



**Waithera v Republic (Criminal Revision E042 of 2025)
[2025] KEHC 17320 (KLR) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E042 OF 2025
FN MUCHEMI, J
NOVEMBER 20, 2025**

BETWEEN

JOSPHAT MBURU WAITHERA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. This undated application seeks for orders of review of sentence and that the applicant be allowed to serve a non-custodial sentence upon review of the sentence downwards.
2. The applicant states that he was charged with the offence murder contrary to Section 203 as read with Section 204 of the Penal Code. He then entered into a plea bargain agreement whereas he pleaded guilty to the charges. He was sentenced to thirteen (13) years imprisonment to run from the date of arrest, 5th June 2019.
3. The applicant states that he is a family man with a wife, two children and a grandmother who all depend on him and who have been suffering during his period in prison. The applicant further states that he has undergone rehabilitation and has transformed and asks the court to grant him a non custodial sentence.
4. In opposition to the application, the respondent filed Grounds of Opposition dated 31st October 2025 and states that the Honourable Court has become functus officio and has no jurisdiction to resentence since it has already pronounced itself on all issues pertaining to sentence. Thus asking the court to entertain resentence is equivalent to asking the court to sit as an appellate court against its own judgment and determine that the appeal has chances of success.



5. The respondent states that the applicant has not argued or suggested that the sentence is manifestly harsh and excessive, or its illegal or improper, or that the court acted on the wrong principle or took into account irrelevant factors in sentencing or that the proceedings were irregular or in violation of his right in fundamental freedom. The sentence passed by this Honourable Court was proper and legal as it considered the aggravating and mitigating circumstances.
6. The respondent states that time spent in custody was also factored in when passing the sentence in accordance with Section 333(2) of the Criminal Procedure Code. The respondent further states that the applicant can pursue the issue of sentence at the Court of Appeal.

The Law.

7. The High Court's power of revision is set out in Article 165 (6) and (7) which provides:-
 - (6) 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 over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
8. Section 362 of the Criminal Procedure Code provides:-

The High Court may call and examine the 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.
9. Section 364(1) of the Criminal Procedure Code provides:-

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may”-

 - a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
 - b. In the case of any other order other than an order of acquittal alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.
10. Article 50 of *the Constitution* provides:-
 - (2) Every accused person has the right to a fair trial, which includes the right:-
 - (q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.
11. As provided above, the High Court can only undertake criminal revision of the decisions of a subordinate court and not of a superior court.
12. In *Daniel Otieno Oracha vs Republic* (2019) eKLR, the petitioner had applied for review of a sentence imposed by a court of concurrent jurisdiction. The court held:-

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.

The judgment of Abida Ali-Aroni J. made in accordance with the law has not been challenged. This court cannot sit on appeal of its own judgment or of court of concurrent competent jurisdiction when the petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.

Good governance demands that cases be handled procedurally in the right forum. This is because the rule of thumb that superior courts cannot sit in review, appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matter falling under the exclusive jurisdiction of Supreme Court under Article 163(3) cannot be dealt with by the High Court.....

13. In the instant matter the applicant was charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code vide Criminal Case No. E003 of 2023 before this court. The applicant entered into a plea bargain agreement with the respondent and pleaded guilty to the offence of manslaughter. On 28th November 2024, this court sentenced the applicant to serve thirteen years imprisonment to commence from the date of arrest, the 5th June 2019. Thus, the court took into consideration the time spent by the applicant in custody pursuant to Section 333(2) of the Criminal Procedure Code. Thus, any further recourse for further reduction of the applicant's sentence lies in the Court of Appeal.
14. I therefore, find that this court lacks jurisdiction to review its own orders in this criminal case. The application for review, is in my view, misconceived and incompetent.
15. The application is hereby struck out with no orders as to costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 20TH DAY OF NOVEMBER 2025.

F. MUCHEMI

JUDGE

