



**Komen v Republic (Miscellaneous Application E015 of 2021)
[2023] KEHC 4101 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS APPLICATION E015 OF 2021**

FSM AMIN, J

MAY 4, 2023

BETWEEN

KIBET ROTICH KOMEN APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This Application by way of an un-dated Petition and an un-dated and an un-commissioned affidavit both filed on July 21, 2021 the Applicant seeks the following reliefs: -
 - i. That, this petition is pursuant to the petitioners of Francis Karioko Muruatetu in the Supreme Court, which declared minimum mandatory sentence is an adjective and an constitution
 - ii. that mitigation ground you are not considered during conviction and sentencing period
 - iii. That, the life sentence is manifestly harsh excessive degrading ambiguous and in human hence pleading for mercy and leniency in the matter.
 - iv. That, I have been in prison for 11 years since 2010 praying The Honourable Court to consider that due to rehabilitation I am a special state trustee ranking a role model and a good crusader for good morals in the society
 - v. That, section 8(1) ARW section (2) is at variance with that Articles 25, 28 and 50(2) of the constitution;
 - vi. That, separation of powers dictate that courts should be independent from other organs of the State;
 - vii. That, I am seeking for a determinant sentence that grants the petitioner hope to integrate back to the society;



- viii. That, I am reformed, repentant and remorseful over the offence committed;
 - ix. That, I promise to enhance the Spirit of reconciliation when given the chance to integrate back Society
 - x. That, while in prison I spent my time constructively by joining vocational training in industrial polishing section and attained grade 3, of which I pray for consideration in this matter.
 - xi. That, I was the sole breadwinner of my needy family who are suffering since my incarceration.
 - xii. That, I rely on the following cases
 - a. *Evans Wanjalla Wanyoni Vs Republic*-Cri App No 312 of 2018
 - b. *Paul Ngei Vs Republic*-Cri App No 33 of 2015
 - c. *Guyo Jarso*-Petition No 6 of 2018
 - d. *Sebastian Okweru Mrefu Vs Republic* (2014)
 - e. *Paulo Dybala bola Vs Republic* - Misc App No 55 of 2019
 - f. *Robert Achapa Okello Vs Republic* (2008).
2. The Applicant concedes that he had filed an appeal before this very Court Criminal Appeal No 58 of 2016 that was dismissed for want of merit and as now been placed before me for revision in exercise of powers conferred on this Court by Section 362 of the Criminal Procedure Code which provides thus: -
- “The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes 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.”
3. Owing to the foregoing, it is important for this Court to consider its jurisdiction to review a sentence confirmed on appeal by a Court of equal jurisdiction.
4. Jurisdiction is everything as was held in the case of *Samuel Kamau Macharia Vs KCB & 2 others*, Civil application No 2 of 2011: -
- “A Court’s jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law 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.”
5. Article 50(2) of the Constitution provides: -
- “Every accused person has the right to a fair trial, which includes the right- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.”
6. Article 165(6) of the constitution empowers the High Court to exercise supervisory jurisdiction over subordinate courts. The Criminal Procedure Code is the Statute that expounds on this jurisdiction. Section 362 of the Criminal Procedure provides: -
- “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 subordinate court.”

7. Section 364 of the penal code empowers the High Court to exercise its revisionary powers conferred to it as a Court of appeal by Sections 354, 357 and 358 and may enhance sentence.
8. In the case of *Prosecutor vs Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a Court when examining the issues pertaining to Section 362 of the Criminal Procedure Code as follows: -
 - a. Where the decision is grossly erroneous;
 - b. Where there is no compliance with the provisions of the law;
 - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
 - d. Where the material evidence on the parties is not considered; and
9. The Appellant has primarily sought to rely on the *Philip Mueke Maingi & 2 others v Republic* [2022] eKLR decision on the basis of: -

“That the High Court sitting at Machakos had ruled that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial court had discretion but to impose the said mandatory minimum sentences are at liberty to petition for re-sentencing in appropriate cases”.
10. It is important to clarify that the Philip Mueke Maingi & 2 others v Republic [2022] eKLR decision did not in a blanket way grant a “second bite at the cherry” to all cases where appellants were sentenced under the *Sexual Offences Act* but against the jurisdiction as provided for under Article 50 (6) of *the Constitution* which provides that: -
 - (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if--
 - a. the person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
 - b. new and compelling evidence has become available.
11. I appreciate the Philip Mueke Maingi & 2 others v Republic [2022] eKLR to afford opportunity for resentencing, those that had been sentenced by the trial courts without the accused mitigation being taken into consideration and that the onus is on the petitioner to demonstrate that mitigation was not considered during sentencing.
12. In *James Macharia Anumbi vs. Republic* [2017] eKLR, the Court identified the key considerations to guide the determination of “new and compelling evidence” as follows: -
 1. The evidence is newly discovered and the petitioner did not know about it prior to, or during the trial;
 2. The evidence must be material and not merely cumulative;
 3. The petitioner’s failure to learn about the evidence before the verdict was not because of lack of diligence; and



4. The new evidence is significant enough that it would likely result in a different outcome if a new trial is granted.
13. I concur with Odunga J as he then was, in the Philip Mueke Maingi decision that, “Article 50(6) is a special provision that deals with specific circumstances where the Constitution seeks to remedy an injustice that might have been occasioned at the stage of the trial”.
14. The Applicant has not laid any basis on the new and compelling evidence test, to satisfy the jurisdictional test under Article 50(6) and If this Court was to determine this application under Article 50, (2), q of the constitution and section 364 of the Criminal Procedure Code it would in essence be reviewing the sentence as confirmed by the Judge in High Court at Nakuru Criminal Appeal no. 152 of 2010.
15. The principles of res judicata are applicable to both civil and criminal cases is alive to issues that were not pleaded, and which ought to have been pleaded in the Court that was competent to determine those issues. The applicant herein cannot be accorded another opportunity for review of sentence that has already been reviewed by a competent Appellate Court of equal status with this Court.
16. In Criminal Appeal No 152 of 2010 the appellant unsuccessfully challenged both the conviction and sentence and the Court on January 30, 2020 reconsidered and re-evaluated all evidence and the entire trial record concluding by affirming the life sentence imprisonment.
17. Both the Trial Court and the Appellate Court considered and re-state the aggravating factors that informed the exercises of the discretion and this Court confirms that the aggravating factors informed the trial Court sentence of which I find no fault.
18. Consequently, I find this application incompetent and offending the principle of *res judicata*. The fact that this Court lacks jurisdiction also renders this application incompetent.
19. This application is hereby dismissed for lack of merit.

It is hereby so ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 4TH DAY OF MAY 2023

MOHOCHI S.M

JUDGE

In the Presence of;

Applicant in Person

Mrs. Mwangi for the Republic

Ms. Schola C.A

