



Onchoke v Republic (Miscellaneous Criminal Application E050 of 2022) [2023] KEHC 21776 (KLR) (30 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CRIMINAL APPLICATION E050 OF 2022**

**PM MULWA, J
AUGUST 30, 2023**

BETWEEN

RICHARD MAKORI ONCHOKE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant filed the instant application wherein he seeks resentencing hearing. It is his case that he was charged and convicted of the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No 3 of 2006 in Thika Criminal case No 1 of 2017 and sentenced to 20 years imprisonment.
2. At the hearing of the application the court directed that the application be heard through written submissions. Both parties filed submissions.

Applicant’s submissions

3. The applicant submits that he was dissatisfied with the conviction and sentence and that he filed a first appeal in Kiambu Criminal Appeal No 23 of 2020 which was dismissed. He contends that at the time of the arrest, he was a student at Jomo Kenyatta University studying electrical engineering and he aspires to continue with his education.
4. The applicant states that he has pursued NITA’s Electrical Wireman Grade III, social re-adaptation courses including guiding and counselling and leadership training coupled with religious training and wishes to undertake more training while outside the prison with the aim of enhancing restorative justice.
5. Further he urged the court to find that his rights have been infringed, denied and threatened by the sentence. He urged the court to exercise its jurisdiction to order the taking of new evidence and review



the sentence. The applicant seeks an alternative non-custodial sentence to enable him to realize his full potential academically. The long-term imprisonment sentence will only serve to psychologically torture and degrade the applicant.

6. The applicant urges the court to consider the time served in custody during the trial and the time spent in service of sentence by dint of section 333(2) of the [Criminal Procedure Code](#).

Respondent's submissions

7. Counsel submits the applicant seeks the consideration of the court the period spent in custody from January 3, 2017 to April 30, 2020 by dint of Section 333(2) [Criminal Procedure Code](#).
8. He further submits that the sentence meted out is within the law, as the penalty for defilement under section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) attracts a penalty of imprisonment for a term of not less than twenty years.
9. That the trial court was guided by the gravity of the offence and the aggravating factors of the case. The applicant is not entitled to a review of the sentence. The sentence is commensurate to the offence and not excessive and urged the court to dismiss the application.

Analysis and determination

10. I have considered the application and the submissions by the parties. What I gather is that the issue raised by the applicant is the review of his sentence and consideration of pre-conviction time spent in custody. The applicant urges the court to issue an alternative sentence.
11. The applicant was convicted of the offence of defilement to 20 years imprisonment. The law prescribes a mandatory imprisonment term of 20 years.
12. The factors to be considered in re-sentencing were laid out in the court of appeal in [Dismas Wafula Kilwake v Republic](#) [2018] eKLR, it observed as follows: -

We hold that the provisions of section 8 of the [Sexual Offences Act](#) must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granting the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

13. The trial court exercised its discretion in sentencing and considering the gravity of the offence meted out the sentence on the applicant.
14. This court is called upon to determine the legality, correctness or propriety of the sentence given by the trial court on the applicant's application for resentencing. In determining so the court must establish if the trial magistrate acted on the wrong principles. From the application filed the applicant contends the trial court failed to consider the period spent in custody prior to the conviction.



15. The applicant urges the court to find that he was 19 years at the time of the commission of the offence and he is now 23 years, mature and remorseful for his actions. He pleads with the court to find the period already served as sufficient punishment.
16. The state submits that the court ought to consider the time spent in custody in accordance with the provisions of section 333(2) of the *Criminal Procedure Code*. The applicant was arrested on January 3, 2017 and sentenced on April 30, 2020.
17. Section 333(2) of the *Criminal Procedure Code* provides: 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. Save for the fact that the applicant was not given credit for the pre-conviction time spent in remand, I find the sentence meted by the trial court to be within the law, the same is sufficient punishment for the offence committed by the applicant.
19. It is my finding that there is no merit in the application for re-sentencing, the application is dismissed. The applicant is entitled to a reconsideration of the time spent in remand before the conviction. That is the period between January 3, 2017 and April 30, 2020 when he was sentenced. The period spent in remand is 3 years 3 months 27 days which translates to 3 years 4 months.
20. In the circumstances this court makes the following orders:
 - i. The application for resentencing is dismissed.
 - ii. The sentence of 20 years is upheld.
 - iii. The applicant is entitled to credit for the period of 3 years and 4 months spent in custody from the date of his arrest to the date of his conviction.

It is so ordered

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30TH DAY OF AUGUST 2023.

P.M. MULWA

JUDGE

In the presence of:

Duale – Court assistant

Applicant – present virtually from Kamiti Max. prison

Mr. Muriuki - for the Respondent

