



REPUBLIC OF KENYA



**Mureithi v Republic (Criminal Revision E035 of 2023)
[2023] KEHC 3111 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL REVISION E035 OF 2023**

LW GITARI, J

APRIL 13, 2023

BETWEEN

PATRICK MUKUNDI MUREITHI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This ruling is in respect of the application filed on February 15, 2023. The brief facts of this matter are that the Applicant herein was initially arrested and charged in Sexual Offence Case No 3/2019 in Chief Magistrate's Court at Chuka with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. He was convicted and ordered to serve ten (10) years imprisonment. He filed an appeal in this court vide High Court Chuka Criminal Appeal No 6/2020. The appeal was heard and vide a judgment of this court dated January 21, 2021 the appeal was dismissed.

The application which is now pending before this court is dated February 15, 2023 and is brought under Section 362 and 364 of the *Criminal Procedure Code*. It seeks orders that this court considers the mitigating factors and grants the applicant the prayers sought. The applicant seeks an order that the sentence be reviewed and he be awarded a non-custodial sentence. The application is based on seven grounds on the face of the application. The grounds are as follows:

1. THAT, he was charged at Chuka Law Court vide criminal case No 03 of 2019 for the offence of defilement c/sec 8(1) (4) of the *sexual offences act* no 3 of 2006, and sentenced to serve 10 years' imprisonment. He appealed to the High Court of Kenya at Chuka vide HCCRA NO 07 OF 2020 which was heard and dismissed.
2. THAT, at the time of arrest, he was a student at Chuka University.
3. THAT, he was a first offender.



4. THAT, he is remorseful and will not indulge in such offence again.
 5. THAT, he is rehabilitated and acquired various certificate in prison i.e Mechanic grade III and welding grade III.
 6. THAT, the honourable court reviews the sentence of 10 years to period already served.
 7. THAT, the honourable court be lenient and review his sentence and accord him non-custodial sentence for the remaining jail term.
2. The application is opposed by the Respondent vide its Grounds of Opposition dated March 13, 2023. It is the Respondent's case that the content of the application is for resentencing but has been brought in the guise of review. According to the Respondent, the Applicant ought to have appealed against the sentence if he was not satisfied with the findings of the court. That the application should therefore be dismissed for being frivolous, vexatious, and a complete abuse of the court process.
3. I note that the application is stated to be that of review. The Applicant urges this court to consider the application in view of the provisions of Section 216 and 329 of the Criminal Procedure Code.
4. Section 216 of the Criminal Procedure Code provides that:
- ' The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.'
5. Section 329 of the Criminal Procedure Code states:
- ' The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.'
6. The above provisions are not in tandem with the orders sought in the present application as the Applicant has already been sentenced. They therefore do not apply in this case.
7. The exercise of this Court's revision jurisdiction is provided for under the provisions of Section 362 of the Criminal Procedure Code which gives the court the power to call for and examine the record of any criminal proceedings before a subordinate court for purposes of satisfying itself as to the legality, the correctness or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any subordinate court. Section 364 thereof provides that:-
- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.'
8. From the above provisions, it is clear that the revisionary jurisdiction of this Court should only be invoked to determine the legality, correctness or propriety of the sentence given by the court on the



applicant's application. In order to exercise that power, the court must be satisfied that the trial court acted upon wrong principles or failed to consider some fundamental principles.

9. In this case, the Applicant is seeking the review of his sentence on account that he is regretful, remorseful and has since rehabilitated. The applicant appealed against the sentence imposed by the trial court but the prayer was declined.
10. This matter was in this court on appeal and the court noted that the sentence was below the bare minimum provided under section 8(4) of the *Sexual Offences Act*. Having dealt with the appeal on the sentence, this court is not clothed with jurisdiction to entertain an application for review. The decision of this court is appealable to the Court of Appeal. This court lacks jurisdiction to entertain a review application having dealt with the appeal.

Section 364(5) of the Criminal Procedure Code provides that revision is not available if the party did not appeal even though he or she was able to do so. The section provides;

' When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.'

Conversely a party who had filed an appeal cannot file an application for revision in the same court. The application, as submitted by the respondent is frivolous, vexatious and an abuse of the court process. I find that it has no merits. I order as follows:

1. The application is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 13TH DAY OF APRIL 2023.

L.W. GITARI

JUDGE

