

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISC. CRIMINAL APPLICATION NO. E210 OF 2024

GEOFREY CHOMBA MUTHONI.....
APPLICANT

VERSUS

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

(From the original conviction and sentence in Nyeri High Court HCCR No. 42 of 2005, Ngaah J and Court of Appeal Case No. 35 of 2018 as read with E012 of 2021 (Muchemi J)

RULING

1. This is one of the strangest applications I have received. The Applicant was convicted and sentenced to death by this court. This court (Ngaah J) found that the prosecution had proved its case against the Applicant for the offence of murder contrary to Section 203 of the Penal Code. The Applicant filed an appeal to the Court of Appeal, which was dismissed under Rule 68 of the Court of Appeal Rules. Subsequently, he filed an application for review to this court. This court (Muchemi J) found no merit in the application and dismissed it. That was thought to be the end of the matter. The applicant filed an undated application for review on 17.7.2024

2. What is perturbing is that the Applicant has again filed yet another application seeking review of the sentence and pleading for mercy. He sought that the court take cognisance of mitigating factors. It is important to note that the review application was dismissed barely three years ago.

3. Application for review is anchored in Section 362 of the Criminal Procedure Code. This vests the High Court with jurisdiction to revise criminal matters decided by lower courts in the following terms:

The High Court may call for 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.

4. Accordingly, the court's revisional jurisdiction is confined to examining the correctness, legality, and propriety of any findings, sentences, or orders passed by the subordinate court. Section 364 (5) of the Criminal Procedure Code restricts the revisional jurisdiction as follows:

When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

5. Though enacted earlier, the same has roots in Article 165(6) of the constitution. It is also subject to limitations within the act prohibiting supervision of the superior court. This is amplified in Article 165(7) of the constitution. The two clauses are as follows:

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) 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.

6. The Applicant had the right to appeal against the sentence and conviction. He exercised that right by filing CACRA 36 of 2018, the proper forum for litigating issues raised. He cannot approach this court through an application for revision even if the sentence is illegal. The orders of the High Court are only appealable. It would be irregular and illegal for this court to review the sentence of the High Court in the circumstances.

7. There is no basis for reviewing the judgment. Further, Muchemi J has already decided on the review in Petition No. E012 of 2021. If the applicant had anything worthwhile, he should have said it then. The court is *functus officio* as far as it relates to the decision made by Ngaah J.

8. Having withdrawn the appeal in the Court of Appeal, the Applicant has two options. First, to await his fate and serve sentence as given or petition the President under Article 133 of the Constitution, which provides as follows:

(1) On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by-

(a) granting a free or conditional pardon to a person convicted of an offence;

(b) postponing the carrying out of a punishment, either for a specified or indefinite period;

(c) substituting a less severe form of punishment; or

(d) remitting all or part of a punishment.

(2)

(3) ...

(4) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.

9. The court finds no justifiable basis to interfere with the sentence imposed in this matter. As a matter of law, interference with a sentence passed by a subordinate court is permissible only in exceptional cases through appeal or review. Consequently, the application stands dismissed.

Determination

10. In the circumstances, I make the following orders:

a) The court is *functus officio*. The undated application for review filed on 17.7.2024 is dismissed *in limine*.

b) The file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 30th day of April, 2025. Ruling is delivered through the Microsoft Teams online platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Mr. Kimani for the State

Applicant - present

Court Assistant - Michael