



**Agutu v Republic (Criminal Petition 32 of 2023)
[2024] KEHC 597 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL PETITION 32 OF 2023
DO OGEMBO, J
JANUARY 30, 2024**

BETWEEN

STEPHEN ODHIAMBO AGUTU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Stephen Odhiambo Agutu, has filed a Notice of Motion application herein dated 30.6.2023. The same is indicated as brought under several provision of constitution the Constitution including article 25 (A), 27(1) (2), (4), 28, 29 (A), (F), and 165 (3). It is also shown to be brought under section 216 and 329 of the Criminal Procedure Code, Cap 75 Laws of Kenya. The application seeks revision of the applicant's sentence.
2. In the affidavit in support of the application, the applicant has deponed that he was sentenced to serve 20 years imprisonment for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 Of 2006. He has raised factors of mitigation that he supports his younger siblings. He relies on Machakos Constitutional Petition No. E017/2021, Philip Mueke Mainji & Others v R, and Mombasa, Constitutional Petition No. 88 of 2021.
3. In the submissions, the applicant has submitted that he had appealed against the sentence. That the High Court, however dismissed his appeal and in the process upheld his sentences. This was in Siaya High Court Criminal Appeal No. 128/2017.
4. In the same submissions, the Appellant has made submissions that seem to challenge the findings of the High Court on his conviction and sentence.
5. He relies on the court of Appeal case of Godfrey Mudegava v R [2004] eKLR on the duty of the appellate court, i.e to re-evaluate facts of the case and the evidence. He has gone ahead to retender the evidence as given by the Prosecution witnesses, especially PW2.



6. I have considered also the short submissions of the prosecution that the applicant can only appeal to the Court of Appeal and that this application be dismissed.
7. I have considered this application, the submissions made and authorities relied on by the applicant and the short response of the prosecution. I have also perused the record of the proceedings both of the trial court and the High Court on Appeal.
8. The record of the proceedings of the lower court show that on 3.10.2016, prior to his sentence, the applicant was accorded the opportunity to and indeed mitigated. In sentencing him, the court noted:

“I have considered the charge and the mitigation by the accused person who is a first offender...”
9. His subsequent Appeal to the High Court on both the conviction and sentence was subsequently dismissed by the Hon. Majanja J. on 19.2.2018, in Siaya Criminal Appeal No. 128 of 2016.
10. By way of this application, the applicant has tried to convince this court to reconsider the evidence tendered by prosecution witnesses and probably come to a different conclusion from the decisions of both the trial court and the 1st appellate court. In doing this, the applicant is obviously inviting this court to sit on appeal on the decision of the Hon. Justice Majanja, a Judge of concurrent jurisdiction.
11. Neither constitution the Constitution nor any written law accords to this court any powers of appeal or revision over any findings or orders of a court of concurrent jurisdiction. The applicant only recourse is to move a court of superior jurisdiction.
12. I therefore find this application of the applicant dated 30.6.2023 totally incompetent and lacking in any merit. I dismiss the same wholly.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF JANUARY, 2024

D.O. OGEMBO

JUDGE

30/1/2024

Court:

Ruling read out in presence of applicant and Ms. Mumo for State.

D.O. OGEMBO

JUDGE

30/1/2024

