



**Nyakundi v Republic (Criminal Revision E006 of 2023)  
[2024] KEHC 2848 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2848 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL REVISION E006 OF 2023  
WA OKWANY, J  
MARCH 14, 2024**

**BETWEEN**

**ABEL NYAKUNDI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original Conviction and Sentence in the Chief Magistrate's Court at Nyamira, Sexual Offence No. 81 of 2020 by Hon. W. C. Waswa, Senior Resident Magistrate on 3rd June 2021)*

**RULING**

1. The Applicant herein was convicted for the offence of defilement and sentenced to serve 15 years' imprisonment. He filed the instant application seeking the revision of his sentence on the basis that his wife has died thus leaving his aging parents with his young child.
2. Mr. Chirchir, learned counsel for the Respondent submitted that the Court can consider the matter and exercise its discretion under section 365 of the *Criminal Procedure Code*.
3. *The Constitution* of Kenya provides for the rights of an accused person under Article 50 as follows: -
  - (2) Every accused person has the right to a fair trial, which included the right-
  - (q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.
4. Article 165 also vests revisionary powers on the High Court as follows:-

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.



5. Further, Sections 362 and 364 of the Criminal Procedure Code outline the manner in which the High Court shall exercise those powers as follows: -

362. Power of the High Court to Call for Records

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.

364. Powers of the High Court on Revision

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 defense:

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 that 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 a 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.

6. It is against the above legal framework that this Court, on review, must determine whether the sentence meted by the trial court was appropriate, legal and correct.

7. Since sentencing is at the discretion of the trial court, it may only be interfered on appeal or revision if it is demonstrated that the sentence meted was manifestly harsh or grossly inadequate or where the trial court overlooked some material factor or acted on wrong principles. This was the position taken in *R. v Ratilal Amarsbi Lakhani* [1958] EA 140, 141, where Lewis J stated: -

“It has been laid down in India that the High Court does not exercise the power of enhancing a sentence in every case in which the sentence passed is inadequate. The mere fact that the High Court would itself, if it had been trying the case, have passed a heavier sentence than



that which the trial Court has passed is no reason for enhancing the sentence. The High Court will interfere only where the sentence passed is manifestly and grossly inadequate.”

8. In the instant case, the Applicant was charged with an offence that attracts a minimum mandatory sentence of 15 years’ imprisonment. I note that the trial court considered the circumstances of the case and the pre-sentence report in arriving at the sentence. I also note that the Applicant faced a serious charge of defilement and that it was necessary that a deterrent sentence be imposed considering that the complainant in this case was a minor aged 14 years old.
9. A perusal of the trial record reveals that the not only did the Applicant defile the complainant but that he also beat her up before locking her up in his house.
10. It is my finding that the law, the circumstances of the case, the effect of the offence on the victim and the Applicant’s mitigation were all duly considered during sentencing. I therefore find no reason to interfere with the sentence of 15 years imposed on the Applicant which I sentence is legal and appropriate.
11. Since the Applicant was released on bond pending his trial, I find that Section 333(2) of the *Criminal Procedure Code* is not applicable in this case.
12. In the end, I find that the Application lacks merit and I therefore dismiss it.
13. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 14<sup>TH</sup> DAY OF MARCH 2024.**

**W. A. OKWANY**

**JUDGE**

