



**Kaino v Republic (Criminal Revision E074 of 2024)
[2025] KEHC 8595 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL REVISION E074 OF 2024**

**E OMINDE, J
JUNE 18, 2025**

BETWEEN

COLLINS KAINO APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. This Application for Revision arises from the conviction and sentence in Iten Senior Principal Magistrates’ Criminal Case (SO) E060 of 2022. The appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 25th November 2022 at (Particulars withheld) within Elgeyo Marakwet County, he intentionally and unlawfully caused NK to touch his penis against his will an indecent act. He was found guilty, convicted, and sentenced to serve 10 years in prison vide the judgement delivered on 30th July 2024.
2. Being aggrieved with the sentence, the applicant filed the present application dated 6th August 2024 seeking a Review of sentence under sections 362 & 364 (1) of the *Criminal Procedure Code* and relying on Articles 22(1) 25 (c), 27(1), (2) & (4), 28, 50(1) & (2) and 51(1) & (2) of *the Constitution* of Kenya among other enabling laws. Additionally, he urged the court be pleased to consider the provisions of the Sentencing Policy Guidelines 2016 published by the Kenya judiciary and invoked the provisions of article 165(3) a, b, d & 258(1) of *the Constitution* of Kenya.
3. In his affidavit, the appellant deposed that the sentence was harsh and excessive against his mitigation. He urged the court to review his sentence to a lesser or non-custodial sentence. Further, that he is a young man with a young family who solely depend on him for their survival. He stated that this court has competent, unlimited jurisdiction to hear and determine this application under the provisions of article 165 of *the Constitution* of Kenya 2010. He further stated that he is remorseful, repentant, reformed and rehabilitated, as he has learned hard lessons while in custody and now beg for leniency.



He prayed that the court accords him with the provision of Article 50(2) (q) of *the Constitution* of Kenya 2010.

4. The appellant opted not to file submissions and rely on what is already on record. The state filed submissions dated 24/03/2025 through State Counsel Rachel Mwangi.

Respondents' submissions

5. Counsel for the state submitted that Section 11 (1) of the *Sexual Offences Act* provides that a person who commits an indecent act with a child is liable to imprisonment of a term not less than 10 years. Further, that sentencing is the discretion of the trial court, such discretion must be exercised judiciously and not capriciously. Counsel urged that the trial court was guided by the evidence on record and sound legal principles before meting out the sentence. Additionally, that the court took into account all relevant factors leaving out all extraneous and or irrelevant factors.
6. Counsel urged that under Section 362 of the *Criminal Procedure Code*, the High Court is vested with powers to call and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality propriety of any finding sentence or order recorded or passed and to the regularity of any proceedings of any such subordinate court. She further stated that the appellate court would be entitled to interfere with the sentence imposed by the trial court only if it is demonstrated that the sentence imposed is not legal or it is so harsh and excessive or amount to a miscarriage of justice, and or that the court acted upon wrong principles or if the court exercised its discretion capriciously. She cited the case of *Ogolla s/o Owuor vs. Republic (1954) EACA 270*. Counsel additionally cited the case of *Bernard Kimani Gacheru vs Republic*.
7. Counsel submitted that while the trial court was exercising its discretion in sentencing the applicant to 10 years in prison, the court bore in mind the principles of proportionality, deterrence, and rehabilitation. The fact that the applicant is a 1st offender, remorseful and reformed cannot therefore be used as a ground for sentence review. Further, that the court also considered proportionality, mitigating, and aggravating factors when sentencing the appellant. The offence committed was an offence against a child who is a vulnerable member of society. This court was duty bound to ensure that the children are protected and rightfully sentenced the applicant to 10 years. She urged the court to dismiss the application.

Analysis & Determination

8. On whether or not the court has the jurisdiction to review the sentence, this court is empowered by Article 165(6) of *the Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides: -

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 not over a superior court.

9. Article 50 of *the Constitution* provides: -

(2) Every accused person has the right to a fair trial, which includes the right: -

(q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.



10. 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.

11. Section 364

(1) of the *Criminal Procedure Code* provides: -

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 his 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 section 354, 357 and 358, and may enhance 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.

12. In *Prosecutor vs Stephen Lesinko* [2018] eKLR the court outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows: -

- a. Where the decision is grossly erroneous;
- b. Where there is no compliance with the provisions of the law;
- c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
- d. Where the material evidence on the parties is not considered; and
- e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

13. Section 11(1) of the *Sexual Offences Act* provides: -

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.

14. I have considered the application, the charge, the relevant statutory provisions and case law as herein outlined. I have considered the sentence. Under Section 11(1) herein reproduced, the minimum aspect of the sentence is 10 years’ imprisonment. The Learned Magistrate sentenced the Applicant to 10 years’ imprisonment which is the minimum. For this reason, I am satisfied that the sentence is legal and is lawful and is therefore not harsh and excessive to warrant the revision of the same by this court. The same is accordingly upheld.

15. In this regard, it is my finding that the Applicant’s Application lacks merit and the same is accordingly dismissed. Right of Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 18TH JUNE 2025



E. OMINDE
JUDGE

