



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ondieki v Republic (Criminal Revision E121 of 2023)  
[2024] KEHC 6607 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6607 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL REVISION E121 OF 2023**

**WA OKWANY, J**

**JUNE 6, 2024**

**BETWEEN**

**WILFRED OCHENGO ONDIEKI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original Conviction and Sentence in the Chief  
Magistrates' Court at Nyamira, Criminal Case No. (S0) 89 of 2020  
by Hon. C.W Waswa, Resident Magistrate on 4th August 2021)*

**RULING**

1. The Applicant was charged and convicted in Nyamira Criminal Case No. (S0) 89 of 2020 for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006, Laws of Kenya. He was sentenced to serve ten years imprisonment and has been in custody since 4<sup>th</sup> August 2021.
2. The Applicant seeks the review of the sentence imposed by the trial Magistrate through the present Application. The Application is premised on the ground that the sentence is harsh and excessive. The Applicant further states that he is sickly and that his condition deteriorating daily thereby making him a burden to fellow inmates and officers in prison. He also avers that he was now 75 years old and is unable to support himself. He states that he was remorseful for the offence and urges the Court to review the sentence and set him at liberty so that he can seek medical treatment out of prison.
3. 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.



4. Article 165 of *the Constitution* and Section 362 of the *Criminal Procedure Code* 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.”

5. Section 364 of the *Criminal Procedure Code* on the other hand provides 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.
6. This Court’s duty is to examine whether the sentence imposed by the trial court is correct, appropriate and legal, bearing in mind the fact that sentencing is a duty of the trial court. (See the Court of Appeal decision in *Bernard Kimani Gacheru v Republic* [2002] eKLR.)



7. It is also an established principle 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. v 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.”

8. Mr. Ondimu, advocate for the Applicant, submitted that the Applicant is sick and cannot walk on his own and presented a Medical Report from Kisii Teaching and Referral Hospital dated 15<sup>th</sup> April 2024 for the Court’s perusal. Mr. Chirchir, learned counsel for the Respondent, submitted that he was not opposed to the Application and asked the Court to exercise its discretion on Revision.

9. I have considered the sentence imposed on the Applicant herein by the trial court. The offence for which the Applicant was convicted of is serious in nature and attracts a mandatory life sentence. However, the trial court considered all mitigating factors and sentenced the Appellant to ten years’ imprisonment. I find that the sentence was just, fair and legal.

10. The above finding notwithstanding, I note that the Applicant has already served three and a half years in custody and that his medical condition has continued to deteriorate. The Medical Reports indicates that is also not mentally stable and has symptoms of senile dementia with psychosis. He has also suffered severe dehydration and dysentery for which he was still receiving treatment.

11. In considering his circumstances, this Court bears in mind the fact that punishment that is excessive does not serve the interests of justice or society in any way. In *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35, it was held thus: -

“Plainly, any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. ....It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.” (Emphasis added).

12. Having considered the unique circumstances of the case together with the Applicant’s old age and sickly body, I find that the period that he has already served in prison is sufficient punishment for his offence. I therefore order that the Applicant be set at liberty forthwith unless otherwise lawfully held.

13. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA THIS 6<sup>TH</sup> DAY OF JUNE 2024.**

**W. A. OKWANY**

**JUDGE**

