



**Mugao v Republic (Criminal Petition E018 of 2024)
[2025] KEHC 12009 (KLR) (14 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL PETITION E018 OF 2024
BK NJOROGE, J
AUGUST 14, 2025**

BETWEEN

NICHOLAS MITAMBO MUGAO PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This judgement is in respect to the Petitioner’s application under a Certificate of Urgency by way of a Notice of Motion dated 12th September 2024. The Petitioner seeks the following reliefs from this Honourable Court:
 - a. The Life sentence be declared unconstitutional
 - b. The petitioner herein granted resentencing and;
 - c. An order be made remitting the matter to the sentencing court for the petitioner herein to be heard on mitigation for sentence rehearing only and for sentencing by the sentencing court.
2. The Motion is supported by the Affidavit sworn by the Petitioner on even date. The Petitioner avers that he was the accused person in Criminal Case No. 1174 of 2010 at the Chief Magistrate’s Court in Thika, where he was charged with Defilement Contrary to Section 8(2) of the *Sexual Offences Act* before Hon. B. Owino, SPM. He was sentenced on 3rd May 2011 to ten (10) years imprisonment on each of the two counts of defilement and committing an indecent act with a child. He further states that he appealed in High Court Criminal Appeal No. 419 of 2013 at Murang’a, where the sentence was enhanced to life imprisonment on 28th November 2013 by Hon. Nzioki wa Makau, J. He has been in prison for a period of fourteen (14) years since his arrest and urges this Court to consider his current age of thirty-seven (37) years as a relevant factor for resentencing. He avers that he was a first-time offender at the time of arrest and that he has since acquired skills in the penal institution which, if granted an opportunity, he intends to use for the benefit of his community and society at large. He



submits that this Court is properly moved under the correct legal provisions and has the constitutional mandate to interpret and enforce the substance of fundamental rights in light of evolving standards of decency that reflect the progress of a mature society, pursuant to Articles 10, 11, 12, 19(2), and 28 of *the Constitution* and paragraph 1.2.6 of the Judiciary Sentencing Guidelines, 2023.

3. He further contends that Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 fails to preserve and protect his dignity by condemning him to spend the remainder of his life in prison, predating the constitutional recognition of the offender's potential for rehabilitation under Article 19(2). He also argues that Section 8(2) does not conform to the fair trial guarantees under Article 25(c) of *the Constitution*, particularly in relation to the role of mitigation. Finally, he submits that the doors for resentencing in sexual offence cases were opened by Article 23, read together with Article 165 of *the Constitution* and the Judiciary Sentencing Policy Guidelines, 2023.
4. The State is opposed to this Petition on the grounds that it is misplaced, ill-advised, and incompetent, arguing that the Court would effectively be sitting on review of a decision made by a Court of concurrent jurisdiction, which is not permissible in law.

Issues For Determination

5. Upon perusal of the pleadings before this Court, the respective affidavits, their responses, and the submissions filed, this Court finds that only one issue arises for determination, namely:
 - a. Whether this Court has the jurisdiction to entertain this Petition.

Analysis

6. In the case of *Antony Nyaga Njagi v Republic* [2020] KEHC 959 (KLR), the Court stated;

“The jurisdiction of the High court is provided for under article 165(3) of *the Constitution* and includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; and any other jurisdiction, original or appellate, conferred on it by legislation. The High court further has supervisory jurisdiction over subordinate courts donated by Article 165(6) of *the Constitution*. This jurisdiction is expounded under sections 362 and 364 of the Criminal Procedure Code.

 9. In my opinion, there is no law which bestows this court with jurisdiction to review a decision by a court of concurrent jurisdiction and/or its own decision. The appellant having been dissatisfied with the decision of Hon. F. Muchemi, J., he ought to have appealed to the Court of Appeal. This is appreciating the provisions of Article 50(2)(q) of *the Constitution* of Kenya 2010 which guarantees as a tenet of fair hearing the right of a person if convicted, to appeal to, or apply for review by a higher court. Further, this is since it is the court bestowed with jurisdiction pursuant to Article 165(3) of *the Constitution* and section 379(1) of the Criminal Procedure Code.”
7. In *Murunja v Republic* (Criminal Miscellaneous Application E020 of 2025) [2025] KEHC 5785 (KLR) (8 May 2025) (Ruling), the High Court (Chigiti J.) declined an application seeking review of a sentence imposed by a judge of concurrent jurisdiction. He thus reaffirmed the principle that a Superior Court cannot sit on an Appeal or Review of a decision made by a judge of equal rank. The applicant had sought to invoke Section 333(2) of the Criminal Procedure Code in a bid to challenge the sentence. However, the Court held that such an application, absent an appeal or a resentencing



petition after appellate processes have been exhausted, amounted to an improper attempt to re-litigate a matter conclusively determined by a Court of competent jurisdiction.

