



REPUBLIC OF KENYA



**Muthoni v Republic (Criminal Revision E018 of 2022)  
[2023] KEHC 3017 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3017 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL REVISION E018 OF 2022  
GL NZIOKA, J  
MARCH 13, 2023**

**BETWEEN**

**DAVID NDUNGU MUTHONI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was arraigned before the Chief Magistrate’s Court at Naivasha charged vide Sexual Offence No. 6 of 2015, with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* No. 3 of 2006. 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 close of the case the learned trial magistrate found him guilty, convicted and sentenced him to serve a term of ten (10) years imprisonment.
3. However, vide an application filed in court on the November 4, 2021, he seeks that the sentence be reviewed and reduced or converted to a non-custodial one. He relies on a document entitled “memorandum of sentence review” and his affidavit.
4. He avers that he is not appealing against conviction but seeks for review of the sentence and prays for leniency. That he is a first offender and remorseful. He sates that he is rehabilitated, been trained in several bible courses and has learnt to be a law abiding citizen. Further he is ready to reconcile with the complainant. Furthermore, he has a poor family background and is the sole breadwinner.
5. The applicant further submitted that despite giving his mitigation before sentence, the learned trial magistrate stated he was bound by minimum mandatory sentence. However, he argues that courts frown on mandatory sentences as they place limitations on judicial discretion to pass sentence and relies on the South African decisions in *S v Toms* 1990 (2) SA 802 (A) and *S v Jansen* 1999 (2) SACR 368 (C).



6. He also cited the decision in *Philip Mueke & 5 others v Director of Public Prosecutions & ano* Machakos High Court Petition No. E017 of 2021 where Odunga J (as he then was) held that, the minimum mandatory sentences under the *Sexual Offences Act* are unconstitutional to the extent they deny the trial court discretion to determine the appropriate sentence to impose. Finally, he relied on the case of *Edward Gikundi Ndege v Republic* (2021) eKLR where the appellant’s sentence was reduced to five (5) years.
7. However, the application was opposed by the respondent vide submissions dated October 24, 2022. The respondent argues that the trial magistrate considered the applicant’s mitigation prior to sentencing. Further, the applicant does not deserve a lighter sentence in light of the circumstances of the case.
8. The respondent relied on the decision of the Supreme Court of Kenya in Petition 15 of 2015, Francis Karioko Muruatetu and Another vs Republic where the court recognized that the objectives of sentencing as per the Judiciary Sentencing Guidelines includes deterrence. That in the present case, a deterrent sentence is appropriate and the ten (10) years meted out is sufficient.
9. Having considered the application, I note that the law that governs revisionary power of the High Court is set down under 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.”

10. However, the aforesaid provisions should be read together with section 364 of the *Criminal Procedure Code* which states as follow: -

“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 objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law.
12. The revisionary 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.
13. As such, 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 S.S Khanna v Brig F.J Dillon 1964 AIR 497, 1964 SCR (4) 409).
14. Pursuant to the aforesaid I note that the applicant was convicted and sentenced under section 9(1) as read with section 9 (2) of the Sexual Offences Act, which states as follows: -
  - “(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
  - (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.”
15. It is clear from the aforesaid that, the sentence for the subject offence is a mandatory minimum sentence of ten (10) years imprisonment and therefore the sentence meted by the trial court is lawful and legal.
16. I have also considered that the applicant was in custody for a period of eight (8) days only which is negligible and therefore find that the application is dismissed for lack of merit.
17. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 13<sup>TH</sup> DAY OF MARCH, 2023**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of:**

Applicant in person virtually

Mr Atika for Respondent

**Ogutu; Court Assistant**

