seek medical attention while under the care of my family.
3. The Respondent opposed the application and filed the following grounds of opposition which is dated February 28, 2023.
- a. That the application is vague and fatally defective, the prayers sought (prayer a-b) cannot be granted as prayed.
 - b. That the application is made pursuant to section 362 and 364 of the Criminal Procedure Code, which provides for the powers of the High Court to call for records and revisionary powers for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any subordinate court to which the applicant has not indicated any irregularities or illegality of the proceedings in the trial court.
 - c. That the application content is for resentencing brought under the guise of revision and thus brought under the wrong provisions of the law.
 - d. That the applicant's appeal was dismissed by this court, and therefore this application is frivolous, vexatious and a complete abuse of court process.
 - e. That there is no basis for the grant of the relief's sought.
4. The Respondent has urged this court to dismiss the application. The brief background of this application is that the applicant was charged, tried and convicted in Chuka Criminal Case No 14 of 2015 with the offence of rape contrary to section 3(1) (a) & (b) as read with section 3(3) of the *sexual offences Act* No 3/2006 and sentenced to serve ten years' imprisonment. The applicant was dissatisfied with both the conviction and sentence and filed an appeal in this court vide Chuka High Court Criminal Appeal No E036/2023. The appeal was admitted and was heard and determined on merits. Vide a judgment of this court, Limo J, dated February 19, 2020, the appeal was disallowed. I



have considered the application before me. Section 362 of the Criminal Procedure Code provides as follows:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

5. This provision deals with the powers of the court on revision. The High Court may call on the record of the Lower Court for the purpose of satisfying itself as to the correctness, legality or propriety of any financial of any sentence or order recorded or passed and as to the regularity of any proceedings of any subordinate court. This is the supervisory role of the High Court over sub-ordinate courts as provided under Article 165(6) of the Constitution.

On the other hand, section 364 of the Criminal Procedure Code provides for the orders which this court may issue on revision.

6. In view of this provisions for an applicant to bring an application under this provisions, he must point out the irregularities or the illegality in the proceedings which were before the trial court. The provisions cited are therefore not relevant to the application as presented. The application Is not properly before this court.

1. The applicant had filed an appeal and a judgment was delivered. The only other option open for the applicant was to file an appeal in the Court of Appeal. The applicant did not file an appeal. Section 365(5) of the Criminal Procedure Code provides that when an appeal lies from finding, sentence or order and no appeal is filed no proceeding by way of revision shall be entertained. In this case the appellant filed an appeal and it was determined on merits.

2. Considering the prayers in this application, I agree with the respondent that what the applicant is seeking is resentencing under the guise of revision. There is no provision for resentencing with respect to the offence of which the applicant was sentenced. In any case the offence of rape is punishable by imprisonment for a term of not less than ten years. On appeal this court held that the applicant’s conviction was safe and that the sentence imposed was the minimum sentence prescribed under Section 3(3) of the Sexual offences Act. It provides that-

“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”

7. Under this provision the court has discretion to enhance but lacks jurisdiction to review the sentence. The prayers in the application are therefore frivolous. It is trite that court’s jurisdiction is denoted by the Constitution and the statute. A party cannot in its application seek to impose jurisdiction on the court which it does not have. The sentence imposed on the applicant was lawful. It follows that the present application lacks merits. This court lacks jurisdiction to resentence the applicant having heard his appeal and rejected it.

8. In conclusion, for the reasons stated, I uphold the grounds of opposition by the respondent and find that the application is frivolous, vexatious and a complete abuse of court process. This court lacks jurisdiction to grant the prayers in the application.

9. I therefore order as follows:

1. This application is dismissed.



DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF APRIL 2023.

L W GITARI

JUDGE

20/4/2023

The ruling has been read out in open court.

L W GITARI

JUDGE

20/4/2023