8. The Court in *Murunja v Republic* (supra) relied on the precedent set in *Daniel Otieno Oracha v Republic* [2019] KEHC 865 (KLR), where it was emphasized that a Judge cannot review or vary the judgment of another judge of equal jurisdiction. Similarly, reliance was placed on *Lawrence Kariuki Njeru v Republic* [2021] KEHC 6118 (KLR), where it was held that such applications should be properly ventilated before the Court of Appeal. Accordingly, the High Court dismissed the application, finding that it lacked jurisdiction to entertain a challenge to the sentence rendered by a fellow High Court judge and that the proper forum for such redress was the Court of Appeal.
9. In *Boniface Gitonga Mwenda v Republic* [2021] KEHC 9246 (KLR), Hon. Lady Justice L. Njuguna reinforced the well-established principle that a High Court judge lacks jurisdiction to review the decision of another judge of concurrent jurisdiction. In that case, the Petitioner had initially appealed to the High Court against the sentence imposed by the Trial Court. The Appeal was dismissed, and the sentence affirmed. Subsequently, the Petitioner returned to the High Court seeking a review of the sentence on the basis that the period spent in pre-trial custody had not been considered under Section 333(2) of the Criminal Procedure Code.
10. Lady Justice Njuguna held that, the High Court, being a court of concurrent jurisdiction to the one that had determined the first Appeal, could not sit in review of that judgment. The Court emphasized that its jurisdiction in relation to review under Sections 362 to 364 of the Criminal Procedure Code is limited to reviewing decisions of subordinate courts, not decisions of courts of equal jurisdiction. The attempt to review a fellow judge's sentence would amount to sitting as an Appellate Court over a peer, a practice the law expressly abhors.
11. In *John v Republic (Criminal Appeal E094 of 2023)* [2025] KECA 45 (KLR) (24 January 2025) (Judgment), the Court of Appeal reaffirmed the limits of the High Court's jurisdiction in criminal matters, particularly with regard to reviewing its own judgments after determination of an Appeal. The Appellant had filed a miscellaneous application inviting the High Court to reconsider and revise the sentence it had imposed while sitting as the first Appellate court. The Court of Appeal held that such an application was procedurally and jurisdictionally improper.
12. The Court of Appeal emphasized that under Article 165 of *the Constitution*, the High Court possesses broad jurisdiction — including original, appellate, interpretive, and supervisory jurisdiction — but this does not extend to reviewing its own decisions or those of a Court of equal standing. Specifically, the revisionary powers conferred by Sections 362 to 364 of the Criminal Procedure Code apply only to decisions of subordinate courts, not judgments of the High Court itself.
13. The Court of Appeal further held that once the High Court determines an Appeal and pronounces judgment, it becomes *functus officio*, meaning it cannot reopen the matter or sit in appeal over its own decisions. The doctrine of *functus officio*, as elaborated in *Raila Odinga & 2 Others v IEBC & 3 Others* [2013] eKLR, and *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989)* [1989] KECA 48 (KLR) (17 November 1989) (Judgment), exists to ensure finality in litigation and to prevent judicial overreach or procedural impropriety. The Appellant therein had invoked Section 333(2) of the Criminal Procedure Code, seeking credit for time spent in remand, and cited *Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others* [2021] KEHC 13027 (KLR). However, the Court held that the High Court could no longer address those issues because it had already issued a final judgment on the Appeal. The Court of Appeal concluded that any challenge to the High Court's judgment, including on sentence, could only be pursued before it — the Appellate Court — under Article 164(3)(a) of *the Constitution*.



14. Finally, relying on *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling), the Supreme Court reaffirmed that jurisdiction flows from *the Constitution* and statute and cannot be assumed or expanded by judicial discretion.
 - (a) Whether this Court has the jurisdiction to entertain this Petition.
15. The Petitioner herein urges this Honourable Court to exercise its jurisdiction and re-open this matter for hearing and determination on its merits pursuant to Articles 22, 23, 48, 50(1), and 165(3)(a), (b), (d)(i) and (ii) of *the Constitution* of Kenya. He invokes the Constitutional mandate of this Court to enforce and protect the Bill of Rights.
16. The Petitioner has brought to the attention of this Honourable Court the proceedings in High Court of Kenya at Murang'a in Criminal Appeal No. 419 of 2013. Following this Appeal, his sentence was enhanced to life imprisonment on 28th November 2013 by Hon. Nzioki wa Makau, J. Thus, the sentence initially imposed by the Learned Trial Magistrate of ten years was enhanced to life imprisonment. He is aggrieved by the said sentence on the ground that life imprisonment, in the circumstances of his case, amounts to cruel, inhuman, and degrading punishment. That it is thus inconsistent with the values and principles espoused in Articles 19(3), 25(a), and 29(d) and (f) of *the Constitution*. The Petitioner clarifies that he does not challenge the conviction as determined by the High Court but instead does contest the life sentence imposed. He argues that it is unconstitutional when all relevant factors are considered within the Constitutional context. The Petitioner submits that the sentence should have been reconciled and harmonized with the provisions of Articles 25(a), 28, and 29(e)(f) of *the Constitution*.
17. The Petitioner therefore moves this Honourable Court under its constitutional jurisdiction and challenges the constitutionality of the life sentence imposed under Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. He submits that the said sentence is unconstitutional and untenable in a democratic society founded on human dignity and the rule of law.
18. It is a well-established principle that Superior Courts of equal and concurrent jurisdiction cannot sit on Appeal or Review of each other's decisions, save as expressly permitted by law. From the foregoing, it is evident that the Petitioner is, in effect, inviting this Honourable Court to declare unconstitutional a decision rendered by the High Court—a Court of concurrent jurisdiction. Such an invitation, which the Petitioner has persistently and erroneously pursued, would amount to this Court assuming Appellate or Review jurisdiction over a decision of a coordinate Court. This is contrary to the doctrine of judicial hierarchy and jurisdictional competence. This Court must, and hereby does, decline that invitation. This Court's power to review sentences is limited to those imposed by subordinate Courts, as provided under Section 362 of the Criminal Procedure Code. The Power to review sentences passed by the High Court lie with the Court of Appeal. To push this Court to do otherwise is to vex the judicial system and to invite this Court to engage in misguided adventurism.
19. Having considered the Petition, the Court finds that on all grounds advanced, the Petition is devoid of merit.

Determination

20. The Petition is hereby dismissed in its entirety for lack of merits.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 14TH DAY OF AUGUST, 2025



NJOROGE BENJAMIN K.

JUDGE

Judgment delivered in the presence of

Petitioner present at Kamiti Prison for the Applicant.

Miss Torosi for the State.

Ms. Susan Nzioka - Court Assistant

