

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**MISC. CRIMINAL APPLICATION NO. E041 OF 2025**

**MASLAH MURSAL**

**HAJIR.....APPLICANT**

**VERSUS**

**REPUBLIC.....**

**.....RESPONDENT**

**(Being revision application against the sentence of Hon. X. Baraka (RM) dated 13<sup>st</sup> January 2025 in Wajir PM's Court Criminal Case No. E001 of 2024).**

**RULING**

1. The applicant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the sexual offences Act No.3 of 2006. Particulars were that on diverse dates between 25-12-2023 and 26-12-2023 at Bulla Adan area Garissa County, he caused his genital organ namely penis to penetrate the genital organ namely vagina of S.A.O. a girl aged 17 years old.
2. Having denied the charge, the matter proceeded to full trial. At the conclusion of the hearing, he was convicted and subsequently sentenced to serve 10 years.

3. He has now moved to this court vide a notice of motion dated 26-9-2025 seeking review of his sentence on grounds that the court did not take into account the period spent in remand custody. In response the prosecution did not oppose the application.
4. 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.**

5. 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.**

6. The court herein is being asked to enforce Section 333(2) of the CPC which provides that during sentencing the trial court should take into consideration the period spent in remand custody. The proviso to section 333(2) of the CPC requires the court to take into account time spent in remand custody during sentencing. The said section provides that: -

**“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day**

**of, the date on which it was pronounced, except where otherwise provided in this Code.**

**Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis mine)."**

7. Court's obligation under Section 333(2) of the CPC has been underscored in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) which provides that:

**"The provision to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."**

8. Case law has also emphasized that courts must give full effect to section 333(2) of the Criminal Procedure Code. See the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR. (see also Bethwel Wilson Kibor vs. Republic [2009] eKLR).**

9. In the instant case, the court merely stated that it had taken into account the period the appellant had been in custody but fell

short of specifying. For that reason, the sentence herein is reviewed to the extent that the period of 1 year and 28 days spent in remand custody shall be taken into account when computing sentence.

Dated, signed and delivered in open court this 11<sup>th</sup> day of December 2025

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**J. N. ONYIEGO**

**JUDGE**