



**Kinyangi v Republic (Miscellaneous Criminal Application E048 of 2024)  
[2024] KEHC 11378 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11378 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
MISCELLANEOUS CRIMINAL APPLICATION E048 OF 2024**

**JN KAMAU, J**

**SEPTEMBER 25, 2024**

**BETWEEN**

**ANTHONY KARANI KINYANGI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

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. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The Trial Magistrate, Hon S. Manyura, convicted him of the main charged and convicted him to fifteen (15) years imprisonment.
2. On 13<sup>th</sup> March 2024, he filed this application on review of sentence pursuant to Section 333(2) of the *Criminal Procedure Code*. He also sought a reduction of the sentence of fifteen (15) years that was imposed on him. In his application, he averred that the Trial Court did not consider the period between when he was arrested on 20<sup>th</sup> February 2022 and 9<sup>th</sup> March 2023 when he was convicted. He also sought to have the period of fifteen (15) years imprisonment be reduced to a more lenient term.
3. He did not file Written Submissions to support his prayer. The Respondent was not opposed to the said application and did not therefore file any Written Submissions.



## Legal Analysis

4. As was stated hereinabove, he was charged under Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#). Section 8(4) of the [Sexual Offences Act](#) provides that:-

“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.”
5. The Trial Court therefore did not there misdirect itself or err when it convicted him to fifteen (15) years imprisonment instead as that was the sentence that was prescribed by the law.
6. Prior to the directions of the Supreme Court in [Francis Karioko Muruatetu and Another vs Republic](#) [2017] eKLR on 6<sup>th</sup> July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
7. 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.
8. 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.
9. 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](#).
10. However, in a decision that was delivered on 12<sup>th</sup> 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.
11. 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.
12. Turning to the period that he spent in custody as his was going on, 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)”



13. This duty is also contained in the [Judiciary Sentencing Policy Guidelines](#) (under clauses 7.10 and 7.11) 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.”
14. 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](#) [2018] eKLR.
15. According to the Charge Sheet, the Applicant was arrested on 20<sup>th</sup> February 2022. He was convicted on 2<sup>nd</sup> February 2022. He was sentenced on 9<sup>th</sup> March 2023. Although he was granted bail, he did not appear to have come out on bond/bail. He thus spent one (1) year and seventeen (17) days in custody before he was convicted.
16. A further reading of the Trial Court’s Sentence showed that it did not pronounce itself on the time he spent in remand before conviction and sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

### **Disposition**

17. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s application for review that was filed on 19<sup>th</sup> September 2022 was partly merited and the same be and is hereby allowed only to the extent of the period that he spent in custody while his trial was ongoing. For the avoidance of doubt, his conviction and sentence be and are hereby upheld as they were both safe.
18. It is hereby ordered that the time he spent in custody between 20<sup>th</sup> February 2022 and 8<sup>th</sup> March 2023 as the trial was ongoing be and is taken into consideration when computing his sentence as provided in Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).
19. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024**

**J. KAMAU**

**JUDGE**

