



**Eseme v Republic (Miscellaneous Criminal Application E323 of 2024)
[2025] KEHC 13623 (KLR) (Crim) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E323 OF 2024
MW MUIGAI, J
SEPTEMBER 30, 2025**

BETWEEN

SUSAN ATENG ESEME APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The Applicant was charged with the offence of committing indecent act with a Child Contrary to Section 11(1) of the [Sexual Offences Act](#).

The particulars of the charges read;

On diverse dates between 7th January and 2nd March 2022 at [Particulars Withheld] in [Particulars Withheld] within Kajiado County intentionally and unlawfully caused her breasts to and vagina to be sucked by SM a child aged 3 years.

2. The Applicant was convicted on her on plea of guilty and was sentenced to serve 10 years imprisonment after the judgment by Hon. Ruguru P.M delivered on 11/10/2022.
3. The Accused has preferred revision proceedings vide Notice of Motion filed on 3/2/2024. The Applicant seeks review of the Trial Court sentence and that this court prefers a non-custodial sentence for the remaining part of the sentence.
4. The Trial Court file and the proceedings recorded in Ngong MCSO No. E011/2022 are before Court.



Grounds for Revision.

5. The Accused/Applicant is a young mother and her child depends on her support.
6. That she left her child in the care of her grandmother who is 64 years old is and is also ailing from diabetes. That the grandmother is financially unstable .
7. The Applicant also filed her supporting affidavit further to the application.

Grounds of Opposition.

8. The Prosecution contests the application and urges that the Applicant was convicted on her own plea of guilty and was sentenced to serve 10 years imprisonment for the offence of committing an indecent act with a child which is in accordance with the law.
9. That the Court is bound by judicial precedence set in the decision of the Supreme Court *Republic v Mwangi Initiative of Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR where the Supreme Court held that where the law provides a mandatory minimum sentence, the Court must not impose lower than the least minimum sentence in sexual offences.
10. The Applicant failed to demonstrate any illegality, incorrectness or impropriety of the sentence imposed on her to warrant the intervention of the Court.
11. The Applicant was charged with a serious offence which does not fall within the scope of consideration of non -custodial sentences.

The Trial Court Record

12. The Accused person stated that the Complainant wished to withdraw the matter from Court, the Trial Court found the child was one of tender years and could not have an independent mind at the tender age to withdraw the matter.
13. The Accused person sought to be availed the birth certificate of the child which was provided and thereafter agreed to proceed with the hearing.
14. On the hearing date 6/10/2022, 3 witnesses were present ready to testify, the Accused person sought to change her plea from plea of not guilty despite being warned of the gravity of the offence before the charge was read to her again by the Trial Court.
15. The Applicant pleaded guilty to the charges and was heard on mitigation. She was remorseful and prayed for leniency. That she was/is an orphan and had a 2 ½ year old child whom she left with her grandmother. That, her grandmother is elderly and the grandfather has amputated leg. She also has siblings to take care of. However, she lost touch with them after the charges were prepared.
16. The Court considered the mitigation in the sentencing notes on record. The applicant was remorseful and was a first offender meriting leniency on her favor. However, the sentence provided is a minimum sentence which the court could not go below and exercise discretion.
17. Section 11 of the *Sexual Offences Act* Section 11 of the *Sexual Offences Act* states:
 11. Indecent act with child or adult

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.



18. The revisionary power of the court is invoked to rectify errors, omissions or illegalities apparent in the Trial Court's record or orders. This includes the Trial Court's sentence.

19. Section 362 of the [Criminal Procedure Code](#) provides 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 .”

20. Applying Section 362 on revision, I perused the original Trial Court file and Court proceedings thereof and confirm the conduct of plea-taking proceedings by Trial Court was in conformity with the law, *Adan v Republic* [1973] EA 445; Section 207(1) and (2) CAP 75 of the [Criminal Procedure Code](#);

21. The cases of *Ogolla S/O Owuor v Republic*, 1954 EACA 270 and *Macharia v Republic*, [2003] KLR 115 set the principle for interference of the trial court's sentence . The sentence must be manifestly harsh and excessive or inordinately low.

22. In the case of *Ahmad Abolfathi Mohammed & Another v Republic*, Criminal Appeal No. 135 of 2016 (unreported) the principles were reaffirmed with the court of appeal holding that:-

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.”

In *Bernard Kimani Gacheru v. Republic*, Cr App No.188 of 2000 this Court stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.” See page 25.

23. The impugned sentence was within the provisions of the law providing for a minimum custodial sentence which applies in mandatory terms. As explained the Court cannot go below the limit nor can it consider and issue non-custodial sentence.

24. Further, the Applicant's mitigation was considered alongside the facts of the case The applicant has also pleaded leniency and indeed her case is peculiar to allow court's intervention and consideration of her personal circumstances and rehabilitation.

25. However, the mandatory nature of the sentence under the [Sexual offences Act](#) together with the gravity of the offences listed therein limits discretion to custodial sentences.



26. In *Republic v Mwangi* (*supra*), the supreme court adopted the definition in the *Black's Law Dictionary*, 9th Edition, that a mandatory sentence is

“A sentence set by law with no discretion for the judge to individualize punishment. While minimum sentence is as defined as follows: The least amount of time that a convicted criminal must serve in prison before becoming eligible for parole.”

27. That

“Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence.”

See paragraph 57 of the judgment. *Republic v Joshua Mwangi* (*supra*)

28. The Applicant was in remand at the time of arraignment and subsequent period of the trial which was 7 months. This period was not considered in computation of sentence as the final sentence as provided under Section 333 of the *Criminal Procedure Code*.

29. The error is hereby rectified by an order that the sentence shall run from the day of arrest 4/3/2022-11/10/2022.

Disposition

30. The Application for revision is partly upheld as far as computation of sentence is concerned to include 7 months presentence period the Accused person was in custody. The rest of the Application for revision to review sentence and possibly consider non-custodial sentence fails as sentence is prescribed as minimum sentence under Section 11 of *Sexual Offences Act*.

**DELIVERED SIGNED & DATED IN CRIMINAL DIVISION OF HIGH COURT AT NAIROBI
THIS 30/9/2025 PHYSICALLY/ VIRTUALLY.**

M.W.MUIGAI

JUDGE

