



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Apkatum v Republic (Miscellaneous Criminal Application
E009 of 2023) [2023] KEHC 20804 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CRIMINAL APPLICATION E009 OF 2023**

RB NGETICH, J

JULY 20, 2023

BETWEEN

SOLOMON APKATUM ALIAS MAMAN APPLICANT

AND

REPUBLIC RESPONDENT

*(Appeal through Kabarnet High Court Criminal Appeal No. E03 of
2020 against both the conviction and sentence which was determined by
Hon. Justice S. Mohochi through a judgment delivered on the 26.01.23.)*

RULING

1. The Applicant jointly with another who escaped from police custody were jointly charged with gang rape contrary to section 10 of the *Sexual Offences Act* No 3 of 2006. The particulars are that on the 14.03.19 at [Particulars Withheld] location within Baringo County, they jointly intentionally and unlawfully inserted his penis into the vagina of EK without her consent. They were also charged with alternative count of committing indecent act with an adult contrary to section 11(a).
2. The applicant denied all the charges and the matter was set down for full trial where the prosecution called a total of 6 witnesses in support of the charges against the accused. The accused in his defence admitted the charges; he said he had nothing to add.
3. Upon the close of the prosecution and the defense case, the trial court through judgment delivered on the 15.01.2020, found the accused guilty and convicted him of the offence of gang-rape.
4. Dissatisfied with the conviction and the sentence by the trial court, the Applicant preferred an appeal through Kabarnet High Court Criminal Appeal No E03 of 2020 against both the conviction and sentence which was determined by Hon Justice S. Mohochi through a judgment delivered on the 26.01.23. He found no merit in the appeal and the same was dismissed on both conviction and sentence.



Application for Review of Sentence

5. The Applicant has now petitioned this court vide an un dated application seeking review of sentence citing Article 50(2)(p)(q), Article 27, Article 22, 23 25 of the Constitution of Kenya,2010, Section 362, 364(1) & 365 of the CPC. He urges court to impose a lesser sentence and/or to be admitted to a non-custodial sentence basis.
6. In his application, the applicant avers that he is a first offender, remorseful, has repentant and reformed as he has learned to take responsibility of his own actions. He states that he is a young man and prays to be re-integrated to the society to serve as a role model, a teacher/mentor to others of similar behavior.
7. The applicant avers that he has served a substantial part of his sentence, more than a third and urges court to consider the sentencing policy guidelines of 2016 published by the Kenya judiciary.
8. On 5.06.2023 when this matter came up for hearing, the applicant restated his prayer to court as captured above and said he regrets the offence and has young children. He further stated that he was jailed for 15 years and he has been in prison for about 5 years; that he was in remand for one year which was deducted from the sentence. He told the court that he committed the offence while drunk and that he will not repeat the offence.

Response

9. In response the state counsel Ms. Ratemo submitted that she is aware that the applicant had filed appeal on conviction and sentence which was heard during service week and appeal was dismissed and this court therefore lacks jurisdiction as it is a court with concurrent jurisdiction and review of sentence can only be entertained by the court of appeal. She referred to the case *Davine Oracha v Republic* [2019] eKLR.

Analysis and Determination

10. I have considered the application and the submissions made by both parties and wish to consider whether this court has jurisdiction to entertain the application herein.
11. This court can review and vary any orders, decision or sentence passed by the trial court if satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court; the court can make appropriate orders to correct the impugned order, decision or sentence and align it with the law as provided by section 362 as read with Section 364 of the Criminal Procedure Code.
12. “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...”
13. It is not disputed that the Applicant had his appeal heard and determined by this Court. It is on this basis that the respondent is challenging jurisdiction of this court. The Applicant having appealed to this Court and his appeal determined did not pursue further appeal to the Court of Appeal.
14. In the case of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR the Supreme Court stated the following in respect to review:-

“...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.”

15. From the foregoing, for a party to successfully move a court to review its own decision or that of a court with coordinate jurisdiction, the party is required to meet certain conditions as established in the above case. The Applicant has not demonstrated the above conditions.

16. From the foregoing, this court therefore lacks jurisdiction to review sentence imposed on the applicant herein as it will amount to reviewing sentence upheld by justice Muhochi. From the foregoing, I decline to allow the application herein.

17. Final orders: -

Application for review of sentence is hereby dismissed.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 20TH DAY OF JULY 2023.

.....
RACHEL NGETICH
JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for State.

Applicant present.

