



**Ongeta v Republic (Revision Case E001 of 2023)
[2024] KEHC 2825 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2825 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
REVISION CASE E001 OF 2023
WA OKWANY, J
MARCH 7, 2024**

BETWEEN

WATSON MAKORI ONGETA APPLICANT

AND

THE REPUBLIC RESPONDENT

*(From the original Conviction and Sentence in the Principal Magistrate's
Court at Keroka, Sexual Offence Case No. CMSO No. 27 of 2017
by Hon. N. Kabara Resident Magistrate on 22nd December 2017)*

RULING

1. The Applicant herein, Watson Makori Ongeta, was convicted in Nyamira SPM in SO No. 27 of 2017 and sentenced to serve twenty (20) years imprisonment for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the charge were that on 31st July 2017 at Miriri Location in Masaba North Sub-county within Nyamira County, intentionally caused his penis to penetrate the vagina of EKP (particulars withheld) a child aged 13 years.
2. The Applicant filed the present application seeking a review of the 20 years sentence. He submitted that the minimum mandatory sentence was declared unconstitutional in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (hereinafter Muruatetu case).
3. The Applicant however conceded that the appeal he had earlier filed before this court challenging his conviction was dismissed. He urged this court to consider his age and the fact that he had undergone rehabilitation, training and spiritual nourishment while in prison.
4. The Respondent herein, the State/Republic, opposed the application through learned counsel, Mr. Mwangi, who submitted that the Muruatetu case did not outlaw minimum mandatory sentence but only outlawed the mandatory nature of death sentences in capital offences. It was further submitted



that since the Applicant's appeal, to this court, against conviction and sentence was unsuccessful, he could not turn around and seek redress before same court through an application for review.

5. 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.
6. This Court's revisionary powers are provided for under Article 165 of the Constitution 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.
Criminal Procedure Code

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."

7. Section 364 of the Criminal Procedure Code outlines the powers of the High Court under Article 165 of the Constitution and Section 362 of the Criminal Procedure Code as follows: -

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 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 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.
8. The duty of this Court is to determine if the sentence imposed by the trial court was correct, appropriate and legal, bearing in mind the fact that sentencing is a duty of the trial court. (See [Bernard Kimani Gacheru vs. Republic](#) [2002] eKLR.)
9. It is also trite that a court will only interfere with the sentence of a trial court where the same is not founded in law or is manifestly excessive. In *R. vs. Mohamedali Jamal* (1948) 15 EACA, 126, the Eastern Africa Court of Appeal 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.”
10. In the present case, it was not disputed that the Applicant’s appeal to this court against both the conviction and sentence was dismissed. This means that the Applicant has once again approached this court seeking a review of the sentence. My understanding of this court’s revisionary powers, as stated under Section 364 of the [CPC](#), is that they are limited to orders emanating from the subordinate court and not from a court of concurrent jurisdiction. This means that this court, having already determined an appeal from the subordinate court, cannot sit on a review over its own orders. My take is that the only recourse available to the Applicant, following the determination of the appeal is to appeal or make an appropriate application before the Court of Appeal.
11. In a nutshell, I find that the present application is not merited and I accordingly dismiss it.

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

W. A. OKWANY

JUDGE

