



**Kitsao v Republic (Miscellaneous Criminal Application E063 of 2025)
[2025] KEHC 15644 (KLR) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CRIMINAL APPLICATION E063 OF 2025**

**M THANDE, J
OCTOBER 31, 2025**

BETWEEN

MWARO ALI KITSAO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was convicted of the offence of rape in Malindi Criminal Case No. 155 of 2016 and sentenced to 20 years imprisonment. He appealed to this Court in Criminal Appeal No. 42 of 2018, which appeal was dismissed.
2. The Applicant has now moved to this Court seeking that the Court considers the period spent in custody prior to sentencing, and reduce his sentence accordingly pursuant to Section 333(2) of the Criminal Procedure Code.
3. The Respondent opted not to file a response to the Application.
4. The circumstances herein are that the Applicant, being aggrieved by the conviction and sentence appealed to this Court against the same. As a first appellate court, this Court subjected the evidence adduced before the trial court to a fresh analysis and evaluation as duly enjoined. See *Okeno v. Republic* [1972] EA 32 and *Kariuki Karanja v Republic* [1986] KLR 190). Having done so, the Court upheld the conviction and sentence and dismissed the Appeal in its entirety. The Court is functus officio and does not have the jurisdiction to reopen the matter.



5. It is trite that a court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR 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.

6. This Court derives its jurisdiction principally from Article 165(3) of *the Constitution* which confers upon this Court unlimited original jurisdiction in criminal and civil matters, the provision clearly delineates and demarcates what the Court can and cannot do. The jurisdiction of this Court includes supervisory powers. By dint of Article 165(6) however, this Court cannot supervise superior courts. It provides:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

7. The Applicant's appeal was heard and dismissed by this Court which is a superior court. By dint of Article 165(6) of *the Constitution* therefore, this Court lacks the jurisdiction to reopen the matter to relook at his sentence. The only recourse available to the Applicant is an appeal before the Court of Appeal. In this regard, I associate with the holding in John Kagunda Kariuki v Republic [2019] eKLR, where Ngugi, J. (as he then was) stated:

10. 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.

8. In light of the foregoing, I find that the Application herein is incompetent for want of jurisdiction, and the same is hereby struck out.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 31ST DAY OF OCTOBER 2025

M. THANDE

JUDGE

