



**Mwangi v Republic (Miscellaneous Application E105 of 2023)
[2024] KEHC 10158 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E105 OF 2023
DO CHEPKWONY, J
AUGUST 16, 2024**

BETWEEN

DOUGLAS MWAURA MWANGI APPLICANT

AND

REPUBLIC DEFENDANT

RULING

1. The Applicant Douglas Mwaura Mwangi was charged, convicted and sentenced 15 years imprisonment for the offence of Defilement contrary to Section 8(1) of the *Sexual Offences Act* No 3 of 2006 in Thika Criminal Case No 401 of 2015. He lodged an appeal vide Kiambu High Court Criminal Appeal No 36 of 2017 which was dismissed on 31st July, 2018.
2. The Applicant has now moved this court vide Chamber Summons Application dated 2nd August, 2023, wherein he has urged the court to consider the time that he spent in custody during trial. He holds that he was arrested on 3rd February, 2015, and was released on bond on 23rd February, 2015. He was re-arrested on 1st September, 2016 and remanded in custody until delivery of Judgment on 28th February, 2017. He therefore contends that the trial Court failed to consider the six(6) months and 17 days that he spent in custody during trial.
3. The Applicant also states that this Court should consider resentencing him since the minimum mandatory sentence he is currently serving was declared unconstitutional. He has further urged that the court should take into account the decongestion exercise that is ongoing in prisons.
4. The Respondent did not file any response or submissions to the application despite having been granted leave to do so on various occasions. However, the court notes that on 16th November, 2023, the prosecution counsel indicated to court that it was not opposed to the prayer under Section 333 of the *Criminal Procedure Code* for the time the Applicant spent in custody during the trial to be considered.



5. To determine the application dated 2nd August, 2023, this court has read through the affidavit and submissions by the Applicant alongside the provisions of the law as cited. The court has also taken note of the prosecution's concession to the prayer under Section 333 of the [Criminal Procedure Code](#) for consideration of time spent in custody during trial. Further, the Court has read through the proceedings before the trial court.
6. With regard to the prayer for time spent in custody to be considered, Section 333(2) of the [Criminal Procedure Code](#) provides as follows:-

“Subject to the provisions of Section 38 of the Penal Code, 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 sub-section(1) has prior, to such sentence shall take account of the period spent in custody
7. According to the The [Judiciary Sentencing Policy Guidelines](#),

“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 offence, the court must take into account the period in which the offence was held in custody during the trial”.
8. Having read through the original record of proceedings before the trial court, the court confirms that indeed the Applicant was arrested on 3rd February, 2015 (see face of charge stated date 4th February, 2015). He was arraigned before court on 4th February, 2015 for plea taking and was released on bond on 23rd February, 2015. (see release order dated 25/2/2022) He failed to attend court from 2nd July, 2016 and was rearrested on warrant of arrest on 1st September, 2016. Upon the court finding his failure to attend court unjustified, the accused person's bond was cancelled and he was remanded in custody until the delivery of Judgment and subsequent sentence on 28th February, 2016. (See ruling delivered on 18th October, 2016).
9. In sentencing the Applicant, the trial Magistrate had this to say:-

“I have considered the nature of the charge, mitigation and the provision of Section 8(4) of the [Sexual Offences Act](#) which provide for a minimum sentence, accused person is sentenced to 15 years imprisonment. Right of Appeal 14 days”.

From this statement, it is clear that the trial court did not take into consideration the period the accused spent in custody during trial which is in contravention of the provision of Section 333 of the [Criminal Procedure Code](#).
10. With regard to resentencing, the court notes that the Applicant was charged, convicted and sentenced for the offence of Defilement. The particulars of the offence were that on the 2nd February, 2015, at [Particulars Withheld] Village in Gatanga District within Muranga county intentionally and unlawfully caused his penis to penetrate the vagina of BWN a child aged 16 years.
11. The law on the offence of defilement is enshrined under the [Sexual Offences Act](#) and the penalties are provided for based on the age of the victim. In this case, the Applicant was found guilty, convicted



and sentenced for defiling a child aged 16 years which is provided for under Section 8(A) of the said Act and it states:-

8(1) A person who commits an act which caused penetration with a child is guilty of an offence termed defilement. The penalty for defiling a child of age sixteen (16) years is provided for under Section 8(4) of the same Act as follows:-

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years”

12. It will be noted that the sentence of fifteen years which is prescribed and was meted out by the trial court is mandatory, which the Applicant argues is prejudicial to him as it has deprived him of his right to mitigate and right to a lesser severe sentence which amounts to discrimination. According to the Applicant, the trial court did not consider his personal circumstances.

13. The unconstitutionality of mandatory sentences was addressed by the court in the case of [*Jared Koita v Republic*](#)[2019]eKLR, where it stated thus:-

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the [*Sexual Offences Act*](#), and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

14. On the same issue, the Court of Appeal in the case of [*Dismas Wafula Kilwake v Republic*](#)[2019] eKLR expressed itself as hereunder:-

“Here at home in a Judgment rendered on 14th December, 2017 in *Francis Muruatetu & another v Republic*, SC Pet No 16 of @015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the [*Sexual Offences Act*](#), we cite it because of the pertinent observations that the apex court made regarding mandatory sentences. In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the [*Sexual Offences Act*](#), which do exactly the same thing”.

15. In reliance on the above decisions, given that the trial court meted out a mandatory minimum sentence which the Court of Appeal has also declared to be unconstitutional, this court proceeds to set aside the sentence of 15 years meted against the Applicant owing to the gravity of the offence and the mitigation of the Applicant, substitutes it with a sentence of twelve (12) years.



16. In totality, the Chamber Summons application dated 2nd August, 2023 is hereby allowed with the following orders issuing:-
- a. The sentence of fifteen (15) years meted against the Applicant be and is hereby set aside and substituted with the sentence of twelve (12) years imprisonment.
 - b. The said sentence to be computed with regard to the six (6) months, 17 days that the Appellant spent in custody during trial.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU VIRTUALLY THIS 16TH DAY OF AUGUST, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Appellant in person present

M/S Ndeda counsel for the Respondent

Court Assistant – Martin

