



**Kabui v Republic (Miscellaneous Criminal Application
E039 of 2022) [2023] KEHC 19801 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CRIMINAL APPLICATION E039 OF 2022**

PM MULWA, J

JULY 6, 2023

BETWEEN

PETER MBUGUA KABUI PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner herein was convicted on two alternative counts of indecent acts with a child contrary to Section 11 of the Sexual Offences Act No 3 of 2006. He was then sentenced to ten (10) years imprisonment on each of these counts, and the sentences to run consecutively. Dissatisfied with the trial court's judgment he appealed against both the conviction and sentence vide Milimani High Court Criminal Appeal No 316 of 2011. In a judgment delivered on May 21, 2014, the appeal was dismissed in its entirety by Justice LA Achode, (as she then was). Subsequently, the petitioner moved to the Court of Appeal vide Criminal Appeal No 66 of 2015 and his appeal was dismissed.
2. He now petitions this court for the following orders;
 - i. That this honorable court considers the sentences on various counts that are running consecutively to run concurrently as at present he is serving a harsh sentence;
 - ii. That the honorable court considers the time that he had spent in custody pending the hearing of one year and seven months to be factored in as part of the sentence to be served by the petitioner;
 - iii. That the court considers the application of section 35 of the Penal Code that the time he has been in custody is sufficient;
 - iv. Any further orders that the honorable court may deem fit.



3. I have considered the petition and the submissions on record. It is my considered view that the issue which I need to decide on is whether the same is merited.
4. The petitioner is before me for review of sentence by invoking the provisions of Section 333(2) of the *Criminal Procedure Code* which he alleges was overlooked by the trial court. The effect of the judgement of the Court of Appeal delivered on March 11, 2016 was to confirm the sentence of the High court which is a court of concurrent jurisdiction with this court. The High Court had upheld the conviction and sentence by the trial court.
5. For emphasis purposes, it is important that the petitioner understands that on appeal, the High Court considers the merit of the conviction and the sentence. It was therefore at that level that he would have urged the court to relook into the sentence.
6. Further, due to the hierarchy of courts, the rule of the thumb is that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than them.
7. That means that this court cannot therefore review the said sentence as doing so would amount to sitting on appeal against the decision of a court of concurrent jurisdiction which is unacceptable under the law. Clearly, this Court became functus officio the moment Justice LA Achode, (as she then was) pronounced herself on the appeal against the conviction and the sentence.
8. As was held in *Joseph Maburu alias Ayub v Republic [2019] eKLR* where the Learned Judge stated that:

' Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black's Law Dictionary 10th Edition defines sentence as: The judgement that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer. Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.'

9. In view of the foregoing, this court is bereft of jurisdiction to determine the matter and in the result, this petition is deemed incompetent and is hereby struck out.

RULING DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 6TH DAY OF JULY 2023.

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P.M. MULWA

JUDGE

In the presence of:

Kinyua – court assistant

Applicant (in person) - present

Mr. Muriuki - for Respondent/State

