



REPUBLIC OF KENYA



**Ng'ang'a v Republic (Criminal Revision E131 of 2022)  
[2023] KEHC 147 (KLR) (5 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 147 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL REVISION E131 OF 2022  
GL NZIOKA, J  
JANUARY 5, 2023**

**BETWEEN**

**JAMES NJENGA NG'ANG'A ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was arraigned before the Chief Magistrate's Court at Naivasha charged vide Criminal S O No 53 of 2018, with the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006, and an alternative charge of indecent act with a child contrary to section 11(1) of the Act. The particulars of the charge are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. At the end of the trial, the learned Magistrate found the applicant guilty and sentenced him to ten (10) years imprisonment.
3. The applicant now seeks for sentence review based on the Notice of Motion application filed in court on September 1, 2022 in which he prays for a review of the sentence. He relies on the memorandum of sentence review in which he states in the mitigating grounds that:-
  - a. That, I am a first offender.
  - b. That I am remorseful of the offence.
  - c. That, I would plead with this honourable court to consider the period spent in remand which was two years and eleven month (2 years, 11 months).
  - d. That I have learnt to be a law-abiding citizen.
  - e. That, I am from a poor family background.
  - f. That, I have acquired arming skills as part of my rehabilitation.



- g. That, I would like to go and use the above skills in catering for myself as I build the nation
4. Despite directions by the Court, the respondent did not file a response to the application nor was a pre-sentence report filed.
5. The law that guides the revisionary power of the High Court sections 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.”
6. The section should be read together with section 364 of the *CPC* 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.”
7. It is clear from the above provisions that, the Court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be involved 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.
8. It therefore follows that, in exercise of revision 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 v Brig FJ Dillon 1964 AIR 497, 1964 SCR \(4\) 409](#).

9. 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](#).
10. Having considered the application, I find that, the offence with which, the applicant is convicted and sentenced with is provided for under section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#), which states as follows: -

- “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

11. It is clear from the aforesaid that, the sentence provided for the offence is a mandatory life imprisonment. The sentence meted in the present case was imprisonment of ten (10) years and therefore the sentence was below what is provided for by the law.
12. From a perusal of the trial court sentencing proceedings it is clear that the trial magistrate being well aware of the law took cognizance of the holding of the Muruatetu case and stated that: -

“The [Sexual Offences Act](#) provides for a life sentence under section 8(1)(2) which are the sections the accused is charged with.

I am also aware to the fact that the ‘Muruatetu case’ as it is famously referred as rests discretion in the trial court even where statute provides for a minimum sentence.

I have also considered the sentencing policy and all other factors.

In my view considering all the above factors, I am satisfied that the accused should not be sentenced to life imprisonment by the Act.”

13. However, the Supreme Court in [Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others \(Amicus Curiae\) \[2021\] eKLR](#) (Muruatetu 2) clarified that its earlier decision was restricted to the offence of murder under section 204 of the [Penal Code](#).

14. Article 50 (2) (p) of the [Constitution](#) provides that:-

“to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;”

15. In [John Mwita Kerario v Republic \[2022\] eKLR](#) the Court faced with a similar issue, where the applicant had been sentenced to a term less than the sentence prescribed for in the [Sexual Offences Act](#) but was sentence prior to the clarification by the Supreme Court in Muruatetu (2) held that: -

“12. That said, the Supreme Court has now changed the above position by clarifying in directions issued on 6th July 2021 in the second Muruatetu case.



The court expressly stated that its decision in the first Muruatetu case applied only to the mandatory death sentence for the offence of murder prescribed under section 204 of the Penal Code and not to any other sentence.

13. The above directions were issued about three years after sentence in this case was passed and in my view, they cannot be applied retrospectively. I believe this is the reason why the prosecution did not apply for enhancement of the applicant's sentence."

16. In the present case, the applicant herein was sentenced on the June 9, 2021, before the Supreme Court rendered itself in Muruatetu 2.

17. In the given circumstances I shall not interfere with the sentence, however application dismissed,

18. It is so ordered

**DATED, DELIVERED AND SIGNED ON THIS 5<sup>TH</sup> DAY OF JANUARY 2023.**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of;**

Applicant in person/virtually

Mr Michuki for the Respondent

**Ogutu: Court Assistant**

