REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CRIMINAL REVISION NO. E027 OF 2024

FLORENCE AKOTH ONDENG.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the sentence passed in Criminal Case No. E001 of 2020 in the Magistrate's Court at Mbita by Hon. N. Moseti, SRM on 21st July 2021)

RULING ON REVISION

[1] Before the Court for determination is the applicant's Notice of Motion dated 13th December 2024. She prayed for orders that:

> **[a]** The sentence imposed on her by the trial court of 10 years' imprisonment be reviewed and converted to a non-custodial sentence or any other sentence the Court may deem fit and proper to pass in the circumstances.
>
> **[b]** That further orders be made in the circumstances.

[2] The applicant averred that she was convicted of the offence of child prostitution contrary to **Section 15(1)** of the Sexual Offences Act, No. 3 of 2006 and was sentenced to 10 years' imprisonment on 21st July 2021, which sentence she has been serving diligently. She further deposed that she has been rehabilitated through counseling and religious studies and is remorseful for the offence. She added that she expects to be

discharged from prison on 15th June 2027 after remission. She therefore prayed for revision of the sentence to enable her serve the remainder of her term on non-custodial basis.

[3] The application was opposed by the respondent on the ground that the sentence passed by the lower court was in accord with **Section 15A** of the Sexual Offences Act and therefore lawful in every sense and is therefore not amenable to revision. Counsel for the respondent relied on **Bernard Kimani Gacheru** [2002] eKLR and **Karimi Ndari v Republic** [2024] eKLR for the proposition that sentence is a matter of discretion. Thus, the respondent prayed for the dismissal of the application.

[4] **Article 50(2)(q)** of the Constitution stipulates that:

> **(2) Every accused person has the right to a fair trial, which includes the right—**
>
> > **(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.**

[5] In the same vein, **Section 362** of the **Criminal Procedure Code,** recognizes that:

> **"The High court may call for and examine the records 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.”**

[6] In that regard, **Section 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

> **"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."**

[7] Accordingly, the Court called for the record of the lower court, namely**, Mbita MCCHSO Case No. E001 of 2020: Republic v Florence Akoth Odeng.** The record of the lower court confirms that the applicant was indeed charged with the offence of child prostitution contrary to **Section 15(a)** of the Sexual Offences Act. The particulars were that on the 14th October 2020 at Kisui Beach, Kasgunga Central Sub-location, Gembe West Location in Mbita Sub-County within the County of Homa Bay, she knowingly procured and permitted M A O, a girl aged 9 years to remain in her house to be sexually abused by **Erick Omondi Oyoo**.

[8] The record of the lower court further shows that the applicant denied those allegations, was taken through the trial process and was ultimately found guilty and convicted by the trial court. She was consequently sentenced to 10 years' imprisonment.

[9] It is trite law that sentence review, even on appeal, ought not to be easily done; and that certain factors must be present to warrant such an intervention. Some of these factors were discussed in the case of **Ogalo s/o Owuora v Republic [1954] 21 EACA 270,** exist as follows:

> **"…The court does not alter a sentence on the mere ground than if the member 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 Republic [1950] 18 EACA 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."**

[10] Similarly, in **Bernard Kimani Gacheru v Republic** [2002] eKLR, the Court of Appeal restated that:

> **"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, anyone of the matters already stated is shown to exist."**

[11] **Section 15** of the Sexual Offences Act provides that:

> **Any person who—**
>
> **(a)knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition**
>
> **…**
>
> **commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years."**

[12] There is no doubt therefore that the sentence meted on the applicant was lawful and is not amenable to revision. Indeed, in the Judiciary Sentencing Policy Guidelines, 2023, it is stated that:

> **2.3.16 Where the law provides mandatory minimum sentences, the court is bound by those provisions and must not impose a sentence lower than what is prescribed. A fine shall not substitute a term of imprisonment where a minimum term of imprisonment is the only option provided…**
>
> **2.3.17 Until the Supreme Court decides on the matters, Judicial Officers and Judges must adhere to the prevailing legislative frameworks, jurisprudence from courts and the SPGs 2022 during sentencing on the issue of the applicability of mandatory minimum sentences.**

[13] I have gone further and perused the record to ascertain whether there was compliance with **Section 333(2)** of the **Criminal Procedure Code.** That provision states:

> **(2) 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."**

[14] Similarly, in the revised **Judiciary Sentencing Guidelines,** it is stated**,** under Clauses 2.3.18 and 2.3.19, that:

> **"2.3.18 Section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.**
> **2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders – for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.**

[15] The record of the lower court shows that the applicant was arrested on 14th October 2020 and was arraigned before court on the following day. The record further shows that, in passing the sentence of 10 years' imprisonment, the learned magistrate ordered that the period be computed from the date of the applicant's arraignment in court. There is therefore no question about the correctness, legality or propriety of the sentence imposed on the applicant. It follows therefore that her application dated 13th December 2024 is utterly devoid of merit and is for dismissal. The same is hereby dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF APRIL 2026

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OLGA SEWE

JUDGE