



REPUBLIC OF KENYA



KENYA LAW
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**Mbatia v Republic (Criminal Revision E125 of 2022)
[2023] KEHC 695 (KLR) (5 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E125 OF 2022
GL NZIOKA, J
JANUARY 5, 2023**

BETWEEN

DAVID MWANGI MBATIA APPLICANT

AND

REPUBLIC RESPONDENT

*(Originating from Senior Principal Magistrate's Court at
Engineer charged vide Sexual Offence No. E023 of 2021)*

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged *vide* Sexual Offence No E023 of 2021, with the offence of rape contrary to section 3 (1)(a)(b) (3) of the [Sexual Offences Act](#). The particulars of the charge are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. The prosecution called four (4) witnesses and at the close of the prosecution case, the trial court ruled that the applicant had a case to answer and placed him on his defence. The applicant offered a defence without calling any witnesses.
3. At the conclusion of the case the trial magistrate found him guilty of the offence and sentenced him to serve a term of ten (10) years imprisonment.
4. By a notice of motion application filed on August 23, 2022, pursuant to article 50 (2) (p) (q) of the [Constitution](#) of Kenya, the applicant is seeking for review of sentence, in particular, the sentence be reduced from the ten (10) year and the court do give any relieve it may deem appropriate.



5. The application is supported by the applicant's affidavit in which he avers as herein below reproduced: -
- a) That, he was charged with the offence of rape contrary to section 4 of the [Sexual Offences Act](#) in SO No E023/2021 at Engineer Magistrate's Court and sentenced to serve ten (10) years imprisonment.
 - b) That he was remorseful of the offence and his incarceration.
 - c) That pursuant to the declaration of the Supreme Court ruling in the case of [Francis Karioko Muruatetu & another](#) the mandatory sentence was declared unconstitutional.
 - d) That in regard to order (1) and (2) of the High Court judgement in Petition No E017 of 2021, in which the mandatory minimum sentence was declared unconstitutional. He seeks for sentence review only.
 - e) That the Court of Appeal in [Benard Mulwa Musyoka vs Republic](#) Appeal No 25 of 2016 affirmed that the Supreme Court did not prohibit courts below it from ordering sentence re-hearing in any matters pending before those courts.
 - f) The court is seized of competent jurisdiction to hear and determine this application under article 165 (3) (b) of the [Constitution](#) of Kenya to hear and determine this matter.
6. The applicant further relies on a document described as a "memorandum of sentence review" in which he states: -
- a) That, I am a first offender.
 - b) That, I have no pending appeal.
 - c) That, I am remorseful of my offence and have learnt to be a law abiding citizen and rehabilitated well enough.
 - d) That, I am from a poor but humble family background.
 - e) That, I am the sole breadwinner of my family and my incarceration has placed them in a very difficult situation.
 - f) That, I am not appealing against sentence and conviction but applying for a review of sentence.
7. However, the respondent opposed the application *vide* submissions dated October 11, 2022, wherein it argues that the trial court considered the circumstances of the offence and applicant's mitigation before passing the sentence. Further, the applicant did not deserve a lighter sentence as he was a danger to society by targeting an older defenceless woman in her house. Further the offence is a sexual and gender based violence one targeting women, which is a primary consideration in sentencing.
8. Further, the Supreme Court in Petition 15 of 2015 [Francis Karioko Muruatetu and Another vs Republic](#) recognized the objectives of sentencing as per the [Judiciary Sentencing Guidelines](#) which include deterrence. That, in the present case, a deterrent sentence was appropriate and the sentence meted is was sufficient as such the court should uphold it.



9. The court also ordered for a pre-sentence report and in that regard a report dated September 16, 2022, was filed by the probation and aftercare department. It indicates that the appellant is 34 years old and a last born in a family of twelve (12) siblings. That he uses of bhang and alcohol leading to three unsuccessful marriages. That, at the time of the offence, was working as a barber and farmer.
10. That he admitted committing the offence but while under the influence bhang and alcohol, however he does not show any remorse and treats the offence casually. Further his family and the community indicates that he is a criminal, nuisance and has had several allegations of crimes levied against him.
11. In fact, his family members have not visited him for three months and the victim's family is against the sentence review and wants him to complete his sentence.
12. The prison authorities indicates that the applicant has undertaken theology courses and bible studies. He is enrolled in carpentry. Further while in prison he has had a few cases of indiscipline after being caught with contraband; bhang.
13. In considering the application. I note that, the law that guides the revisionary power of the High Court is provided for under section 362 of the [Criminal Procedure Code](#) which states as follows:

“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.”

14. The section should be read together with section 364 of the [Criminal Procedure Code](#) which provide as follow: -

- “ (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 than 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, 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.”
15. From the afore provisions it is clear that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus, the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.
16. Therefore, in exercise of revisionary powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major SS Khanna vs Brig FJ Dillon* 1964 AIR 497, 1964 SCR (4) 409).
17. It is noteworthy therefore that, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another v Republic* [2017] eKLR, *Republic v Everlyne Wamuyu Ngumo* [2016] eKLR, *Public Prosecutors v Muhavi Bi Mond Jani & Another* 1996 4 LRC 728, 743-5, *DPP v Samuel Kimuche*.
18. Having considered the aforesaid I find that, the offence with which, the applicant is convicted of and sentenced is provided for under section 3(1) as read with section 3 (3) of the *Sexual Offences Act* as follows: -
- (1) A person commits the offence termed rape if—
- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.
- (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.
19. Therefore, minimum sentence provided for the offence is a mandatory ten (10) years. In the present case, the applicant was sentenced to imprisonment for ten (10) years, which is the minimum sentence applicable. The sentence is therefore within the law and thus legal, proper and correct. As such there is no basis to interfere with it. In the given circumstances the application for revision of sentence is dismissed for lack of merit.
20. It is so ordered.

Dated, delivered and signed on this 5th day of January 2023

GRACE L NZIOKA

JUDGE



In the presence of:

Applicant in person virtually

Mr. Michuki for the Respondent

Ms Ogutu: Court Assistant

