



REPUBLIC OF KENYA



**Waithaka v Republic (Miscellaneous Criminal Application
E082 of 2022) [2023] KEHC 1764 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1764 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION E082 OF 2022**

GL NZIOKA, J

FEBRUARY 27, 2023

BETWEEN

REUBEN WAIREGI WAITHAKA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant is seeking for orders that the sentence meted against him vide in Criminal Case No. 113 of 2009, at the Senior Principal Magistrate’s Court, Naivasha, of thirty (30) years be reviewed to a lenient sentence pursuant to; article 50(2) (p)(q) of the Constitution and that the court invokes the provisions of section 333(2) and take into account the period he was in custody while on trial.
2. The respondent did not file any response to the application. I have considered the application and I note that, the applicant was charged in two counts with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (herein “the Act”) and indecent act with a child contrary to section 11(1) of the Act, in two alternative counts. He was subsequently found guilty of the offences of defilement and sentenced to serve thirty (30) years imprisonment on each count. The sentence was ordered to run concurrently.
3. However, he appealed against the decision vide High Court Criminal Appeal No. 173 of 2011 at Nakuru and on November 6, 2012, the appeal was marked as withdrawn.
4. I note that from the application the applicant is not challenging the conviction in the lower court matter as evidenced by the withdrawal of the appeal and only seeks for sentence review.



5. The provisions that govern sentence review are found under section 362 and 364 of the [Criminal Procedure Code](#) which states that: -

“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.”

6. However, that 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.”

7. Pursuant to the aforesaid sentence may be reviewed where the same is incorrect, irregular, improper and illegal. The applicant is charged under section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006 which states: -

8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.



8. It therefore follows that the sentence imposed herein of 30 years is lawful and proper. I cannot therefore interfere with it. However, the applicant also wants the court to invoke the provisions of section 333(2) which states as follows; -

“Subject to the provisions of section 38 of the Penal Code (cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”

9. I have considered the proceedings of the lower court and I note that before the court sentenced the applicant it remarked that:

“The offence the accused is charged with are a violation of the dignity of a girl child. He deserves a deterrent sentence. The court herein stated;

“Count 1: Accused will serve 30 years’ imprisonment.

Count II: Accused is sentenced to serve 30 years’ imprisonment.

Order: Right of appeal 14 days. Sentence to run concurrently”.

10. It is therefore clear that the court did not indicate whether the period the applicant spent in custody was considered. The committal warrant in the trial court file shows he was in custody throughout the trial.

11. He was arrested on the 9th July 2009 and convicted and sentenced on 31st March 2010. A period of one year and eight months. I therefore direct the same be taken into account, but it shall not attract remission. For clarity he shall serve 30 years less 1 year 8 months to 28 years and 4 months which is the period subject to remission (if any).

12. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 27TH FEBRUARY 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:-

Applicant virtually

Mr. Atika for the Respondent

Ogutu- Court Assistant

