



**AWS v Republic (Criminal Revision E013 of 2024)  
[2024] KEHC 10445 (KLR) (21 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10445 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL REVISION E013 OF 2024  
FN MUCHEMI, J  
AUGUST 21, 2024**

**BETWEEN**

**AWS ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application for determination is undated and was filed on 2<sup>nd</sup> January 2024 in which the applicant seeks for orders for review of sentence reviewed.
2. The applicant was convicted by Thika Chief Magistrate in Criminal Case (Sexual Offences) No. 54 of 2019 with the offence of indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006 and was convicted to serve ten (10) years imprisonment. The applicant states that he did not appeal to the High Court and is seeking for this court to review his sentence and grant him a lesser sentence.
3. The respondent states that the applicant was charged with the offence of incest and an alternative charge of committing an indecent act with a child. The applicant was found guilty of the alternative charge and sentenced to ten (10) years imprisonment.
4. The respondent states that from the record of appeal the proceedings of 23<sup>rd</sup> December 2019 the applicant asking for court’s leniency and that he was remorseful. The trial court thereafter ordered for a presentence report. On 13<sup>th</sup> February 2020, during sentencing, the trial court considered the mitigation of the applicant and the pre-sentence report prepared by the probation officer. The trial court further took into consideration of the time spent in custody by the applicant and sentenced the applicant to ten years imprisonment.



5. The respondent argues that both the mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial court. The respondent further states that the applicant attempted to not only defile a minor but the victim was his own daughter.
6. The respondent argues that the applicant's affidavit is not commissioned by a commissioner for oaths and it is therefore defective.
7. The respondent states that the sentence passed by the trial court was proper and legal as it considered the aggravating and mitigating circumstances, presentence report and the time spent in custody by the applicant.

### **The Applicant's Submissions**

8. The applicant submits that the offence as prescribed in Section 11(1) of the *Sexual Offences Act* calls for a sentence of not less than ten years conviction. The applicant relies on the case of *Edwin Wachira & 10 Others v DPP* (no citation given) and states that he seeks to have his sentence reviewed downwards and/or for granting of a non-custodial sentence to serve under probation on the remaining part of his sentence as provided in Section 4(2) of the *Probation Offenders Act*.
9. The applicant submits that he is a first offender and did not fully understand the consequences of his irresponsible behaviour but he has since learnt his lesson the hard way. The applicant further states that he is remorseful, regretful and apologetic for his irresponsible behaviour.
10. The applicant relies on the decision in *Muruatetu* 1 and Article 50(2)(p) of the *Constitution* and urges the court to mete out the least severe punishment for his offence.
11. The applicant submits that he has continued to have a positive social engagement with his family and therefore does not pose a threat to his family and society too at large. The applicant further submits that he has been of exemplary amiable conduct with no indiscipline, he has adhered to the strict disciplinary protocols as affirmed by the recommendation attached from the officer in charge Nyeri medium prison. Thus he states that he has been of good character and morals.
12. The applicant submits that he has been incarcerated from 20<sup>th</sup> May 2019 which amounts to over 5 years within which time he has learnt his lesson the hard way. The applicant further states that he has been engaging himself in meaningful rehabilitation programs offered by the correctional services department in carpentry and Certificate in Prisoners Journey Gold Level offered by Prison Fellowship International and Bible League International. Having been equipped with the smart farming skills in agroforestry will be of great importance once the applicant is released. He therefore submits that he has reformed and would be of good character and useful to his family and society at large in building the nation at large.

### **The Respondent's Submissions**

13. The respondent reiterates what she deposed in her affidavit and urges the court to uphold the sentence of the trial court.



## The Law

14. This court is empowered by Article 165(6) of the Constitution of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.

15. The applicant has come to this Honourable court by way of review provided for under Article 50 of the Constitution. It provides:-

(2) Every accused person has the right to a fair trial, which includes the right:-

(q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.

16. Section 362 of the Criminal Procedure Code provides:-

The High Court may call 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.

17. Section 364(1) of the Criminal Procedure Code provides:-

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 his 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 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.

18. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of Joseph Nduvi Mbuvi v Republic [2019] eKLR:-

“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on



to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

19. Similarly Nyakundi J in *Prosecutor v Stephen Lesinko* [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows:-
  - a. Where the decision is grossly erroneous;
  - b. Where there is no compliance with the provisions of the law;
  - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
  - d. Where the material evidence on the parties is not considered; and
  - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
20. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.
21. The applicant herein was convicted of the offence of committing an indecent act with a child under Section 11(1) of the *Sexual Offences Act* and was sentenced to ten years imprisonment. According to the facts of the case, the applicant is the father to the complainant and on the material day, the complainant was asleep on the sofa when the applicant went to the sofa naked and tried to remove the complainant’s trousers and she refused by pushing him with her legs. The applicant inserted his hands into the complainant’s blouse and touched her breasts. As they struggled, they heard the door being knocked and it was the complainant’s mother who had gone back to pick her identity card.
22. The penalty for indecent act with a child under Section 11(1) of the *Act* is an imprisonment term for not less than 10 years. The section provides:-

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction for a term of not less than ten years.
23. Ten years imprisonment is the minimum sentence and therefore the least severe sentence contemplated in Article 50(2)(1) of the *Constitution*. The Article provides:-

Every accused person has the right to a fair trial, which includes the right-

To the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.
24. The trial court had the discretion to impose either ten years imprisonment or even more in the event that they were in existence. In this case, there were no aggravating circumstances and as such the court imposed the minimum sentence. Applicant has not said that the sentence is manifestly harsh and excessive, or that the sentence is illegal or improper or that the trial court acted on the wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceeding was irregular or in violation of his right or fundamental freedom.



25. The applicant was convicted and sentenced on 13<sup>th</sup> February 2020 thus he spent about 5 years months in custody since his arrest. The only mitigating factor on record is that the applicant is remorseful. In his submissions, the applicant states that he has transformed by undertaking some courses to better himself while in custody. I do not find these grounds sufficient to warrant interference of the trial court in sentencing or warrant upsetting the sentence imposed by the lower court. The sentence imposed by the lower court was legal and just and fair given the circumstances of the case.
26. Consequently, I find this application not successful and I dismiss it accordingly.
27. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21<sup>ST</sup> DAY OF AUGUST 2024.**

**F. MUCHEMI**

**JUDGE**

