



**Chebonich & another v Republic (Criminal Petition E006 of 2023)  
[2024] KEHC 13667 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13667 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL PETITION E006 OF 2023  
JRA WANANDA, J  
NOVEMBER 6, 2024**

**BETWEEN**

**CLINTON CHEBONICH ..... 1<sup>ST</sup> PETITIONER**

**ROBERT KIMUTAI CHERUIYOT ..... 2<sup>ND</sup> PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The 1<sup>st</sup> Petitioner was charged in Iten Chief Magistrate's Court Criminal Case No. 127 of 2014 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the charge were that on 27/01/2014 at [particulars withheld] village, Aror location within Elgeyo Marakwet County, he intentionally and unlawfully caused his penis to penetrate the vagina of MJC, a girl aged 16 years. He was also charged with the alternative count of committing an indecent act with the same girl on the same date and place, contrary to Section 11(1) of the [Sexual Offences Act](#).
3. By the Judgment delivered by the trial Court, the 1<sup>st</sup> Petitioner was convicted on the main charge and was on 12/11/2019 sentenced to serve 15 years imprisonment.
4. Dissatisfied with the decision, the 1<sup>st</sup> Petitioner filed Eldoret High Court Criminal Appeal No. 179 of 2019 in which by the Judgment delivered by Hon. Justice R. Nyakundi on 9/11/2022, the conviction was upheld. On sentence however, the 15 years imprisonment was reduced to 10 years and additionally, the period served in remand custody before conviction was also ordered to be deducted from computation of the sentence.



5. On his part, the 2<sup>nd</sup> Petitioner was charged in Iten Chief Magistrate's Court Criminal Case No. 195 of 2019 with 3 counts, the first two for assault contrary to Section 251 of the Penal Code and the third count, for the offence of resisting arrest contrary to Section 103(a) of the Police Service Act.
6. By the Judgment delivered by the trial Court, the 2<sup>nd</sup> Petitioner was convicted on all the 3 counts and was on 26/11/2019 sentenced to serve 3 years imprisonment in count 1 and 20 years respectively, for count 2 and 3.
7. Dissatisfied with the decision, the 2<sup>nd</sup> Petitioner filed Eldoret High Court Criminal Appeal No. 195 of 2020 in which by the Judgment delivered by Hon. Lady Justice T. Matheka on 30/12/2022, the sentence of 3 years imprisonment on count 1 was upheld and the sentences of 20 years imprisonment in count 2 and 3, respectively, were reduced to 4 years. Additionally, the sentence was ordered to be computed from the date when the 2<sup>nd</sup> Petitioner was first remanded in custody and further, the sentences were ordered to run concurrently with the sentence on the 1<sup>st</sup> count.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioner have now returned to this Court with the instant joint Application filed on 27/07/2023 again seeking review of their already reduced sentence as aforesaid. No grounds for the Application have however been disclosed.
9. Prosecution Counsel, Rachel Mwangi, filed Submissions in which she basically argued that the Petitioners having earlier filed Appeals which dealt with the issue of sentence and which were determined as aforesaid, this Court cannot reopen the judgments already rendered by a Judge of corresponding jurisdiction. According to her, the Petitioners only recourse is to move to the Court of Appeal and she urged that the Petition be dismissed.

### **Determination**

10. The first observation I make is that the two Applicants have filed a joint Application herein with no explanation given on why that is so when the matters in issue are obviously separate and distinct and secondly, emanate from two different cases before two different trial Courts and arise from two different Judgments. The offences charged are also different and unrelated. At one point, it was alleged orally that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner is one and the same person despite the names being evidently distinct. No substantiation was made on this allegation and in the circumstances, I cannot just accept it. In any event, even if truly the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner is one and the same person, still that will not change the fact that the matters in issue are completely distinct and obviously cannot be heard in one Application. On this ground alone, I would dismiss this Petition.
11. The other issue that arises for determination is "whether this Court can review the sentences imposed by the trial Court when the issue of the sentences had already been in issue in the respective Appeals".
12. It is not in doubt that the Applicants were convicted and sentenced by the Magistrate's Court, that they then appealed to this Court and their sentences were reduced. They have yet again come to this Court, once more seeking reduction of the sentences. As aforesaid, no grounds for seeking such reduction have been disclosed.
13. What the Applicant is inviting this Court to do is to interfere with the sentence already reviewed by this very Court, an action which is untenable in law. A High Court Judge cannot sit on appeal over a decision of another Judge of equal jurisdiction. This Court having already pronounced itself on the same issue of sentence, it is now functus officio and the issue of sentence is now also Res Judicata.



14. I echo the words of Kiarie Waeru Kiarie J made in the case of Joseph Maburu alias Ayub vs Republic [2019] eKLR, in which he stated the following:

“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 Tenth (10<sup>th</sup>) Edition describes 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.”

15. I also cite the decision of Hon. Lady Justice L. Njuguna in the case of Boniface Gitonga Mwenda v Republic [2021] eKLR, where, faced with a similar situation, she 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.”

16. In view of the foregoing, it is evident that Petitioners recourse was to move to the Court of Appeal, not to return to this Court to seek a review in disguise. The upshot of the foregoing is therefore the conclusion that this Court lacks the jurisdiction to entertain the present Petition. In the premises, the same is dismissed.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 6<sup>TH</sup> DAY OF NOVEMBER 2024**

.....

**WANANDA J. R. ANURO**

**JUDGE**

**Delivered in the presence of:**

Ms. Ayuma for the State

Petitioner present

Court Assistant: Brian Kimathi

