



**Nduru v Republic (Criminal Revision E012 of 2021)
[2023] KEHC 2044 (KLR) (5 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 2044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E012 OF 2021
GL NZIOKA, J
JANUARY 5, 2023**

BETWEEN

JAMES MBURU NDURU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* (herein “the Act”), vide Sexual Offence Case No 47 of 2018. He was further charged with an alternative offence of committing an indecent act with a child contrary to section 11 (1) of the Act. The particulars of each 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, he had a case to answer and placed him on his defence. He did not call any witnesses during the trial.
3. At the conclusion of the entire case, he was convicted on the main count and sentenced him to serve a term of ten (10) years imprisonment.
4. However, by a document filed on October 21, 2021, under the heading of: “Memorandum of Sentence Review” the applicant is seeking for review of sentence, so that the sentence is reduced, or he be grant a non-custodial sentence, or the court grants any other relief it may deem appropriate.
5. He avers that he a first offender and remorseful of the offence he is charged with. That, he is well rehabilitated through training in biblical courses and has learnt to be a law abiding citizen. Furthermore, he comes from a poor family and is a sole breadwinner thereof and, therefore his incarceration has placed them in a very difficult situation.



6. Finally, he avers that he did not give proper mitigation during the sentencing and prays for an opportunity to mitigate. That, he will abide by all the conditions that the court may fit to give
7. However, the application was opposed vide submissions filed by the respondent dated October 24, 2022, wherein it is submitted that, the trial court considered the circumstances of the offence and applicant's mitigation before meting out the sentence and used its discretion fully. Further, the applicant does not deserve a lighter sentence he has lured the complainant, a young and vulnerable child, to his house and defiled her.
8. That, the Supreme Court of Kenya 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. Therefore, in the present case, a deterrent sentence is appropriate as such the ten (10) year imprisonment is sufficient.
9. I have considered the application in the light of the material before court and I note that, the law that guides the revisionary power of the High Court is provided for under sections 362 of the *Criminal Procedure Code* (herein "the 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.”

10. However, the section should be read together with section 364 of the *Code* which provision states 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.”

11. It is therefore clear from the above provisions 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.
12. In the instant matter, the applicant was convicted and sentenced of the offence under section 8(1) as read with section 8 (3) of the *Sexual Offences Act* as follows: -
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (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.
13. The applicant was sentenced to ten (10) years imprisonment, which is less than the prescribed sentence of twenty (20) years imprisonment as it seems the trial magistrate quoted the wrong section of the law. However, taking into account that the sentence was passed when the decision of the Supreme Court in Muruatetu was still being applied in sexual offences, I shall not enhance the sentence.
14. In any case to enhance the sentence without an application from the respondent and without according the applicant an opportunity to be heard, will amount to an injustice and therefore having found the sentence is legal, I shall not interfere with it. The application is dismissed.
15. 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

