



REPUBLIC OF KENYA



**Ndura v Republic (Criminal Revision E119 of 2022)
[2023] KEHC 527 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E119 OF 2022
GL NZIOKA, J
JANUARY 24, 2023**

BETWEEN

ISAAC NGUGI NDURA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Chief Magistrate's Court at Naivasha charged vide Sexual Offence No 26 of 2020, with the offence of sexual assault contrary to section 5 (1)(a)(i) as read with section 5 (2) of the *Sexual Offences Act* (herein "the Act"). He was further charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Act* and an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Act*. The particulars of all the charges are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. The prosecution called seven (7) witnesses and at the close of the prosecution case, the trial court ruled that he had a case to answer and placed him on his defence. He did not call any witnesses during the trial.
3. At the conclusion of the entire case the trial court acquitted him on the first count but convicted him of the offence of attempted defilement and sentenced him to serve a term of ten (10) years imprisonment.
4. By a notice of motion application filed in court on 23rd August 2022, pursuant to Article 50 (2) (p) (q) of the *Constitution* of Kenya, the applicant is seeking for sentence review, so that the subject sentence be reduced or the court grant any other relief it may deem appropriate.
5. The application is supported by the applicant's affidavit in which he avers as herein below reproduced: -
 - a. That, he was charged with the offence of attempted defilement contrary to section 9 (1) as read with section 9 (2) of the *Sexual Offences Act* in SO No



26/2020 at Naivasha Chief Magistrate's Court and sentenced to serve ten (10) years imprisonment from the date he was remanded 14th May 2020.

- b. That he pleaded not guilty to the charges.
 - c. That he was remorseful of the offence and his incarceration.
 - d. That in regard to order (1) and (2) of the High Court judgement in Petition No E017 of 2021, in which the mandatory minimum sentence was declared unconstitutional. I seek for sentence review only.
 - e. The court is seized of competent jurisdiction to hear and determine this application under Article 165 (3) (b) of the *Constitution* of Kenya to hear and determine this matter.
6. He further relies on a document filed under the heading of: "Memorandum of Sentence Review" in which he states: -
- a. That, I am a first offender.
 - b. That, I have no pending appeal.
 - c. That, I am remorseful of my offence and have learnt to be a law abiding citizen and rehabilitated well enough.
 - d. That, I am from a poor but humble family background.
 - e. That, I am the sole breadwinner of my family and my incarceration has placed them in a very difficult situation.
 - f. That, I am not appealing against sentence and conviction but applying for a review of sentence.
7. The applicant further filed submissions on the 12th October 2022 wherein he reiterates mitigation that, he is a first offender; sole breadwinner of his family and since his incarceration his children have not attended school due to lack of school fees. That, he has since become a law-abiding citizen and obtained knowledge, skill and expertise that will be useful to the Society.
8. He submits that, despite the mitigation he offered, the trial court stated that it was bound by minimum mandatory sentence. He cited the case of, *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* Machakos High Court Petition No No E017 of 2021 where the court held that the minimum mandatory sentences under the *Sexual Offences Act* are unconstitutional to the extent they deny the trial court discretion to determine the appropriate sentence to impose.
9. He also cited the case of; *Edward Gikundi Ndege v Republic* (2021) eKLR where the appellant's sentence was reduced to five (5) years. He argues that, the courts frown on mandatory sentence as it places limitations on judicial discretion and relied on the decision in *S v Toms* 1990 (2) SA 802 (A) and *S v Jansen* 1999 (2) SACR 368 (C).
10. The application was opposed vide submissions dated 11th October 2022, filed by the respondent wherein it is submitted that, the trial court considered the circumstances of the offence and applicant's mitigation before passing the sentence and used its discretion fully.
11. Further, the applicant does not deserve a lighter sentence as he was charged with the offence of; sexual and gender based violence offence targeting a child, which is primary consideration in sentencing.



12. That the Supreme Court of Kenya in Petition 15 of 2015 *Francis Karioko Muruatetu and Another v Republic* recognized the objectives of sentencing as per the Judiciary Sentencing Guidelines which include deterrence. That in the present case, a deterrent sentence is appropriate, therefore the ten (10) year imprisonment is sufficient.
13. Pursuant to hearing the application, the court ordered for a pre-sentence report and a report dated 23rd September 2022, was filed. The report indicates that, the appellant is aged 45 years and his parents are deceased. That he has a wife, five (5) children, (three of who school going) and nine (9) siblings, some of whom are deceased.
14. Further he is remorseful of his actions and that he had learnt his lesson and seeks for leniency. Similarly, his elder brother, two elder sons and wife, are praying for leniency in sentence. Furthermore, the Village elder has no objection to the sentence review.
15. That at the time of the offence the applicant was a farmer and also worked as a casual. However, he has resumed his education in Prison and is in class 7. He has also taken a bible course: The Prisoner's journey. He has no case of indiscipline and is dedicated to his studies.
16. However, the victim's father was opposed to the sentence review. That he is bitter in that he has fought for the right of his child who at the time of the offence was eight (8) years old. Further, he has incurred considerable costs during the hearing of the case, which has never been reimbursed by the family of the applicant.
17. I have considered the application in the light of the material before court and I note that, the law that guides the revisionary power of the High Court is provided for under sections 362 of the *Criminal Procedure Code* (herein "the Code"), which states 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.”

18. However, the section should be read together with section 364 of the *Code* which provision states as follow: -

- “ (1) 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 sections 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: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.



- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) 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.”

19. It is therefore clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be involved where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.
20. As such it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major S.S Khanna v Brig F.J Dillon* 1964 AIR 497, 1964 SCR (4) 409).
21. Further, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another v Republic* [2017] eKLR, *Republic v Everlyne Wamuyu Ngumo* (2016) eKLR, *Public Prosecutors v Muhavi Bi Mond Jani & Another* 1996 4 LRC 728, 743-5, *DPP v Samuel Kimuche*.
22. In the instant matter, the applicant was convicted and sentenced over an offence under section 9(1) as read with section 9 (2) of the *Sexual Offences Act* that as follows: -
 - (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
 - (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.
23. The applicant was sentenced ten (10) years to imprisonment which is the minimum sentence applicable. The sentence was therefore within the law and is legal, proper and correct. I find no basis to interfere with the same.
24. As regards the argument by the applicant that the learned trial court was compelled to sentenced him to ten (10) years imprisonment since it is a mandatory minimum sentence, I note from the trial court’s record that the learned trial magistrate stated as follows, before sentencing the applicant: -

“I have considered the accused person’s mitigation. He is a first offender. However, in view of the nature of the offence, a custodial sentence is the most appropriate so as to serve as a deterrence.

I hereby sentence the accused to 10 years in prison.



The period he has been in custody to be considered.”

25. It is clear from the aforesaid that the issue of minimum mandatory sentence did not arise. The trial court considered more of prevalence of the offence and need for deterrence. Furthermore, the period the applicant was in custody was also considered.
26. The upshot of the aforesaid is that, the application has no merit and I accordingly dismiss it.
27. It is so ordered.

Dated, delivered and signed on this 24th day of January 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person

Ms Kirenge for the Respondent

Ms Ogutu: Court Assistant

