



**Mutembei v Republic (Miscellaneous Criminal Case E101 of 2023)
[2024] KEHC 577 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL CASE E101 OF 2023
HM NYAGA, J
JANUARY 30, 2024**

BETWEEN

PETER MBAABU MUTEMBEI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged jointly with Morris Mbugua Mutegi in Nakuru Chief Magistrate's Criminal Case Number 3101 of 2012 with the offence of Robbery with Violence Contrary to section 295 as read with 296 (2) of the *Penal Code*.
2. In the alternative they were charged with the offence of Handling Stolen Motor Vehicle Contrary to section 322 (2) of the same code.
3. The particulars are that on the September 8, 2012 at Nakuru Rift Motors' Bazaar in Nakuru District within Rift Valley Province jointly with others not before court while armed with dangerous weapon namely pistol they robbed Michael Nganga Josphat of motor vehicle registration number xxxx Toyota Premio valued Kshs. 1.25 million, one mobile phone make Nokia valued Kshs 14,000/=, cash Kshs. 15,000/= all valued at Kshs. 1,282,900/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Michael Nganga Josphat.
4. In the alternative charge it was alleged that on September 8, 2012 at Kiti village in Nakuru within Rift Valley Province, otherwise than in the course of stealing, they dishonestly assisted in the retention of Motor Vehicle Registration Number xxxx for the benefit of one Njoroge knowing or having reasons to believe it to be stolen motor vehicle.
5. After a full trial the appellant together with his co-accused were each found guilty of the offence of Robbery with Violence, convicted and sentenced to life imprisonment vide the learned trial court's Judgment of April 30, 2020 and Sentence Ruling of May 6, 2020 respectively.



6. The applicant was aggrieved by the conviction and the sentence and lodged an appeal before this court through Criminal Appeal No. 12 of 2020. This court in a judgement delivered on 19th October, 2022 upheld his conviction by the lower court but reviewed the Applicant's sentence from life imprisonment to a definite term of 30 years' imprisonment.
7. Subsequently, the Applicant has filed the present application under certificate of urgency expressed to be brought under article 43(1)(a) of *the Constitution* of Kenya and section 354 and 364 of the *Criminal Procedure Code* seeking review of his sentence to non-custodial sentence on grounds that he suffers from hernia and requires proper medical care and strict diet to avoid the condition from worsening.
8. In his supporting affidavit, he averred that he is prepared to abide by the terms as may be imposed by this Honourable Court for review of his sentence as prayed.
9. I heard the matter on November 30, 2023. The defence counsel told court that this is purely a discretionary matter as the applicant wishes to seek medical treatment abroad.
10. The state counsel urged this court to dismiss the application on grounds that the Applicant's health condition was raised in the appeal before this court and the court reviewed his sentence and considering the Applicant is seeking for further resentencing, the court clothed with jurisdiction to determine his application is the Court of Appeal.

Analysis & Determination

11. I have considered the material before me, as well as the submissions for each of the parties. From the arguments advanced by the applicant and the respondent, two issues arise for determination, namely:
 - a. Whether this court has jurisdiction to hear and determine this Application and;
 - b. Whether the review order sought should be granted.
12. It is trite law that a court of law can only exercise jurisdiction as conferred to it by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Further, a court cannot expand its jurisdiction through judicial craft. (See *Samuel Kamau Macharia & Another vs KCB & 2 Others* App. No. 2/2011).
13. The jurisdiction of the High court is provided for under article 165(3) of *the Constitution* and includes;
 - a. Unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights;
 - b. Appellate jurisdiction;
 - c. Interpretative jurisdiction; and
 - d. Any other jurisdiction, original or appellate, conferred on it by legislation.
 - e. 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.
14. The Court of Appeal in *Bellevue Development Company Ltd vs Francis Gikonyo & 7 others* [2018] eKLR the court stated as follows: -

“I have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges,



who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status.

15. Section 362 of the [Criminal Procedure Code](#) provides as follows:

“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.”

16. The powers of the High Court to exercise revisionary jurisdiction are provided for under section 364 of the [Criminal Procedure Code](#) which provides for the following;

“In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge the High Court may:

(a) In the case of a conviction exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358 and may enhance the sentence.

(b) In the case of any other order other than an order of acquittal alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.”

17. The power for revision vested in this court under section 362 of the [Criminal Procedure Code](#) is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court.

18. From the above, it is clear that no law bestows this court with jurisdiction to review a decision by a court of concurrent jurisdiction and/or its own decision.

19. The respondent argued that considering that this court had already reviewed the sentence imposed by the trial court of life imprisonment to 30 years’ imprisonment, the proper court to determine this application is the Court of appeal.

20. I note my sister Justice M.T Matheka in [Mutembei Republic](#) (Criminal Appeal 12 of 2020) [2022] KEHC 9892 (KLR) (22 July 2022) (Ruling) conclusively dealt with the issues raised in this application and revised the Applicant’s sentence to a definite term of 30 years’ imprisonment. She stated as follows:

“Evidently, the allegations that the appellant though out on bond on account of illness were so serious that the learned trial magistrate found them to be compelling reasons to deny the appellant bond. There was no appeal or review.

When he came on an application for bail pending appeal it was the same record that worked against him.

But what stands out from that record is that the appellant did not deny or challenge what his own surety stated on oath, he only asked the court to allow him to get another surety



which the court declined. Why is this important yet the issue is sentencing? It goes to show that when the learned trial magistrate issued the sentence, the court was well aware of the appellant's alleged illness. The learned trial magistrate took into consideration the fact of the appellant's sickness.

This was not a cause of re-sentencing, it was an appeal against conviction and sentence. The Learned trial magistrate did not sentence the appellant to death, as required by section 296 (2) of the *Penal Code*, but sentenced him to imprisonment for life, in deference to Muruatetu, hence the appellant's case does not come into the purview of the Resentencing in Muruatetu.

Be that as it may, the review of sentence on appeal is allowed by the law but only within the specified parameters again in agreement with Nicholas Mukila Ndeti, there is room taking into consideration the circumstances of the offence, both the aggravating and mitigating circumstances; the motor vehicle was recovered, the victim did not sustain very serious physical injuries serious but carries trauma to date, however the appellant was in the company of others, they were armed with a pistol, and fed the victim a poisonous substance.

The Kenya Prisons Service is a correctional facility whose mission is 'To contain offenders in humane safe conditions in order to facilitate the administration of justice, rehabilitation, social integration and community protection'. Its motto is Kurekebisha na Haki. The appellant has demonstrated through his conduct during the trial in the subordinate court that, that despite his health complaints, he requires containment for purposes of correction and rehabilitation.

In view of my finding that the learned trial magistrate was alive to his complaint, bearing in mind the numerous authorities on this point, I consider a review of the life sentence to 30 years' imprisonment to run from the date of his re arrest in 2019 proportionate.

In the end, the appeal is disposed of as follows: the conviction is sustained. The sentence is reduced to 30 years' imprisonment to run from 2019."

21. The court was acutely aware of the Applicant's medical condition when it revised its sentence. The same grounds have been advanced herein by the Applicant in seeking review of his 30 years sentence to a non-custodial sentence. It is on this premise that I hold that this court is bereft of jurisdiction to grant the review order sought.
22. As such, I find and so hold, that the application is incapable of being granted for want of jurisdiction and the same is hereby dismissed.
23. Orders accordingly.

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

H. M. NYAGA,

JUDGE.

In the presence of;

Murunga for state

C/A Jeniffer

Applicant present

