



REPUBLIC OF KENYA



KENYA LAW
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**DMW v Republic (Criminal Application E172 of 2024)
[2025] KECA 948 (KLR) (2 May 2025) (Ruling)**

Neutral citation: [2025] KECA 948 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPLICATION E172 OF 2024
FA OCHIENG, JA
MAY 2, 2025**

BETWEEN

DMW APPLICANT

AND

REPUBLIC RESPONDENT

(An application for leave to appeal out of time from the decision of the High Court of Kenya at Nyeri (M. Kizito, J.) in Misc. Cr. Application No. E036 of 2024)

RULING

1. The applicant, DMW, has moved this Court pursuant to rules 31 and 42 of the Court of Appeal Rules. Through the said application, he seeks leave to appeal out of time.
2. He informed the court that on 31st July 2012, the Hon. W. Kagendo (PM), who was then sitting at the Mukurweini Magistrate's Court, convicted him for the offence of incest contrary to section 20(1) of the *Sexual Offences Act*.
Thereafter, the learned trial magistrate sentenced the applicant to life imprisonment.
3. Being dissatisfied with the decision rendered by the trial court, the applicant lodged an appeal at the High Court, Nyeri; the said appeal was Criminal Appeal No. 140 of 2012.
4. The applicant informed this Court that his appeal was determined by Mativo, J. (as he then was), on 28th October 2015. In its determination, the High Court dismissed the appeal against conviction, but it partially allowed the appeal against sentence, by substituting the life sentence with a sentence of 40 years imprisonment.
5. The partial success of the appeal was decried by the applicant to be insufficient. He was therefore, motivated to lodge Criminal Appeal No. 73 of 2015 at the Court of Appeal, Nyeri. However, the appeal was dismissed.



6. Nonetheless, the applicant refused to give up. Almost nine (9) years later, he filed Misc. Cr. Application No. E036 of 2024 at the High Court, Nyeri. The said application sought the review of the sentence which had been imposed by Mativo, J.
7. The application for review was heard and then dismissed by Kizito, J. It is the said decision which prompted the applicant to file the application which is now the subject of determination in this ruling.
8. The application came up for hearing on 22nd January 2025. On that day, the applicant represented himself, whilst the respondent was represented by Prosecution Counsel, Mr. Naulikha.
9. The applicant requested this Court to review the sentence as he was of the view that the same was excessive. However, the court reminded him that the issue of sentence could not be the subject of determination in the current application as there was no substantive appeal before the court.
10. Eventually, the applicant reverted to the application by seeking leave to appeal out of time. He said that the reason why he delayed in lodging his intended appeal was that the High Court failed to provide him with a copy of its ruling.
11. In answer to the application, Mr. Naulika submitted that this Court had no jurisdiction to entertain another appeal considering that it had previously dismissed the applicant's appeal against both conviction and sentence.
12. It was the understanding of the respondent that this Court had been rendered functus officio. The court was called upon to down its tools, at this point in time, by rejecting the application which could enable the applicant to file a second appeal after the court had previously dismissed the first appeal.
13. During the hearing of the application, the court asked the applicant if he had lodged a notice of appeal after Kizito, J. rejected the application for review. The answer was in the negative.
14. Pursuant to the provisions of rule 61(1) of the [Court of Appeal Rules, 2022](#); -

“A person who desires to appeal to the Court shall give notice in writing, which shall be lodged in six copies with the registrar of the Superior Court at the place where the decision against which it is desired to appeal was given, within fourteen days after the date of that decision, and the notice of appeal shall institute the appeal.”
15. Rule 61(2) makes it clear that the notice of appeal shall; -
 - a. briefly state the nature of the acquittal, conviction, sentence, or finding against which it is desired to appeal; and
 - b. contain the address at which any documents connected to the appeal may be served upon the appellant.
16. In this case, it would have been sufficient if the applicant had filed a notice of appeal in which he indicated his intention to appeal against his conviction and sentence; and if he cited the address at which any documents could be served upon him. In other words, the lack of proceedings from the trial court or from the High Court, were not a hindrance to the commencement of the process of appeal.
17. The court also sought to know from the applicant the particulars of the steps he took in order to enable him obtain what he required for the purposes of the intended appeal. His answer was that he was asking this Court to assist him to get the proceedings from the High Court. He further stated that his desire was to have this Court order that his sentence be reduced.



18. In light of the fact that he had only sought leave to appeal, the court reminded the applicant that he did not have any substantive appeal or application which could enable this Court to give consideration to the request for a reduction of the sentence.
19. The applicant then implored this Court to come to his aid as he had not studied the law. Whilst the court has sympathy for the applicant, I regret that his lack of knowledge of the law, of itself, cannot be the basis upon which the court grants leave to appeal. Furthermore, there is the substantive issue that was raised by the respondent, concerning the jurisdiction of the court.
20. I hold the considered view that this Court lacked jurisdiction to have a second look at the issue of sentence. It will be recalled that the court had earlier dismissed the applicant's appeal against both conviction and sentence. Thereafter, the High Court was persuaded to reduce the sentence from life imprisonment to a sentence of 40 years imprisonment.
21. In the said circumstances, I find that it would be erroneous for this Court to consider the applicant's request for a reduction of the sentence of 40 years imprisonment, whereas the court had earlier expressed the considered view that life imprisonment was lawful.
22. Having rendered its decision on the appeal against sentence, this Court is now functus officio.
23. In conclusion, the application lacks merit, it is therefore dismissed.

Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF MAY, 2025.

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

