



**Kisorio v Republic (Criminal Petition E021 of 2021)
[2023] KEHC 18572 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E021 OF 2021
JRA WANANDA, J
JUNE 16, 2023**

BETWEEN

DANIEL KIRWA KISORIO PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* in Eldoret Chief Magistrates Criminal Case No 6202 of 2010. He was convicted on his own plea of guilty and sentenced to 20 years' imprisonment.
2. Before the Court is the Petitioner's Notice of Motion dated 28/01/2021 premised as follows:
 - i. That the Petitioner is seeking for review in accordance to Article 50(2)(p)(q) of the *Constitution* of Kenya 2010.
 - ii. That the application be certified urgent and service thereof be dispensed with it to be heard in the first instance.
 - iii. That the Petitioner has been in prison for a long time.
3. The Petition is supported by the Affidavit sworn by the Petitioner.

Petitioner's Submissions

4. The Petitioner filed written Submissions in support of the Petition. He submitted that he seeks a reduction of sentence imposed on him as he is a first offender, he pleaded guilty to the offence, he has been in prison for 11 years, he pleads for leniency, he is remorseful, repentant and reformed, life in prison has rehabilitated him and he stands to proclaim the word of God, he has attained various certificates and diplomas and serves as a minister of God in the institution. He attached copies of



certificates to the Submissions and prayed to the Court to invoke its power under the Criminal Procedure Code and the Constitution and grant his prayer for resentencing.

Respondent's Submission

5. In opposing the Petition, Learned counsel for the State, Ms Emma Okok, made oral Submissions. She stated that the Petition was for resentencing pursuant to the now famous Muruatetu decision, the Petitioner was convicted of defilement, he had also filed Miscellaneous Application No 4 of 2019 seeking resentencing, the same was heard and determined by Hon. Justice Omondi vide a Ruling delivered on 21/10/2020 dismissing the same, this issue has therefore already been heard and determined by a Court of similar jurisdiction, in the Ruling, the Court considered the Muruatetu decision in depth. She prayed that the Petition be dismissed.

Analysis & Determination

6. Upon considering the Petition and Submissions made, I find that the issue that emerges for determination is “whether this Court should review the sentence imposed on the Petitioner by the trial Court”
7. I have looked at the Record and established that being aggrieved with the decision of the trial Court, the Petitioner did file an Appeal, namely, High Court Criminal Appeal No 3 of 2011 challenging both conviction and sentence. The Appeal was heard and dismissed. Accordingly, the High Court upheld the conviction and sentence.
8. I have also established that after the said Appeal was dismissed, the Petitioner subsequently filed an Application, namely, Eldoret High Court Miscellaneous Application No 4 of 2019 in which he sought resentencing. This Application was also heard and dismissed vide the Ruling delivered by Omondi J on 21/10/2020.
9. Article 50(2)(q) of the Constitution provides as follows;
 - (2) 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 law.
10. It is therefore not in doubt that generally, the Petitioner has a right to appeal or apply for review against the decision of the Magistrate's Court which convicted and sentenced him. However, is that right still available to him in the present circumstances?
11. L Njuguna J, in the case of Boniface Gitonga Mwenda v Republic [2021] eKLR when faced with a similar situation held as follows;

“However, as I have noted, the Petitioner herein appealed the trial court's decision to this court. The court in dismissing the appeal against the sentence held that the trial court's sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to 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. (See Section 362-364 of the *Criminal Procedure Code*).

Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting



as an Appellate court on the judgment of Hon F Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn't have jurisdiction in that respect and as such, the prayer to that respect ought to fail.”

12. I fully associate myself with the above holding.
13. In this instant case, by the Petitioner's own admission and by perusal of the record, it is clear that he filed an Appeal before this very Court vide Eldoret High Court Criminal Appeal No 3 of 2011 both against his conviction and sentence. This Court heard the appeal and upheld the sentence and conviction vide the decision delivered on 20/01/2012. The Petitioner subsequently filed an Application vide Miscellaneous Application No 4 of 2019 seeking remission of his sentence. This Application was also dismissed. In the circumstances, it is my considered view that this Court cannot therefore review a decision of its own as that would be tantamount to sitting on appeal in its own decision. The Petitioner's recourse lay with the Court of Appeal, not to return to this same High Court to seek a Relief which this very Court had already determined. My finding is that the issues concerning the sentence imposed upon the Petitioner were conclusively dealt with both in the said Appeal and also in the subsequent Application for remission of his sentence.

Conclusion

14. In the premises, this Court cannot entertain the present Application as it lacks the jurisdiction to do so. I hereby dismiss the Appeal for want of jurisdiction.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

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WANANDA J.R. ANURO

JUDGE

