



REPUBLIC OF KENYA



**Mbugua v Republic (Criminal Revision E048 of 2023)
[2023] KEHC 18177 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E048 OF 2023
GL NZIOKA, J
JUNE 2, 2023**

BETWEEN

FRANCIS KARIUKI MBUGUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. On April 1, 2022, the applicant was arraigned before the Senior Principal Magistrate’s court 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”) in the main count and an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of each count are as per the charge sheet.
2. The applicant pleaded not guilty and the case proceeded to full hearing. He was found guilty on the main count and convicted accordingly. He was then sentenced to serve a custodial period of fifteen years (15) years.
3. However, he has filed the subject application herein in which he seeks for review of the subject sentence on the grounds that, he is a first offender and remorseful. That he is not appealing against conviction and pleads to be released on a non-custodial sentence, as he is the sole bread winner of the family. He avers through the supporting affidavit that, pursuant the famous case of [Muruatetu](#) and the case of [Benard Mulwa Musyoka -vs- Republic](#) Criminal Appeal No 26 of 2016, minimum sentences have been declared unconstitutional, as it does interfere with the discretionary power of the court in sentencing a convicted person.
4. The Respondent did not file any response to the application as the matter was listed for consideration alongside other matters earmarked for decongestion under the [Community Service Orders Act](#).
5. Be that as it were, the court ordered for a sentence review report and was availed by the Probation Department.



6. I have considered the application in the light of section 362 as read with section 364 of the [Criminal Procedure Code](#) which provides for revisionary power of the court. The subject provisions states that: -

“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.”

7. Further, section 364 of the Code 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.”

8. Pursuant thereto, the power will only be exercised 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 and that 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.



9. The applicant herein was convicted of an offence under section 8(1) of the Act. The sentence is provided for under section 8(3) of the Act which states: -

“(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.”

10. In the given circumstance the sentence meted out of 15 years’ imprisonment is lawful and legal. As such it is not subject to revision

11. Furthermore, although the sentence review report seems to be positive, it does not capture the views of the victim, therefore lacks objectivity and neither can it displace the minimum mandatory sentence meted out.

12. However, I note that the sentence meted out did not take into account the period he was in custody. I therefore order that the fifteen (15) years’ term runs from April 1, 2022. Otherwise the rest of application fails for lack of merit.

DATED, DELIVERED AND SIGNED THIS 2ND DAY OF JUNE 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Applicant in court, virtually

Mr. Atika for the Respondent

Ms. Ogutu Court Assistant.

