



**Cherop v Republic (Miscellaneous Criminal Application  
E004 of 2023) [2023] KEHC 4013 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4013 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2023**

**RB NGETICH, J**

**MAY 2, 2023**

**BETWEEN**

**ALPHAEUS CHEROP ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant ALphaeus Cherop filed undated notice of motion application under section 362, 364(1) and 365 of the Criminal procedure Code in reliance with Article 27(1)(2)(4), 28, 22(1), 25(c), 50(1) (2) and 51(1)(2) of the constitution of Kenya 2010 seeking review of sentence imposed by trial court and upheld by the High court. He also seeks the period he served in remand to be computed in sentence.
2. Before the trial court, the applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 vide Kabarnet Magistrate's court sexual offences criminal case No. 117 of 2013. He denied the charge and after full trial, convicted and sentenced to serve 20 years imprisonment.
3. The Applicant relies on recent ruling of Justice G.V Odunga at Machakos High Court Petition No. E017 of 2021, provisions of the sentencing policy guidelines of 2016 and the provisions of Article 165(3)(a)(d) and 258(1) of the constitution to urge this court to reduce his sentence to more reasonable terms.
4. In his supporting affidavit, the applicant avers that he was convicted to serve 20 years imprisonment for the offence of defilement at Kabarnet Law courts; that he appealed against both the conviction and sentence *vide* Kabarnet High court Criminal Appeal No. 74 of 2017 which was dismissed.
5. He avers that he is remorseful, repentant, has rehabilitated and learned good morals while in custody and he is ready to act as a role model and a mentor in the society.



6. He further states that the court has discretion to hear and determine this application under the provisions of section 362 of the C.P.C and Articles 159 and 165 of the constitution of Kenya, 2010 and place reliance on the case of *PKK v Rep* in Eldoret High Court Criminal Appeal No. 125 of 2015 by Justice E. Ogola and the case of Marwick [1993] 37 CR. APP. REP 125.

### **Applicants Submissions**

7. The applicant filed written submissions and submits that the sentence of 20 years imprisonment is too harsh given that he is a first offender and it does not serve the interest of justice nor the society as sentencing should have a role of salvaging and rehabilitating the offender; that he should be treated with compassion and understanding and cited the case of *Rep vs Thomas Patrick* (2009) eKLR.
8. The Applicant urged this court to invoke the provisions of Articles 27, 28 of the constitution of Kenya, Section 354, 364 and 365 of the C.P.C and impose a lesser sentence considering that he has served 8 years in prison which is enough to transform his character and he is ready for reintegration.
9. The Applicant submits that he has opted to rely on the mitigating factors to seek the Honorable court to re-hear his case and impose a lesser sentence in line with the Judiciary of Kenya Sentencing policy guideline, 2016 which is clear on the issue of mitigation; that he has no previous criminal records and being a first offender, the sentence meted on him was too harsh and the trial court and the Appellate court failed to consider the mitigating circumstances.
10. He restated his averments in the supporting affidavit and cited the case of *Christopher Ochieng vs Republic* where the court of appeal stated as follows:-

“The court should not be constrained by section 8 of the *Sexual Offences Act* No.3 of 2006 where the circumstances do not demand.”
11. The Applicant submits that he is remorseful, repentant, apologetic for the offence and deeply regrets committing the offence the offence. He further submits that he has undergone various theological and vocational trainings to enhance the ability of a changed person and he has since obtained 6 certificates in theology which he attached to his application before court and prison recommendation letters confirm that he has reformed; and that he has a child who is in grade 4
12. The applicant submitted that he has served more than half of the sentence and was in remand for 3 years. He urged this court to review of sentence and consider the time served in remand to be considered.

### **Respondents Submissions**

13. On the 20.04.2023 Ms Ratemo for the state argued orally in court that they have no objection to the time spent in remand being considered but on review of the sentence, she submitted that this court lacks jurisdiction to handle the application as the accused had appealed to the High court and judgment was delivered and this court cannot therefore review the sentence because it will be sitting on appeal of its own decisions.
14. She further submitted that the Applicant has not exhausted all the available options before coming to this court for re-sentencing unlike the Applicant in Machakos Petition No. 17 of 2021 who had already been sentenced prior to justice Odunga’s decision and argued that the law does not apply retrospectively. She submitted that the Applicant is at liberty to seek review of sentence before the Court of Appeal



## Analysis And Determination

15. I have considered averments and submissions herein. The state is not opposed to sentence served in remand being computed/reduced from sentence imposed. What is in issue is whether this court is seized with jurisdiction to review sentence imposed against the Applicant.
16. The Applicant argues that this Court has jurisdiction under sections 354, 364 and 365 of the C.P.C to hear and determine his application for sentence review. The Respondent on the other hand contends that this Court lacks jurisdiction to handle this matter having rendered judgment on appeal.
17. The law on jurisdiction was stated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others*, Application No. 2 of 2011 thus:

“ A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”
18. It is not disputed that the Applicant had his appeal heard and determined by this Court. This court upheld sentence imposed by the trial court. The Applicant did not pursue further appeal to the Court of Appeal. What I consider to be in issue is whether this Court is possessed with jurisdiction to review its own sentence.
19. The Supreme Court considered the issue of review of judgements and orders in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR and held that:

“...we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

  - (i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
  - (ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
  - (iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
  - (iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”
20. From the foregoing, for a party to succeed in application for review, the above conditions must be demonstrated by the Applicant. None of the above conditions has been demonstrated by the applicant.
21. From the foregoing, this court therefore lacks jurisdiction to review sentence imposed on the applicant herein as it will amount to reviewing its own decision on sentence without prove of prerequisite conditions for review as outlined by the supreme court in paragraph 19 above.



22. In respect to consideration of sentence served in remand, Section 333(2) of the *Criminal Procedure Code* provides:-

“Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody.” (Check section quoted).

23. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR where the Court of Appeal held that:-

“The second issue is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

24. Further the *Judiciary Sentencing Policy Guidelines* provide as follow:-

“The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must consider the period in which the offender was held in custody during the trial.”

25. From the foregoing, the applicant is entitled to have reduction of period served in remand from sentence imposed. The Applicant submitted that he spent 3 years in remand which should be reduced from sentenced imposed. The exact period to be confirmed from record.

## 26. **Final Orders**

1. Prayer for review of sentence is hereby dismissed.
2. Sentence served by applicant in remand to be reduced from sentence imposed.



**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 2ND DAY OF MAY 2023.**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Mr. Sitienei - Court Assistant.

Ms. Ratemo for State.

Applicant - Present

