



**Nyantabagia v Republic (Criminal Revision E104 of 2023)
[2024] KEHC 3208 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL REVISION E104 OF 2023
WA OKWANY, J
MARCH 7, 2024**

BETWEEN

ROBIN ONYARI NYANTABAGIA APPLICANT

AND

REPUBLIC RESPONDENT

*(From the original Conviction and Sentence in the Chief Magistrate's
Court at Nyamira, Criminal Case (SO) No. 76 of 2019 by
Hon. C. Waswa, Resident Magistrate on 20th February 2020)*

RULING

1. The Applicant herein was convicted in Nyamira Sexual Offence Case no 76 of 2019 on the charge of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#). He was sentenced to serve six (6) years imprisonment.
2. This ruling is in respect to an application filed under Section 333(2) of the [Criminal Procedure Code](#) wherein the Applicant seeks the review of the sentence passed by the trial court on the basis that the time that he spent in custody while awaiting his trial was not considered during sentencing.
3. At the hearing of the Application, Mr. Chirchir, learned Prosecution Counsel submitted that the Applicant remained in custody during the entire trial period.
4. Article 50 of the [Constitution](#) of Kenya provides for the rights of an accused person as follows: -
 - (2) Every accused person has the right to a fair trial, which includes the right-
 - (q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.



5. The Court's revisionary powers are provided for under Article 165 of the *Constitution* (2010) and Section 362 of the *Criminal Procedure Code* which provide as follows: -

Article 165

1. 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.

The *Criminal Procedure Code*, Cap 75 Laws of Kenya

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.”

6. Section 364 of the *Criminal Procedure Code* outlines the manner in which the revisionary powers of the High Court are to be exercised thus: -

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.



7. The duty of this Court is to re-examine the trial record and consider whether the sentence imposed by the trial court was correct, appropriate and legal.
8. It is also a well-established principle that a court will only interfere with the sentence passed by a trial court where the same is unfounded in law or is manifestly excessive or grossly inadequate. In *R v Mohamedali Jamal* (1948) 15 EACA, 126, the Court of Appeal of Eastern Africa held thus: -

“It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence, the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.”
9. I have considered the sentence imposed on the Applicant herein by the trial court. The offence for which the Applicant was charged and convicted calls for a minimum sentence of not less than 20 years’ imprisonment. The said section states: -

8 (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
10. It has been argued that minimum mandatory sentences are unconstitutional because they limit the court’s exercise of discretion during sentencing. (See *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) [17 May 2022])
11. Courts are now free to depart from mandatory minimum sentences depending on the circumstances of each case as was the position in the present case where the complainant, a 13-year old admitted before court that the Applicant, a 22-year old was her boyfriend and that they intended to get married. A perusal of the judgment reveals that the trial court also noted that the complainant willingly went to the Applicant’s house.
12. The trial court considered the fact that the complainant had since been married off to another man and had left the Applicant at the mercy of the court. The trial court also considered the age of the Applicant and the period he had already spent in custody while awaiting his trial before arriving at the sentence. The said court rendered itself as follows:

“I have considered the age of the accused person. He is merely 22 years old. I have also considered the time that the accused person has spent in remand custody during the pendency of his trial.”
13. I therefore find that Section 333 (2) of the *CPC* was complied with and that the sentence imposed on the Applicant was legal, correct and appropriate. I find no reason to interfere with the sentence.
14. In sum, I find that the Application lacks merit and I therefore dismiss it.
15. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIDE MICROSOFT TEAMS THIS 7TH DAY OF MARCH 2024.

W. A. OKWANY

JUDGE

