



**Omondi v Republic (Miscellaneous Criminal Application
E022 of 2022) [2023] KEHC 20908 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CRIMINAL APPLICATION E022 OF 2022**

**RB NGETICH, J
JULY 20, 2023**

BETWEEN

FRED OMAR OMONDI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

BACKGROUND

1. The applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars were that on the June 25, 2010 in Marigat District within Rift Valley province, the applicant intentionally and unlawfully caused his penis to penetrate the vagina of CS a girl aged 12 years, in violation of the said Act.
2. The applicant denied all the charges and the matter was set down for full trial where the prosecution called a total of 4 witnesses in support of the charges facing the accused. The accused in his defence gave a sworn statement of defence denying the offence. He stated that this case was prompted by business rivalry with the girl's parents and was meant to frame the applicant.
3. Upon the close of the prosecution and the defence case, the trial court found the applicant guilty of the offence and convicted him accordingly and sentenced him to 20 years imprisonment.
4. Dissatisfied with the conviction and the sentence of the trial court, the applicant lodged an appeal in the High Court at Eldoret being criminal appeal No 59 of 2012 which was also heard to its logical conclusion. The learned judge found no reason to interfere with the trial court's finding and upheld the conviction and the sentence.
5. Still dissatisfied with the decision of the High Court, the applicant herein lodged an appeal to the court of appeal *vide* Eldoret Court of Appeal criminal appeal No 89 of 2018 where upon hearing the



appeal, the court held that the charge against the appellant was proved beyond reasonable doubt, the conviction was sound and sentence lawful. The appeal was therefore dismissed.

APPLICATION FOR REVIEW OF SENTENCE

6. The applicant has now petitioned this court *vide* the application dated June 29, 2022 seeking orders for review of sentence in view of petition No E017/2021 at Machakos and section 362, 364(1) & 365 of the CPC cap 75 laws of Kenya and in reliance to article 27(1)(2)(4), 22(1), 23(1), 25c, 50(1)(2) and 51(1)(2) of the Constitution of Kenya 2010 among other enabling laws.
7. In his application, the applicant seeks orders for reduction of his term of sentence by the time spent in remand custody pursuant to section 333(2) and section 362,364(1)(b) and 365 of the CPC cap 75 Laws of Kenya among other enabling laws. He urged this court to consider the sentencing policy guidelines of 2016 published by the Kenya judiciary and invoke the provisions of article 165(3) a, b, d and 258(1) of the Constitution of Kenya, 2010 and reduce his sentence to more reasonable terms.
8. The grounds upon which the application is founded is that the applicant has exhausted all the appeals and he has therefore filed this application with a view to seek review of sentence to a lesser sentence on the grounds that he is a first offender, remorseful, repentant and has reformed as he has learnt to take responsibility of his actions and ready for social re-adaptation.
9. The applicant states that while in custody, he has managed to undergo spiritual/ theological/vocational programs to enhance the ability of a changed person and has obtained grade iii, ii and i in carpentry and joinery from National Industrial Training Authority, certificates in prison fellowship, Bible Education and Diploma in Discovery bible school.
10. That the sentence meted upon him is too harsh and excessive hence he prays for a lesser sentence or in the alternative be considered for a non-custodial sentence like probation or community service considering the fact that he was the sole bread winner.
11. When the matter came up for hearing on the June 5, 2023, the applicant informed court that he has been in prison for 13 years now having been sentenced in the year 2011; he said he spent time in remand and urged this court to reduce his sentence.
12. In response, the state counsel Ms Ratemo submitted that the High Court in Eldoret pronounced itself on conviction and sentence and this court lacks jurisdiction by virtue of the fact that the High Court in Eldoret which is a court of concurrent jurisdiction with this court upheld the conviction and sentence and application to this court is an abuse of the court process. She prayed that the application be dismissed.

ANALYSIS AND DETERMINATION

13. I have considered grounds of application, averments in affidavit and the submissions by parties. I wish to consider the following: -
 - i. Whether this court has jurisdiction to review sentence herein
 - ii. Whether applicant is entitled to the orders sought.
 - i. Whether this court has jurisdiction to review sentence herein
14. The applicant argues that this court has jurisdiction under sections 354, 364 and 365 of the CPC 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 earlier on determined the appeal.



15. 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...”

16. It is not disputed that the applicant had his appeal heard and determined by this court and the Court of Appeal. It is on this fact that the jurisdiction of this court is being questioned by the respondent. The trial court’s sentence was upheld by this court following appeal filed by the applicant herein.

17. The supreme court pronounced itself in respect to review in the case of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR where the court stated as follows: -

“...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.”

18. In view of the above, a party is required to meet the above conditions so as to successfully move a court to review its own decision or that of a court with coordinate jurisdiction. The applicant has not demonstrated that any of the grounds set by the Supreme Court have been established in his case. There is therefore no ground for this court to review sentence upheld by this court and the Court of Appeal.

FINAL ORDERS:

19. The 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.

