



**Abalone v Republic (Miscellaneous Criminal Application E038 of 2025)
[2025] KEHC 16306 (KLR) (13 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16306 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E038 OF 2025
JN ONYIEGO, J
NOVEMBER 13, 2025**

BETWEEN

ISMAEL ABDI ABALONE APPLICANT

AND

REPUBLIC RESPONDENT

(Being a revision application against the sentence of Hon.C.M. Maundu (CM) delivered on 22nd October 2020 in Sexual Offences Case No. 12 of 2019 Garissa CM's court)

RULING

1. The applicant herein was charged with the offence of defilement contrary to Section 8(1)(2) of the [Sexual Offences Act](#) No. 3 of 2006. Particulars were that on 18.03.2019 at [Particulars Withheld] in Fafi Sub-County, within Garissa County, he intentionally and unlawfully caused his genital organ(penis) to penetrate the genital organ (anus) of O.M.I., a child of 10 years.
2. He was also faced with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. Particulars were that; on 18.03.2019 at [Particulars Withheld] in Fafi Sub-County, within Garissa County, he intentionally and unlawfully caused his genital organ (penis) to touch the genital organ(anus) of O.M.I., a child of 10 years.
3. During the hearing, prosecution called four (4) witnesses in support of the charge. In its judgment delivered on 22.10.2020, the learned trial magistrate convicted the appellant of the main count and sentenced him to serve 20 years' imprisonment.
4. Dissatisfied with the conviction and sentence, he proffered criminal appeal No.E002 of 2020 which confirmed the conviction but reduced the sentence to 15 years. Undeterred, he filed an undated notice of motion seeking to review the sentence by incorporating Section 333(2) of the CPC seeking consideration of the period spent in remand custody. In response, the respondent opposed the



application on grounds that Section 333(2) of the CPC was taken into account during the hearing of the appeal. Learned counsel stated that the sentence meted out is legal.

5. I have considered the application herein and the response thereof. The law governing revision in a criminal case is captured under Section 362 and 364 of the CPC. Section 362 and 364 provides as follows;

“ 362. Power of High Court to call for records

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.

364. Powers of High Court on revision

- (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

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(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.

(c) in proceedings under section 203 or 296(2) of the Panel Code (Cap. 63), the *Prevention of Terrorism Act* (Cap. 59B), the *Narcotic Drugs and Psychotropic Substances (Control) Act* (Cap. 245), the Prevention of Organized Crimes Act (Cap. 59), the *Proceeds of Crime and Anti-Money Laundering Act* (Cap. 59A), the *Sexual Offences Act* (Cap. 63A) and the *Counter-Trafficking in Persons Act* (Cap. 61), where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

- (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.
6. It is clear from the above provisions that an application for review of sentence can be entertained only for purposes of the court satisfying itself as to the correctness, legality or propriety of the proceedings. Section 364(5) of the CPC is emphatic that no application for revision should be entertained where an appeal lies from a sentence or order. This position was espoused in Criminal Revision number 194 of 2023 Kisii High court in the case of Barongo Siany Atembe vs Republic.
7. From the record, the court is merely being asked to exercise mercy on the applicant. He is not appealing against sentence nor conviction. It is trite law that sentencing is at the discretion of the court and an appellate court can only interfere if the same is illegal, harsh or excessive or the trial court failed to take into account relevant factors or considered wrong legal principles.
8. The above position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola S/o Owoura Vs Reginum (1954) 21 270 as follows:-
- “The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James V R., (1950) 18 E.A.C.A 147:
- "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
- To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. V Sher shewky, (1912) C.C.A. 28 T.L.R. 364."
9. It is therefore clear, taking into account the nature of the offence committed, the sentence imposed is not excessive nor harsh. The trial court properly exercised its discretion hence I have no reason to interfere with it. The issue of Section 333(2) of the CPC was considered during the appeal and 20 months spent in remand custody taken into account. In my view, the court is functus officio. Accordingly, the application is dismissed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF NOVEMBER 2025.

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J.N.ONYIEGO



JUDGE

