

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**MISC.CRIMINAL APPLICATION NO. E037 OF 2025**

**ABDI                      HURE                      MUHUMED.....**  
**.....APPLICANT**

**V**

**REPUBLIC.....**  
**RESPONDENT**

**(Being a revision application against the sentence of Hon. R. Aganyo (PM) delivered on 08-05-2024 in S.O.Case Number E004 of 2024 Wajir PM's Court)**

**RULING**

1. The applicant herein was on 14-04-2025 charged with the offence of attempted defilement contrary to Section 9(1)(2) of the sexual offences Act No.3 of 2006. Particulars were that on 11-04-2024 at Khorof Harar Sub-County, within Wajir County he intentionally attempted to course his penis to penetrate the vagina of M.A.S. a child aged 13 years.
2. He was further charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. Particulars were that on 11-04-2024 at Khorof Harar Sub-County, within Wajir County he intentionally touched the thighs of M.A.S. a child aged 13 years.
3. In respect to count 2, he was charged with being present in Kenya contrary to section 53(2)(j) as read with Section 53(2) No.12 of the Kenya Citizenship and immigration Act No.12 of 2012. Particulars states that on the 11.04.2024 at Khorofharar sub-county, within Wajir county, being a Somali citizen was found to be in Kenya

illegally and without any documents to warrant his stay in Kenya which is in contravention of the said Act.

4. Having pleaded guilty, a plea of guilty was entered. He was subsequently convicted and sentenced to serve seven years imprisonment in respect to count one and three years imprisonment in respect to count two. The sentences to run concurrently.
5. He has now moved to this court vide an undated application for review of sentence seeking review of his sentence on grounds that; he is a first offender; he is remorseful; he has no pending appeal; he did not give proper mitigation during sentencing; he is seeking repatriation to his home country; he has suffered enough in custody; he is a father of six and that his father is blind.
6. Basically, the applicant is seeking revision of his sentence to enable him get out of prison. In response, the respondent opposed the application on grounds that the sentence is legal and appropriate.
7. 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—**

**(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.**

**(1) 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. 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.**

9. From the record, the court is merely being asked to exercise mercy on the applicant. He is not appealing against sentence nor conviction. It 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.
10. 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."**

11. However, the applicant being a first offender and having pleaded guilty thus saving court's time and further considering that the minimum sentence provided for count one is five years imprisonment or a fine of kshs 50,000/=, the trial court should have exercised its discretion in favour of the applicant by imposing the least severe punishment provided pursuant to Article 50(2) (p) of the constitution.

12. In the circumstances therefore, am inclined to substitute the sentence in respect to count one with a fine of 50,000/= in default serve five years imprisonment. I also substitute the sentence of three years in respect to count two with a sentence of one -year imprisonment. The same to run concurrently from the date of sentence before the trial court.

Dated, signed and delivered in open court this 13<sup>th</sup> day of November 2025.

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**J.N.ONYIEGO**

**JUDGE**