



REPUBLIC OF KENYA



**AMK v Republic (Criminal Revision E177 of 2021)
[2022] KEHC 10996 (KLR) (3 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 10996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E177 OF 2021
FN MUCHEMI, J
AUGUST 3, 2022**

BETWEEN

AMK APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The applicant seeks review of his sentence imposed on 12th July 2021 by Karatina Principal Magistrate in S.O case No.15 of 2020. The applicant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. he was committed to serve three (3) years in a borstal institution. At the time of sentencing, the applicant was 15 years of age and he was sentenced to serve three years in Borstal Institution in Mombasa. The applicant seeks to have his sentenced reviewed to a non-custodial sentence so that he may join Secondary School. He states that he has undergone psychological counselling at the institution and he is very remorseful for having committed the offence.

Issue for determination

2. The issue for determination is whether the applicant is entitled to the orders sought in his application based on the provisions of Article 165(6) of the [Constitution](#) and under section 362 of the [Criminal Procedure Code](#).

The Law

3. Article 165 of the [Constitution](#) empowers this court to exercise supervisory jurisdiction over subordinate court. The said provision states:-



- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
4. Section 362 of the [Criminal Procedure Code](#) provides:-
- The High Court may call 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.
5. In respect of sentencing of children in conflict with the law, Section 191(1) of the [Children's Act](#) is an omnibus provisions and provides that:-
1. In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence and that court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways:-
- (e) If the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments.
6. As regards sentencing of youthful offenders, [Borstal Institution Act](#) Section 2 describes a youthful offender as:-
- “a person who has been convicted of an offence punishable with imprisonment and has been found by the court, at the time of such conviction, to have attained the age of 15 years but to be under the age of 18 years”
7. Section 5 and Section 191 of the [Children's Act](#) requires the court to consider several things while sentencing a youthful offender as was held by the Court of Appeal in the case of *R vs Dennis Kirui Cheruyoit* [2014] eKLR stated:-
- When dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence.
8. I have perused the judgement of the trial court and noted that the court applied the relevant provisions of the law. The gravity of the offence and the nature of injuries sustained by the victim; the circumstances of the offence, the character of the offender were also considered in sentencing the applicant. The victim in this case was a child of four (4) years and the injuries she sustained in the sexual assault were grave and damaging to the child of tender years. The respondent conceded to this application for review of sentence. In my considered view, the respondent failed to appreciate the gravity of the offence and that the trauma the child was subjected to was immense in nature.
9. Section 362 and 364 of the [Criminal Procedure Code](#) will be invoked in cases where the trial magistrate committed any irregularity, impropriety, mistake or illegality. In my view, the trial magistrate did not go contrary or beyond the letter of the law in sentencing the applicant. All the relevant guidelines in sentencing were followed.



10. At the time of sentencing on 12th July 2021, the applicant was aged sixteen years. A youthful offender can only be held in a borstal institution for three years until he/she attains the age of eighteen years. The applicant at the age of sixteen(16) was sentenced to serve three years, which means that he will stay at the institution until he attains nineteen years. At that age the applicant will have passed the limited age in the institution. This is an anomaly that this court can correct within its powers of revision.
11. It is my finding that this application has no merit and it is hereby declined.
12. Due to the anomaly in the duration of sentence, this court reviews the sentence to the effect that the applicant will serve at Shimo La Tewa Borstal Institution until he attains the age of eighteen (18). The period commenced from 12th July 2021.
13. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 3rd OF AUGUST, 2022.

F. MUCHEMI

JUDGE

Ruling delivered through video-link this 3rd day of August, 2022

