



REPUBLIC OF KENYA



KENYA LAW
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**Mwarigha v Republic (Criminal Revision E320 of 2022)
[2023] KEHC 392 (KLR) (23 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL REVISION E320 OF 2022
JN ONYIEGO, J
JANUARY 23, 2023**

BETWEEN

LISTON MWARIGHA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was on 19th February 2020 arraigned before Cm’s court Voi charged with the offence of Sexual assault c/s 5(1)(a)(1)(2) of the *sexual offences Act* no 3 of 2006. Particulars were that on the 27th day of October 2019 at around 800Am at [Particulars withheld] in Voi sub county within Taita Taveta County unlawfully used his fingers to penetrated the vagina of EM a girl aged 8years.
2. In the alternative he was charged with indescent act with a child contrary to section 11(1) of the *sexual offences Act* No.3 of 2006. Particulars were that on 27th day of October 2019 at around 8Am at [particulars withheld] in Voi Sub County within Taita Taveta County intentionally and unlawfully touched the vagina of EM a child aged 8years with his fingers.
3. Having returned a plea of not guilty, the matter proceeded to full trial. He was subsequently convicted of the main count on 27th January 2022 and sentenced to 15 years imprisonment. Aggrieved with the sentence, he wrote a letter addressed to the presiding judge on 8th November, 2022 seeking revision of the sentence on grounds that; he was a first offender; he was remorseful; that he be granted the minimum sentence and that the period spent in remand custody be taken into account.The state conceded that the court did not take into account the period spent in custody for about 11 months. I have considered the application herein and the response thereof. I further have considered the seriousness of the offence committed which attracts a minimum penalty of 10years.
4. 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 any 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.

5. I am alive to the fact that sentencing is at the discretion of the trial court. However, this court in its appellate capacity is empowered to intervene where the sentence meted out is illegal or excessive. See *Shadrack Kipkoech Kogo =Versus= Republic* Criminal Appeal Number 25 of 2003 where the Court of Appeal held that sentencing is at the discretion of the trial court and that an appellate court can only interfere or intervene if it is shown that the trial court took into consideration irrelevant factors, applied wrong principles of the law or that the sentence was excessive and therefore an error.
6. The applicant is aggrieved with the sentence which he terms as excessive. It is clear from the record that the applicant was a first offender and remorseful hence should have benefitted from the minimum sentence provided for under the relevant penalty section. Accordingly, am persuaded to substitute the sentence of 15 years with 10 years' imprisonment. In the spirit of Section 333(2) of the CPC, the applicant shall have the period of 11 months spent in remand custody taken into account when computing the 10 years sentence pronounced by this court. Sentence to start running from the date the trial court passed the impugned sentence.

Right of appeal 14 days

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF
JANUARY, 2023**

J.N.ONYIEGO

JUDGE

