



REPUBLIC OF KENYA



**Gombeko v Republic (Criminal Revision E011 of 2023)  
[2024] KEHC 9575 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9575 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CRIMINAL REVISION E011 OF 2023**

**OA SEWE, J  
JULY 25, 2024**

**BETWEEN**

**NYAWA CHAKA GOMBEKO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the sentence passed in Sexual Offences Case No. 32 of 2019 in the  
Magistrate's Court at Msambweni by Hon. S. Ogot, SRM on 24th November, 2021)*

**RULING**

1. The Notice of Motion filed herein on 31<sup>st</sup> October 2023 was brought by the applicant, Nyawa Chaka Gombero. He cited Section 364(1)(b) of the Criminal Procedure Code and prayed for orders that the sentence imposed on him by the lower court be commuted to probation placement; and that his pre-sentence period be taken into consideration.
2. In his Supporting Affidavit, the applicant averred that he was arrested charged, tried, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to Section 8(3) of the *Sexual Offences Act*. He further averred that he appealed the decision to the High Court where his appeal was dismissed on conviction but the sentence was reduced to 10 years' imprisonment.
3. The applicant further explained that, prior to his arrest, he had developed a medical condition in which he would have eruptions of boils all over his body; and that the condition could only be managed by herbal medicine. As a result, he contended that his stay at the prison has been traumatizing owing to his inability to access herbal medicine. Consequently, the applicant prayed that he be allowed to serve the remaining part of his sentence by way of non-custodial sentence such as probation.
4. The applicant deposed that he was arrested on 4<sup>th</sup> November 2019 and has since served 4 years of his sentence. He therefore prayed, in the alternative, that his pre-sentence detention period be taken into account pursuant to Section 333(2) of the Criminal Procedure Code.



5. The applicant urged his application by way of written submissions in which he essentially reiterated the factual basis of his case. In support of his submissions for consideration on medical grounds, the applicant relied on Mombasa High Court Petition No. 128 of 2018: *James Kazungu Luganje v Republic* in which Hon. Ogola, J. set aside death sentence and substituted it with imprisonment for 16 years, part of which was to be served on probation, on the ground, inter alia, that the inmate was sickly.
6. The respondent opposed the application. Learned counsel for the respondent, Ms. Mwaura, made her oral submissions on 30<sup>th</sup> May 2024 pointing out that the applicant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, and that upon conviction he was sentenced to 20 years' imprisonment. She further pointed out that the applicant appealed against conviction and sentence, whereupon the sentence was reduced to 10 years' imprisonment.
7. Accordingly, the respondent's contention was that, the appellate court having reduced the applicant's sentence to 10 years' imprisonment, the application for sentence review is misconceived. Counsel added that the sentence of 10 years was itself lenient, granted the minimum sentence prescribed for the offence and the prevalent nature of the offence in Kwale County.
8. Article 50(2)(q) of the Constitution pursuant to which the applicant approached the Court 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.
9. 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."
10. In that regard, Section and 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."
11. Accordingly, the Court called for the record of the lower court, namely, Msambweni Principal Magistrate's Court Sexual Offence No. 32 of 2019: *Republic v Nyawa Chaka Gombeko*. The record of the lower court confirms that the applicant was indeed charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The offence was alleged to have been committed on diverse dates between 19<sup>th</sup> October 2019 and 4<sup>th</sup> November 2019 at Majoreni Area in Vanga Location within Kwale County and the victim was said to be a girl then aged 14 years. In the alternative, the applicant was charged with indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
12. The record further shows that the applicant denied those allegations and was consequently taken through the trial process. Ultimately the lower court was satisfied that the main count of defilement had been proved beyond reasonable doubt. He was convicted accordingly. The applicant was then given an opportunity to express himself in mitigation before the sentence was pronounced. The learned



magistrate called for a pre-sentence report and took time to consider all the relevant factors, including the prevalence of the offence within the jurisdiction of her court.

13. 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 interference. Some of these factors were discussed in the case of *Ogalo s/o Owuora v Republic* 1954. 21 EACA 270, as follows:

...The court does not alter a sentence on the mere ground that 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.”

14. 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

15. In this instance, it is common ground that the sentence imposed by the subordinate court has already been reconsidered and reviewed on appeal and reduced to 10 years’ imprisonment by a court of concurrent jurisdiction. Accordingly, the question of further consideration by this Court cannot arise. In this connection, I agree entirely with the expressions of Hon. Aburili, J. in *Constitutional Petition No. 5 of 2018 Daniel Otieno Oracha v Republic* 2019. eKLR, that:

14. The law abhors the practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a judgment of the subordinate court or if the petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.

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16. The judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own judgment or of court of concurrent competent jurisdiction when the Petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.

17. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matters falling under the exclusive jurisdiction of Supreme Court under Article 163(3) cannot be dealt with by the High Court



16. Therefore, the applicant's prayer for his sentence to be reviewed further and be substituted with probation placement is indeed misconceived and I so find.

17. The second limb of the application is for the applicant's pre-sentence detention period to be taken into account in 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."

18. 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.

19. Thus, in *Ahamad Abolfathi Mohammed & Another v Republic* 2018. eKLR the Court of Appeal held:

...By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19<sup>th</sup> June 2012.



20. The record of the lower court shows that the applicant was arrested on 4<sup>th</sup> November 2019 and that, although an order was made for his release on bond on terms which were later reduced from Kshs. 200,000/= to Kshs. 2,000/=, he was unable to comply with those terms. Accordingly, the applicant remained in custody from 4<sup>th</sup> November 2019 to 24<sup>th</sup> November 2021 when he was sentenced by the subordinate court.
21. There being no indication in the sentencing notes of the trial court that the applicant's pre-sentence detention period was taken into account, I am satisfied that the second limb of the application is meritorious. In this regard, I am persuaded by the position taken by Hon. Odunga, J. (as he then was) in *Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020)* 2021. KEHC 457 (KLR) (18 January 2021) that:
- A holistic consideration of the above provisions clearly show that this court has the power to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and one such violation is the denial or threat of denial of freedom without a just cause such as where the sentence that a person risks serving is in excess of the lawfully prescribed one by failing to comply with section 333(2) of the Criminal Procedure Code.”
22. In the result, I find merit in the application filed herein on 31<sup>st</sup> October 2023. The same is hereby allowed to the extent that the petitioner's 10-year imprisonment shall take into account the period he spent in custody between 4<sup>th</sup> November 2019 when he was arrested and 24<sup>th</sup> November 2021 when his sentence was pronounced.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25<sup>TH</sup> DAY OF JULY 2024**

**OLGA SEWE**

**JUDGE**

