REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CRIMINAL APPLICATION NO. E042 OF 2025

ABDIHAKIM ALI HUSSEIN…… APPLICANT

V

REPUBLIC…… RESPONDENT

(Being a revision application against the sentence of Hon. P.Wasike (SRM) delivered on 26-1-2022 in criminal case number E030 Mandera SRM'S Court)

RULING

1. The applicant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the sexual offences Act No.3 of 2006. Particulars were that on 21-08-2021 at Bulla Shantoley in Mandera North Sub-County in Mandera County, he intentionally caused his penis to penetrate the vagina of M.M. a child aged 15 years.

2. He was also charged with the alternative offence 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 21-08-2021 at Bulla Shantoley in Mandera North Sub-County, in Mandera County, he unlawfully did commit an indecent act with M.M. a child aged 15 years by rubbing his penis against her vagina.
3. Having denied the charge, the case proceeded to full trial. He was consequently convicted and sentenced to serve 15 years

imprisonment. Having been dissatisfied, he filed criminal appeal No. E037 of 2022 which was dismissed in its entirety on 7-5 2025.

4. He has now moved to this court vide an undated application for review of sentence citing grounds that; he is a first offender; he is remorseful; he has no pending appeal; he did not give proper mitigation during sentencing; he has served 5 years since sentence was imposed; he has attained some tailoring and carpentry skills; has done KCPE exam while in custody and that he has reformed hence needs non-custodial sentence.

5. 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 and that the court is functus officio.

6. 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.

7. 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 Sianyo Atembe vs Republic.**

8. 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.

9. 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 tha t 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:**
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> **"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."**

10. 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. In any event the issue was canvassed during the appeal hence the court is functus officio. Accordingly, the application is dismissed.

Dated, signed and delivered in open court this 25th day of November 2025.

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J.N.ONYIEGO

JUDGE