



**Mutwiri v Republic (Criminal Miscellaneous Application  
E001 of 2025) [2025] KEHC 13717 (KLR) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13717 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL MISCELLANEOUS APPLICATION E001 OF 2025**

**AK NDUNG’U, J**

**OCTOBER 1, 2025**

**IN THE MATTER OF ARTICLES 2,3 (A), 19(2), 23(C), 27(1),  
28,50(2)(P)(Q), 159(2)AND 165(3) OF THE CONSTITUTION  
OF KENYA**

**AND**

**IN THEMATTER OF CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND  
PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF SECTION 364 OF THE CRIMINAL  
PROCEDURE CODE CAP 75 LAWS OF KENYA  
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**AND**

**IN THE MATTER OF SECTION 4 OF PROVATIO NOF  
OFFENDERS ACT CAP 64 LAWS OF KENYA**

**BETWEEN**

**MORRIS MUTWIRI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**



## RULING

(Being a miscellaneous Criminal Application seeking for a non-custodial sentence under Section 4 of the [probation of offenders Act](#) Cap 64 Laws of Kenya)

1. The applicant moved this court for orders;
  1. That, this honourable court has jurisdiction to hear and determine the application.
  2. That, this honourable court be pleased to grant the prayers sought of the invocation of the provision of Section 4 of the [probation of offenders Act](#) Cap 64 Laws of Kenya.
  3. That, the applicant is a pauper who cannot afford the legal fees for filing this application.

Which application is supported by the following grounds;

- a. That, the applicant was arrested on 25/9/2012, charged with the offence of defilement contrary to Section 8 (1) of the [Sexual Offences Act](#), No. 3 of 2006, vide Magistrates Court Criminal Case No. 1070 of 2012) after a fully trial, he was convicted and sentenced to serve life imprisonment by Hon. E.Bett Senior Resident Magistrates on 17/12/2014 in the magistrate court at Nanyuki.
- b. That, the applicant lodged 1<sup>st</sup> appeal both conviction and sentence in the High Court of Kenya at Nanyuki vide HCCRA.NO. 47 of 2015 which was dismissed on both conviction and sentence by, Hon. Mary Kasango (j) on 25<sup>th</sup> February 2016.
- c. That, the applicant lodged this 2<sup>nd</sup> appeal against both conviction and sentence in the Court of Appeal at Nyeri vide C.O.A. CR. A. No. 3 of 2016 which was dismissed on conviction and sentence where the court substituted the life sentence with a definite sentence of 20 years imprisonment by the three coram bench judges presided by; Hon. W. Ouko. F. Sichale, S.ole Kantai (JJJ) on 23<sup>rd</sup> day of May 2018.
- d. That, the applicant approaches the honourable court in good faith to further seek for consideration of a non-custodial sentence for the remaining part sentence of 3 years and 4 months.
- e. That, this court has discretion to order for a non-custodial sentence as enhanced under Section 4 of the [Probation of offenders Act](#) Cap 64 Laws of Kenya and further provided under the Judiciary of Kenya sentencing policy guidelines 024.
- f. That, the applicant is a first offender, young man, remorseful, truthful, and rehabilitated person, ready to join the community and be productive to the society as well as serving as an example to the youth and agent of change and rehabilitation.
- g. That, the applicant has serious underlined health conditions which he has been on follow at various health facilities as shall be outlined in an annexed affidavit.
- h. That, the main objectives of punishment are rehabilitation and deterrence as stipulated in the Judiciary of Kenya Sentencing Policy Guidelines 2023 has been achieved.
- i. That, these objectives have been achieved since the applicant has undergone some of the rehabilitative programs offered in prisons facilities as shall be adduced during the hearing of this application.



- j. That, the applicant has also remained of good behavior and has undergone through counselling.
- k. That, this court has original jurisdiction to hear this matter falling with the jurisdiction as donated by Article 165(3) (a),(d) of the Constitution of Kenya.
2. The application is supported by his affidavit which basically reiterates the grounds relied on.
  3. The application elicited a preliminary objection by the Respondent the gist of which is that this court lacks the jurisdiction to entertain, hear and/or determine the Notice of Motion. That the same is an abuse of the court process, is bad in form and substance and should accordingly be dismissed.
  4. I have had occasion to consider the preliminary objection raised by the Respondent. I have read and considered the application, the grounds in support and the supporting affidavit. Of determination is whether the preliminary objection has merit.
  5. It is not contested that the applicant was tried and convicted by the Senior Resident Magistrate at Nanyuki for the offence of defilement and sentenced to life imprisonment. An appeal lodged before the High Court (Kasango J) came a cropper and was dismissed. A further appeal to the Court of Appeal partly succeeded with the sentence of life imprisonment being substituted with a sentence of 20 years imprisonment.
  6. Of determination in the preliminary objection is whether this court has jurisdiction to entertain the present application and grant the orders sought.
  7. The applicant seeks to have this court review the sentence passed by the Court of Appeal in which his term of imprisonment was reduced to 20 years.
  8. It is trite law that the jurisdiction of court is conferred by the constitution or by statute and a court of law can only exercise jurisdiction as conferred upon it by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
  9. This position was well articulated in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the Supreme Court succinctly stated:  

“ A Court’s jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”
  10. The law abhors the practice of a Judge sitting to review a Judgment or decision of another Judge of concurrent jurisdiction. This is because the rule of the thumb is that courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts of higher Jurisdiction than theirs. In the instant case, am invited to interfere with a sentence imposed by the court of appeal.



11. An invite of a similar nature had been made to the court in the case of Daniel Otieno Oracha -vs- Republic [2019]eKLR, and in sentiments that I wholly agree with the court stated: -

“The law abhors that practice of a Judge sitting to review a Judgment or decision of another Judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a Judgment of the subordinate court or if the Petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.....”

12. Notably, the resentencing option is not available to the applicant as the window for resentencing is only open for murder convicts who were sentenced to the mandatory death sentence in murder cases and who had no opportunity to offer mitigation before sentence and the remedy is not available in sexual offences cases as clearly clarified by the Supreme Court in Muruatetu 2 and recently in the Gichuki Mwangi case.

13. It is common ground that the Applicant has unsuccessfully appealed to this Court and partly succeeded at the Court of Appeal. What he now seeks is that this Court reviews its own decision and that of the Court of Appeal, a jurisdiction it does not have. In this regard, I associate with the holding in John Kagunda Kariuki v Republic [2019] eKLR, where Ngugi, J, (as he then was) stated:

“In the present case, the Applicant’s appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.

At the helm of the Court system in Kenya is the Supreme Court followed by the Court of Appeal. This Court falls below the Court of Appeal. After the Applicant’s appeal in this Court was dismissed, he appealed to the Court of Appeal and the same was dismissed. That decision of the Court of Appeal is binding on this Court. In light of this, to entertain this matter in respect of which the Court of Appeal has pronounced itself, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm. In this regard, I am guided by the holding in the case of Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR, where the Court of Appeal stated: As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice...Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. the constitution itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts. Moreover, under Article 164(3) of the constitution, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant’s submission that the issue pits supremacy of the courts against citizens’ enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a



court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere”.

14. In light of the foregoing, the preliminary objection herein has merit. Same is allowed and the Notice of Motion undated and filed on 10/1/25 is dismissed for want of jurisdiction.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 1<sup>ST</sup> DAY OF OCTOBER, 2025.**

**A.K. NDUNG’U**

**JUDGE**

