



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oduor v Republic (Criminal Petition E055 of 2023)  
[2024] KEHC 15941 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15941 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E055 OF 2023  
E OMINDE, J  
DECEMBER 19, 2024**

**BETWEEN**

**ISAAH ONYANGO ODUOR ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This Petition arises from the sentence in Eldoret Chief Magistrates' Criminal Case (Sexual Offences) No. 256 of 2019.
2. The Petitioner was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 24<sup>th</sup> October 2019, in (particulars withheld) within Kakamega County, he unlawfully and intentionally caused his genital organ namely penis to penetrate into the genital organ of DAI, a girl aged 14 years.
3. In the alternative, he was charged with the offence of committing and indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 24<sup>th</sup> October 2019, in (particulars withheld) within Kakamega County, he unlawfully and intentionally caused his genital organ namely penis to come into contact with the genital organ of DAI, a girl aged 14 years.
4. The Petitioner pleaded not guilty and the matter proceeded to full hearing. The prosecution called 4 witnesses in support of its case whereas the Petitioner testified as the only witness in his defence by giving a sworn statement. Upon considering the testimonies of the witnesses and the evidence tendered in court, the trial magistrate convicted the Petitioner of the main charge. Upon consideration of his mitigation, the trial court sentenced him to 15 years imprisonment vide a judgement delivered on 15/07/2021.



5. Being aggrieved with the sentence, the Petitioner instituted the present petition vide a Notice of Motion Application dated 07/08/2023 seeking a reduction of his sentence under section 333(2) of the Criminal Procedure Code. Additionally, he seeks a sentence review under section 362 as read with section 364 of the Criminal Procedure Code.
6. The parties were directed to prosecute the petition vide written submissions

#### **Petitioner's submissions**

7. The Petitioner filed submissions on 06/09/2023 in person. He submitted that he is a first offender who has no criminal record history and urged the court to take into consideration the fact that he had spent one year and ten months in custody before the conclusion of his trial. Additionally, he stated that he has spent four years in prison and prays for a second chance. The Petitioner urged that he has taken full advantage of the courses available in prison service which he believes that he will make a positive change to the community.
8. In conclusion, he urged that what he did marred relations with his family and friends as he had chosen bad company and he has now paid the price. He requested the court to deem the period served as adequate punishment and reduce his sentence or give him a non-custodial sentence.

#### **Respondents' submissions**

9. Learned counsel for the state, S.G Thuo, filed submissions dated 15/11/2024. He submitted that section 333(2) of the Criminal Procedure Code mandates a court to take into account the time spent in custody before handing down a sentence. Further, that the Petitioner was in custody from the date of 07/09/2019 to 15/07/2023, a period that was not factored into his sentencing.
10. Counsel urged that the sentence of 15 years for an offence was largely informed by the authority in Muruatetu which position was overturned on 12/07/2024 vide the Supreme Court decision on SCOK Petition No. E018 of 2023 – R vs Joshua Gichuki Mwangi & Others. Counsel submitted that when considering a matter for resentencing the court must evaluate the evidence in respect of each case and determine whether there existed aggravating factors. It is his view that this is a case where the aggravating factors outweighed the mitigation the Petitioner offered. The crime was heinous and the permissible sentence by law ought to have been a life sentence. He stated that the 15-year sentence was lenient and in the circumstances the court is clothed with jurisdiction to enhance the sentence to a life sentence and dismiss the application.

#### **Analysis & Determination**

11. The prescribed sentence for defilement under section 8(3) of the *Sexual Offences Act* is as follows;
  - (3) 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.
12. Section 333(2) of the Criminal Procedure Code provides:-

“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.”



13. According to 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 offender, the court must take into account the period in which the offender was held in custody during the trial.”

14. The provisions of section 333(2) of the Criminal Procedure Code was the subject of the decision in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR where the Court of Appeal held that:-

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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.”

15. In *Bethwel Wilson Kibor vs Republic* [2009] eKLR the Court of Appeal expressed itself as follows:-

“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22<sup>nd</sup> September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

16. In light of the above, it is clear that the application of the provision of Section 333(2) upon conviction is mandatory and if it is apparent that the same was not applied by the Trial Court, then this Court is obligated to remedy this omission. On the prayer seeking that the sentence imposed be revised to a



lesser sentence for the reasons herein summarised, the decision of the Supreme Court in Petition No. E018 of 2023, Republic V Joshua Gichuki Mwangi & Others is relevant. In the said decision, the Court was emphatic that until a decision is made on a constitutional petition properly so filed challenging the sentences provided for in the *Sexual Offences Act*, the sentences as currently prescribed under Act remain legal lawful and valid until such a time when the said Act will be repealed and that in this regard therefore, Courts are bound to apply those sentences as provided.

17. In the said case, a decision of the Court of Appeal where an imprisonment term of 20 years imposed by a Magistrates' Court upon an Appellant who was convicted for defilement was commuted to 15 years was set aside by the Supreme Court and the 20-year imprisonment term reinstated. In setting aside, the Court of Appeal decision, the Supreme Court stated as follows with regard to the minimum and mandatory sentences imposed by the *Sexual Offences Act* 2006;

“.....the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence”

18. In light of this decision of the Supreme Court and given the age of the victim, I am of the finding that the sentence meted out by the Trial Court is an illegal sentence for reasons that the victim was a child aged 14 years and so the relevant sentence ought to have been as provided under Section 8(3) and that is to a period of not less than 20 years. The Appellant was sentenced to 15 years.

19. Section 354 of the Criminal Procedure Code provides as follows on the powers of High Court of appeals and revisions;

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- (1) At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.
- (2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.
- (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
  - a. in an appeal from a conviction—
    - i. reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
    - ii. alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
    - iii. with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;
  - b. in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

364. Powers of High Court on revision



1. In the case of a proceeding in a 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—
  - a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
  - b. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

20. It follows from the above provisions of the Criminal Procedure Code that this Court has the power and the mandate to alter the decision of the Trial Court in terms of the conviction and sentence where it deems it just and expedient to do so in the interest of justice given the circumstances of the case before it. In this case, the circumstances are that the Trial Court failed to pass the sentence that it was required to pass under the *Sexual Offences Act* 2006 and so the proviso to Section 364 of the CPC shall apply.
21. In this regard, being satisfied that the Trial Court was of the finding that the victim was a child aged 14 years, the Appellant sentence is now hereby enhanced from 15 years to 20 years imprisonment
22. Much as the Appellant did not state the period of time that he was in custody during the trial, I have perused the Lower Court file and there is no evidence indicating that the accused was out on bond during the trial. I have also perused the sentence and it shows that that the Trial Magistrate did not factor in the period spent in custody in the sentence.
23. The record shows that the plea was taken on 5<sup>th</sup> November 2019 and the Appellant was sentenced on 15<sup>th</sup> July 2021 bringing the period spent in remand to one year and eight months and 10 days. In finding merit with the appellant's appeal on this ground, I allow the same and direct that this period be computed in the enhanced term of 20 years imprisonment.

**READ DATED AND SIGNED AT ELDORET ON 19<sup>TH</sup> DECEMBER 2024**

**E.OMINDE**

**JUDGE**

