

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
HIGH COURT CRIMINAL REVISION NO. E242 OF 2024

JACKSON KANYARI MWANGI.....
APPLICANT

VERSUS

REPUBLIC.....
.....RESPONDENT

RULING

1. This is an application for review of sentence arising from Magistrates Court at Kandara in E220 of 2015. The Applicant was tried and convicted of the offence of defilement contrary to section 8(1) as read with section (3) of the Sexual Offences Act. He was sentenced to 35 years imprisonment on 8th April 2024. Subsequently, upon appeal to the vide Criminal Appeal No. 10 of 2016 the Sentence was reviewed to 20 years imprisonment.
2. The Applicant applied to this Court through an undated Chamber summons Application anchored under Sections 333(2), 362 and 35 of the Penal Code seeking the that the Honourable Court be pleased to revise the sentence mitigated upon the Applicant and to reduce his sentence to the period already served taking into account that he spent substantial time in custody pending trial.
3. The Application for revision is supported by the grounds set out on its face and the Applicant's undated Affidavit wherein he averred inter alia that he is not willing to go for second appeal at the court of appeal because of his health status in that he suffers from diabetes and ulcers. He therefore prays to this court to consider and grant this application.

4. I have considered the applicant's application together with the record and the available evidence. It is apparent that no evidence has been placed before the Court attesting to the health status of the applicant
5. The applicant has based his application on **section 333(2) of the CPC** which requires courts to factor in the period spent by the accused in custody pending trial as period having been served as part of the sentence.
6. Secondly, the Applicant relies **section 35 of the Penal Code** which provides for unconditional discharge where:
"... a court before which a person is convicted of an offence is of the opinion having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation and Offenders Act is not appropriate, the court may make an order discharging him absolutely or if the court thinks fit, discharging him subject to the condition that he commits no offence during such period not exceeding 12 months from the date of the order as may be specified therein."
7. This court has also noted from the record that the Applicant has benefitted from an appeal of the high court (Murang'a Criminal Appeal No. 10 of 2016) which effectively revised his sentence from 40 to 20 years imprisonment.
8. In considering this application I will address myself to two issues: whether this court has jurisdiction to handle this matter while the applicant had exercised his right of appeal in the same court. Secondly, and dependent upon the finding in the first issue above, whether the Applicant has

demonstrated any special circumstances that would merit a consideration for an order of discharge under **section 35 of the penal code.**

9. Vide *High Court Criminal Appeal No. 10 of 2016* the applicant had appealed against conviction and sentence arising from Magistrates Court at Kandara in E220 of 2015 on the basis that the sentence of 40 years imprisonment was harsh. The same was reduced to 20 years vide judgement by *Kimondo, J* delivered on 26th March 2020. The Applicant is now come back to the same court seeking revision orders of his sentence.

10. The High Court's power of revision is set out in Article **165 (6) and (7) of the Constitution 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.

11. A perusal of the pleadings herein shows that the legality of the Sentence meted against the Applicant has already been addressed by a court of competent jurisdiction. As a general rule, the High Court can only review the Judgment of a subordinate court as provided for under sections 362 to 364 of the *Criminal Procedure Code*. This court therefore does not have the jurisdiction to review its own decision. In **John**

Kagunda Kariuki v Republic (2019) eKLR, Ngugi J. (as he then was) held that:

“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”.

12. I am persuaded by the decision in **Daniel Otieno Oracha v Republic (2019) eKLR**, where Aburili J. decided on a similar application that:

“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 the 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 matters falling under the exclusive jurisdiction of

Supreme Court under Article 163(3) cannot be dealt with by the High Court.....”

13. It follows therefore that this court although differently constituted, is a court of concurrent jurisdiction has already upheld the Applicant’s conviction and revised the sentence. The Applicant’s only further recourse regarding his sentence that now lies in the Court of Appeal and not in this court.
14. Following the above reasoning, I am not minded to consider the second issue save for mentioning that the applicant has not placed any evidence before this court on support his allegation of health status and that **section 35 of the penal code** on discharge is applicable in minor offences not the in serious cases of this nature with mandatory sentences.
15. In the circumstances, I find that this court has no jurisdiction to entertain this matter.

16. The Application is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER, 2025.

**HON. T. W. Ouya
JUDGE**

**For Applicant..... Jackson Kanyari Mwangi (In Person)
For Respondent.....P. Mwangi
COURT ASSISTANT.....Brian**

ORIGINAL