



**Nduta v Republic (Criminal Revision E004 of 2023)  
[2023] KEHC 18528 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18528 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL REVISION E004 OF 2023  
GL NZIOKA, J  
JUNE 2, 2023**

**BETWEEN**

**JOSEPH CHEGE NDUTA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was arraigned before the Senior Principal Magistrate's court at Engineer charged vide criminal sexual offence No. E060 of 2022, with the offence of attempted rape contrary to section 4 of the *Sexual Offences Act* No. 3 of 2006 (herein "the Act"). He was further charged with the alternative count of committing an indecent act with an adult contrary to section 11(A) of the Act and insulting modesty by forcible stripping contrary to section 251(A) of the *Penal Code*. The particulars of each charge are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to a full hearing. He was subsequently convicted of the attempted rape under count 1 and sentenced to serve five (5) years imprisonment.
3. However, by the application herein he seeks for sentence review on the grounds that, he is a first offender and that, he did not give proper mitigation before sentence. Further he is 26 years old, married with a seven (7) months old child, who is under the care of a single mother. Furthermore, he takes care of his two younger sister, therefore he prays for a non-custodial sentence.
4. The Respondent was given an opportunity to respond to the application but did not file any response. The Probation Department on the other hand filed a sentence review report as directed by the court.
5. The subject report indicates that, he is 26 years old, and dropped out of school while in class 5 for no apparent reason. That, the complainant indicated that the ordeal is still vivid in her memory and objects to the release of the applicant on a non-custodial sentence.



6. That the village elder Mr. Stephen Njugia stated that the applicant had other allegations within the community, albeit without evidence, but was not committal on sentence review, whereas, the applicant's family members supported revision of sentence to a non-custodial one pledging to assist him into rehabilitation.
7. Having considered the provisions of section 362 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.”
8. However, the section should be read together with section 364 of the Code which 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.”
9. 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.



10. I further note the sentence for the offence of attempted rape provided under section 4 of the Act states: -
- “Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.”
11. The sentence of five (5) years herein is the minimum sentence. Therefore, it is legal and lawful and not subject to review and the application fails.
12. However, the trial court did not consider the period he was in custody, as required under section 333 (2) of the [Criminal Procedure Code](#). In that regard I direct that the sentence runs from 21<sup>st</sup> June 2022.
13. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 2<sup>ND</sup> DAY OF JUNE 2023.**

**GRACE L. NZIOKA**

**JUDGE**

**In presence of:**

Applicant present, virtually

Mr. Atika for the Respondent

**Ms. Ogutu Court Assistant**

