



**Inzauli v Republic (Miscellaneous Criminal Application
E038 of 2023) [2024] KEHC 9598 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E038 OF 2023**

JN KAMAU, J

JULY 31, 2024

BETWEEN

CHRISPINUS INZAULI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

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. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was convicted on the main charge and sentenced to ten (10) years imprisonment.
2. On 10th January 2024, he filed an undated Notice of Motion application seeking review of his sentence. He prayed that the period that he stayed in custody while the trial was ongoing between 20th November 2021 and 4th May 2023, when he was arrested and convicted respectively, be taken into account as part of the sentence that he had already served pursuant to the decision in the case of *Abmed Abolfathi Mohammed and Another vs Republic* [2018] eKLR and Section 333(2) of the *Criminal Procedure Code*.
3. It was his assertion that the omission by the Trial Court to consider this period contravened his right to fair trial under Article 25 (2) of *the Constitution*.
4. He urged the court to also reduce his sentence of ten (10) years to a lesser term for reasons that his family was suffering due to his incarceration.
5. His undated Written Submissions were filed on 10th January 2024. The Respondent was not opposed to the said application and did not therefore file any Written Submissions.



Legal Analysis

6. In his mitigation, the Applicant submitted that he was a father of seven (7) children whose mother had run away after his conviction. He averred that he was brought up in a single parent family and he was their sole bread winner.
7. He contended that for the period he had been in custody, he had undergone spiritual courses which had transformed him to a better person. He sought for a second chance to go and take care of his children. He prayed for a non-custodial sentence and/or a reduction of his sentence or any other order that the court would find just on his part. In that regard, he cited the case of *Samson Boyii Nkulet vs Republic* [2019] eKLR without highlighting the holding he was relying on therein.
8. As has been seen hereinabove, he was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. Section 8(3) of the *Sexual Offences Act* provides that:-

“ A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
9. The Trial Court could therefore not be faulted for having sentenced him to ten (10) years imprisonment as the same was lenient in the circumstances.
10. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
11. This court took cognisance of the fact that there had been emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.
12. Notably, in the case of *Joshua Gichuki Mwangi vs Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake vs Republic* [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
13. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.
14. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case *Joshua Gichuki Mwangi vs Republic (Supra)* and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant had since been released from prison be apprehended to complete the remainder of his sentence.
15. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Applicant's sentence. Even without the directions of the Supreme Court of 12th July 2024, it would still not have interfered with the sentence that was meted against the Applicant as it was below the mandatory minimum sentence.



16. This court struggled with the question of whether it ought to enhance the sentence herein in view of the directions of the Supreme Court of 12th July 2024. This is because the Supreme Court issued its directions after this court had reserved the Ruling herein. As the Applicant did not have the opportunity to elect whether or not to proceed with the application after being duly informed of the risk of proceeding with his said application, this court opted to leave the said sentence against him undisturbed.
17. Turning to the period that he spent in custody while his trial was ongoing, this court had due regard to Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya). 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 Court).
18. This duty is also contained in the Judiciary Sentencing Policy Guidelines where it is provided that: -
- “The proviso 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.”
19. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the [Criminal Procedure Code](#) was restated by the Court of Appeal in the case of [Abamad Abolfathi Mohammed & Another vs Republic](#) (*Supra*).
20. Although the Applicant indicated that he was arrested on 20th November 2021, the Charge Sheet herein showed that he was arrested on 21st November 2021. He was sentenced on 4th May 2023. Although he was granted bond/bail, he did not appear to have come out on bond/bail while his trial was going on. He thus spent one (1) year five (5) months and ten (10) days in custody before he was sentenced.
21. A reading of the Trial Court’s Sentence showed that it did not take into consideration the time he spent in remand before sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

22. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s undated Notice of Motion application that was filed on 10th January 2024 was merited and the same be and is hereby allowed.



23. It is hereby directed that the time the Applicant spent in custody between 21st November 2021 and 3rd May 2023 be taken into account while computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

24. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF JULY 2024

J. KAMAU

JUDGE

