



REPUBLIC OF KENYA



**Kinuthia v Republic (Criminal Revision E017 of 2021)
[2023] KEHC 3680 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E017 OF 2021
GL NZIOKA, J
MARCH 24, 2023**

BETWEEN

GEOFFREY KIOKO KINUTHIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged before the Chief Magistrate's Court at Naivasha *vide* Criminal Case Sexual Offences Case No. 68 of 2015 with the offence of; sexual assault contrary to section 5 (1)(a)(i)(2) of the *Sexual Offences Act* No 3 of 2006, in count 1 and an alternate count of committing an indecent act contrary to section 11A of the *Sexual Offences Act* No 3 of 2006.
2. He was further charged with offences of defilement contrary to section 8 (1) as read with section 8 (3) of *Sexual Offences Act* No 3 of 2006. In count 2 and 3 with an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006, to both count 2 and 3. The particulars of each count are as per the charge sheet.
3. He pleaded not guilty and the matter proceeded to full hearing. At the conclusion of the trial he was acquitted on counts 1, 2 and 3 but was found guilty of the alternative charge and sentenced to a term of ten (10) years imprisonment.
4. He now seeks for review of that sentence through an application filed herein on November 4, 2021, supported by the grounds in a document entitled "Memorandum of Sentence Review" and his Affidavit where he avers that, he is a first offender, remorseful and has learnt to be a law abiding citizen.
5. That he comes from a poor family background and is the sole breadwinner thereof and his incarceration has placed them in a difficult position. He prays that pursuant to section 333 (2) of the *Criminal Procedure Code* the court takes into account the two (2) years and six (6) months he spent in custody during trial and reduces the sentence.



6. However, the respondent opposed the application *vide* Submissions dated October 12, 2022, and argued that the sentence meted out is lenient considering that the offence was committed against a minor aged 4 years old. That, the applicant does not deserve a reduction of his sentence as he is a predator of young children and does not deserve to be in society. Therefore, the sentence should be upheld.
7. In addition, the Probation department filed a pre-sentence report dated November 30, 2021, which indicates the 43 years old and married with two (2) children though separated with his wife and the children currently reside with his sister at Machakos. That he attended school until class 8 and trained in fishing and before his arrest he was working as a casual at a horticultural flower farm and as a fisherman.
8. That he is positively reformed and has no issue with his ten (10) years sentence and only applies for revision of sentence. Further, his family members' states that he does not have any negative record and pray for a favourable review.
9. That similarly, the community report indicates that he does not a record of crime and no underlying threat if he is released on non-custodial sentence. Further he has been deployed to the grass-cutting at the prison and obtained several certificates during his four (4) years in prison. He no record of indiscipline.
10. The probation report recommends the period the applicant spent in remand be included in his sentence. However, the complainant is said to have relocated to another location after the offence and could not be traced.
11. In considering the application, I find that 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.”

12. However, the provisions 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.”

13. Pursuant to the aforesaid, 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 invoked 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.

14. In the instant matter I note that, the applicant was convicted and sentenced over an offence under section 11 (1) of the *Sexual Offences Act* No 3 of 2006, that provides as follows: -

“ 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 to imprisonment for a term of not less than ten years”.

15. As such the sentence meted out is legal and lawful. However, the appellant has invoked the provisions of section 333(2) of the Code which states: -

“(2) 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”

16. In the instant matter the appellant was arrested on November 14, 2015 and arraigned in court November 16, 2016. He was in custody during trial. The trial court’s record does not indicate whether that period in custody was to taken into account.

17. I therefore direct that the appellant’s sentence runs from the date of arraignment in court on November 16, 2015. The application otherwise fails.

18. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 24TH DAY OF MARCH, 2023.

GRACE L NZIOKA

JUDGE

In the presence of:

Appellant present in person, in court virtually



Mr Atika for the Respondent

Ms Ogutu: Court Assistant

