



**Mwakilenge v Republic (Criminal Miscellaneous Application E222 of 2024) [2025] KEHC 17698 (KLR) (27 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17698 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL MISCELLANEOUS APPLICATION E222 OF 2024**

**WM KAGENDO., J  
NOVEMBER 27, 2025**

**BETWEEN**

**ERICK MWAKILENGE ..... APPLICANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**RULING**

1. The undated notice of motion was brought and the Applicant seeking to file an application seeking commutation of his sentence to Probation Placement.  
  
The application is grounded upon the affidavit of Erick Mwakilenga Nyangale and any other grounds as may be adduced during the hearing thereof.
2. The Applicant is an adult currently serving a 15 years sentence in Shimo-la-Tewa maximum security prison for the offence of defilement. The respondent is the DPP an office established pursuant to article 157 of *the constitution* with mandate of instituting and undertaking criminal proceedings against any person before any court ( other than court martial) in respect of any offence recognized by laws of Kenya.

**The Legal Background**

3. Section 364(1)(b) of Criminal Procedure Code; 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 its knowledge, the high court may
  - (b) in the case of any other order other than an order of acquittal, alter or reverse the order. Section 216 And 329 Of The Criminal Procedure Code – The court may, before passing sentence,



receive with evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. Kenya Sentencing Policy Guidelines; page 15, paragraph 4.1 as follows:

“sentences are imposed to meet the objectives one of which is;

Retribution: to punish the offender for his/her criminal conduct in a just manner,

4. The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some case instances some sentences may be in conflict”.

On the other hand, the following guidelines are applicable in review of sentence;

- a. The age of the offender
- b. Being a first offender
- c. Whether the offender pleaded guilty
- d. Character and record of the offender
- e. Remorseful of the offender
- f. The possibility of reform and social re-adaption of the offender;
- g. Any other factor that the court considers relevant (Emphasis underlined)

### **Mitigating Factors**

5. He left behind an elderly and sickly mother and his five(5) siblings, all of whom are now living in destination owing to his absence for long myself and the manner in which I have interacted with both fellow inmates and the prison officers during my stay in here.
6. Has undertaken the following theological courses during the service of his sentence:A certificate of completion in Discover The Bible.A certificate of completion in Focus On The Family.A certificate of completion in Heal Education.A diploma certificate of completion in Discover The Bible.A baptismal certificate by the Seventh Day Adventism ChurchA recommendation letter by the Seventh Day Adventist Church
7. He sincerely regrets the subject offence very much and he decries the same in the strongest terms and promise never to commit any such senseless acts in future. He was a first offender in the subject matter, a fact that commends itself to this Hon. Court as crucial mitigating factor.
8. He cited case of Republic vs Scott (2005) NSW CCA 152 Howie, Grove and Barr JJ stated:- “There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender”.
9. His humble submission that once the sentence imposed upon a convicted person has achieved all the foregoing objectives being retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation, it is no longer necessary or desirable to continue holding the accused in incarceration and on this premise, he urge that he deserve a review of his sentence, in consideration of the foregoing mitigating factors.

The state opposed the application Conclusion



1. I have considered the application, the supporting affidavit and the response by the State. The issue for determination is whether this Court has jurisdiction to review the sentence imposed by a judge of concurrent jurisdiction.
2. It is trite law that the High Court cannot review, vary or set aside a sentence imposed by another judge of equal jurisdiction after the matter has been determined. This position is anchored in the doctrine of stare decisis and the hierarchical structure of the courts which safeguard consistency and finality in judicial decisions.
3. In *Republic v Karisa Chengo & 2 Others* (2017) eKLR, the Supreme Court affirmed that the High Court lacks jurisdiction to revisit or alter a sentence imposed by another High Court judge unless through an appeal to a higher court or a review specifically provided for in statute.
4. Similarly, in *Joseph Nduvi Mbuvi v Republic* (2019) eKLR, the Court of Appeal reiterated that one High Court judge cannot sit on appeal or review the decision of another judge of concurrent jurisdiction as it would undermine judicial orderliness and certainty.
5. On this basis, the Applicant's request for revision of the sentence cannot be entertained by this Court. Entertaining the application would, in effect, amount to sitting on appeal against a decision of a judge of concurrent jurisdiction. The Applicant's proper remedy lies in an appeal to the Court of Appeal as provided under Article 164(3) of *the Constitution*.
6. Accordingly, I find that the Notice of Motion dated 31st January 2025 lacks merit and the same is hereby dismissed.
7. Orders accordingly.
8. Ruling delivered through the Microsoft Teams online platform.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THE 27TH DAY OF NOVEMBER 2025**

**HON. LADY JUSTICE W. K. MICHENI JUDGE**

In the presence of:

The Accused Persons

For The Prosecutor Mr Sirima Court Assistant Bebora

