



**Sivaji v Republic (Miscellaneous Criminal Application E039 of 2023)  
[2024] KEHC 13532 (KLR) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
MISCELLANEOUS CRIMINAL APPLICATION E039 OF 2023**

**JN KAMAU, J  
OCTOBER 28, 2024**

**BETWEEN**

**BENSON SIVAJI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. The Applicant herein was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(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*.
2. He was convicted of the main charge and sentenced to ten (10) years imprisonment.
3. On 14<sup>th</sup> August 2023, he filed a Notice of Motion application dated 29<sup>th</sup> June 2023 seeking a review of his sentence. He prayed that the period of three (3) years that he stayed in custody while the trial was ongoing, be taken into account as part of the sentence that he had already served pursuant to Section 333(2) of the *Criminal Procedure Code* and the decisions in the cases of *Abmed Abolfathi Mohammed and another v Republic* [2018] eKLR and *Bethwel Wilson Kibor v COA* in Eldoret (sic) Criminal Appeal No 78 of 2019 (eKLR citation not provided).
4. He contended that the omission by the Trial Court was not in promotion of the right to fair trial under Article 25(2) of the *Constitution* of Kenya, 2010.
5. His Written Submissions were dated 2<sup>nd</sup> January 2024 and filed on 10<sup>th</sup> January 2024. The Respondent was not opposed to the said application and did not therefore file any written submissions. The Ruling herein is therefore based on the affidavit evidence by the Applicant herein.



## Legal Analysis

6. The Applicant urged the court to consider reducing his sentence and the same be computed to run from 12<sup>th</sup> November 2019 when he was arrested. He pointed out that he was convicted on 21<sup>st</sup> September 2022.
7. He reiterated the cases he relied on and further relied on Article 22(1), 23, 25(q), (c), 27(1), (2), 165(3) of the Bill of Rights and fundamental freedoms in the *Constitution* of Kenya and urged this court to consider his mitigation, aggravating factors, the time he spent in custody during trial, the rehabilitation programmes that he had undergone, the fact that he was a first offender and that he had reformed and was remorseful to the parties. He pleaded with this court to substitute his sentence with a least severe one.
8. The Applicant herein was sentenced under Section 9(2) of the *Sexual Offences Act*. The same provides as follows: -

“A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years”
9. This court could not therefore fault the Trial Court for having sentenced him to ten (10) years imprisonment as that was lawful.
10. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and another v 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.
11. Notably, in the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v 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.
12. 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*.
13. 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 v 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 therein had since been released from prison.
14. 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. It had no option but to leave the said sentence that was meted against the Applicant herein undisturbed.
15. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was on going as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).



16. The said Section 333(2) of the *Criminal Procedure Code* 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).
17. 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.”
18. 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 *Ahamad Abolfathi Mohammed & Another v Republic* (Supra).
19. The Charge Sheet showed that the Applicant herein was arrested on 17<sup>th</sup> November 2019. The proceedings were not clear as to when he was released on bond/bail. It was, however clear that he was not in custody as at 30<sup>th</sup> March 2020.
20. The proceedings showed that he absconded court on 23<sup>rd</sup> March 2021 whereupon a warrant of arrest was issued. He was arraigned in court on 21<sup>st</sup> July 2021 and remained in custody until 23<sup>rd</sup> March 2022.
21. It was not clear from the proceedings when he was released on bond/bail. However, the proceedings showed that he was out on bond/bail as at 6<sup>th</sup> April 2022. As at 25<sup>th</sup> May 2022, he was in custody where he remained until his conviction. He was sentenced on 21<sup>st</sup> September 2022. He thus spent one (1) year, four (4) months and ten (10) days in custody before he was sentenced.
22. In his mitigation the Applicant stated as follows:-
- “My mum is deceased. I am a parent of 2 children. May court consider the period I have spent in remand.” (emphasis court).
23. In response thereof, the Trial Court rendered itself as follows:-
- “I have considered the general circumstances of this case. I have further taken into account the accused person’s mitigation(emphasis court). I note that the accused person is not remorseful. The complainant was 4 years old. The accused person is a fully grown adult. I take into account that the offence herein is rampant in this area and must be deterred so that young children in the community are protected from such perpetrators. Accused to serve 10 years in jail.”.
24. Although the Trial Court considered the Applicant’s mitigation, it did not expressly pronounce itself on his prayer under Section 333(2) of the *Criminal Procedure Code*. The Applicant was arrested on



17<sup>th</sup> November 2019 and convicted on 21<sup>st</sup> September 2022. As the pronouncement was not clear to this court, it found that this was a suitable case for it to direct that the period he spent in custody be taken into account while computing his sentence.

### **Disposition**

25. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 29<sup>th</sup> June 2023 and filed on 14<sup>th</sup> August 2023 was partly merited as regards the period that he spent in custody while his trial was ongoing. His sentence and conviction were otherwise lawful and safe and are hereby upheld.
26. It is hereby directed that the period that the Applicant spent in custody between 17<sup>th</sup> November 2019 and 20<sup>th</sup> September 2022 while his trial was going on be taken into consideration while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
27. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 28<sup>TH</sup> DAY OF OCTOBER 2024**

**J. KAMAU**

**JUDGE**

