



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwanyalo v Republic (Criminal Revision E260 of 2022)  
[2023] KEHC 433 (KLR) (23 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 433 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL REVISION E260 OF 2022  
JN ONYIEGO, J  
JANUARY 23, 2023**

**BETWEEN**

**CASIAN MWAKIO MWANYALO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was on March 4, 2021 arraigned before Wundanyi law courts charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. Particulars were that on the 11<sup>th</sup> day of February 2021 at around 1230 hours at [Particulars Withheld] village, Mwatate sub-county intentionally caused his penis to penetrate the vagina of IM a child aged 13 years.
2. He was further charged with the alternative count of committing an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. Particulars were that on 11<sup>th</sup> day of February 2021 at around 1230 hours at [Particulars Withheld] village, Mwatate sub-county within Taita Taveta County intentionally touched the vagina of IM a child aged 13 years with his penis.
3. Having returned a plea of not guilty, the matter proceeded to full trial. Upon conclusion of the trial, the applicant was found guilty and convicted of the main count on September 16, 2021. In exercise of its discretion, the court sentenced him to 5 years imprisonment.
4. Vide a chamber summons filed on August 1, 2022, the applicant moved to this court seeking revision of the sentence imposed on grounds that the court did not take into account the period spent in remand custody.
5. During the hearing, the applicant merely urged the court to consider his prayer by directing that the period spent in remand be deducted from the sentence imposed. Mr Sirima for the state did not oppose



the application but instead observed that the applicant should appreciate that he is already enjoying a lenient and illegal sentence.

6. I have considered the application herein and response thereto. This court has been summoned to exercise its discretion to revise the impugned sentence. It is trite law that this court is empowered to exercise its supervisory powers under article 165(6) and (7) of the Constitution to call for a subordinate court's record so as to make any directions or order to ensure fair administration of justice. Besides, under section 362 and 364 of the Criminal Procedure Code, the High Court is empowered to call upon and examine the record of criminal proceedings from a subordinate court so as to satisfy itself as to the correctness, legality, propriety on sentence passed or order made and on the regularity of the proceedings.
7. Courts have time and again held that sentencing is at the trial court's discretion and that an appellate court can only interfere if proved inter alia; that the trial court erred by applying wrong principles of the law or that the sentence was excessive. See the case Bernard Kimani Gacheru v Republic [2002] eKLR.
8. In the instant case, the applicant was sentenced to serve 5 years imprisonment. Although the state is not opposed to the application, it is concerned with the lenient sentence imposed by the court. Unfortunately, there is no appeal lodged against that sentence.
9. The issue of imposition of minimum sentences in sexual offences has since been settled by the court of appeal in the case of Joshua Gichuki Mwangi v Republic Criminal Appeal No 84 of 2015 at Nyeri where the court held that a trial court's sentencing discretionary power cannot be taken away through legislation. On that account, the sentence imposed cannot be said to be unlawful as the court exercised its discretion. See also Korir v Republic (Criminal Appeal 100 of 2019) [2021] KECA 305 (KLR).
10. The appellant took plea on March 4, 2021 and was sentenced on September 16, 2021. He was therefore in remand custody for six months and twelve days. In compliance with section 333(2) of the CPC, the applicant is entitled to deduction of the period he stayed in custody.
11. From the record, it is clear that the court did not take into account the period spent in remand custody. Accordingly, the application is allowed to the extent that the period spent in remand custody amounting to six months and twelve days be taken into account when computing sentence.

Right of appeal 14 days

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23<sup>RD</sup> DAY OF JANUARY, 2023.**

**JN ONYIEGO**

**JUDGE**

