



**Mugunda v Republic (Miscellaneous Criminal Application  
E003 of 2022) [2023] KEHC 25937 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25937 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
MISCELLANEOUS CRIMINAL APPLICATION E003 OF 2022**

**JN KAMAU, J**

**NOVEMBER 27, 2023**

**BETWEEN**

**NEWTON MUGUNDA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. The Applicant herein was charged with the offence of defilement contrary to Section 8 (3) (sic) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of attempted defilement contrary to Section 9 of the *Sexual Offences Act*. He was convicted on the alternative charge and sentenced to ten (10) years imprisonment.
2. On 21<sup>st</sup> January 2022, he filed a Chamber Summons application seeking for leniency and a non-custodial sentence.
3. His undated Written Submissions were filed on 10<sup>th</sup> August 2023 while those of the Respondent were dated 18<sup>th</sup> August 2023 and filed on 21<sup>st</sup> August 2023.

**Legal Analysis**

4. In his Mitigation seeking leniency that was filed on 21<sup>st</sup> February 2022, the Appellant pointed out that he was dissatisfied with the decision of both the Trial Court and the High Court that dismissed his Appeal. He asserted that the sentence of ten (10) years was harsh and excessive bearing in mind that he was a first offender and that he was a family man whose responsibility had been deprived by the courts.
5. He averred that he had learnt more about the case after he was convicted and drew the court's attention to the fact that PW 1 was reminded under oath and procedures (sic) and that her evidence did not



corroborate as it was stated that he was not the father of the child. He added that there was no clear link on the part of the exhibits (sic).

6. In his Written Submissions, he was emphatic that PW 1's evidence was inconsistent and contradictory in the manner in which the incident is said to have occurred. He also set out several areas that he averred PW 1 contradicted herself amongst them her assertion that she was not pregnant which she later changed to the fact that she was pregnant but that he was not the father to the child.
7. He further stated that his lawyer failed to appear in court to play his role and that the Trial Court proceeded with the case in the absence of his said lawyer. He termed this as a miscarriage of justice because he relied on his lawyer for his defence.
8. He pointed out that he had served more than a third (1/3) of his sentence and that he only had fourteen (14) months remaining for him to complete the sentence. He asserted that he had undergone various religious and technical training and attained Grade 3 in welding which would benefit him when he was set free.
9. It was his further submission that under Article 165 (sic), the High Court has unlimited jurisdiction to determine the question respecting the interpretation as this constitution or any other law was constant with or in contravention of *the Constitution* (sic).
10. He further stated that the three (3) months he spent in custody while his trial was ongoing ought to be taken into account in his sentence or in lieu thereof be subjected to a non-custodial sentence for the remaining one (1) year as provided for by the law to all first offenders serving a sentence of three (3) years and below.
11. On its part, the Respondent asked this court to disregard the issues the Applicant had raised in his Written Submissions as they were substantively dealt with in Kakamega HCCRA No 12 of 2018 whereupon the decision of the lower court was upheld. It further pointed that the penalty for the offence of attempted defilement was then (10) years as provided in Section 9(2) of the *Sexual Offences Act*. It therefore urged this court not to interfere with the conviction and sentence.
12. Notably, the Applicant raised several matters of fact and points of law in his Written Submissions. However, as the Respondent correctly pointed out, the said issues were exhaustively dealt with by Majanja J in *Newton Mugunda vs Republic* [2019] eKLR. This court could not therefore purport to sit on appeal of the decision of the learned judge as he was of equal and competent jurisdiction as this court. If the Applicant was dissatisfied with his decision, the only option was for him to appeal to the Court of Appeal.
13. Going further, as was seen hereinabove, the Applicant had urged this court to consider the period that he spent in prison while his trial was on going. Notably, Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) 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).



14. 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.”
15. 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* (Supra).
16. It was therefore evident that the period that the Applicant spent in custody while the trial was ongoing therefore ought to have been taken into account in the computation of his sentence as provided in Section 333(2) of the *Criminal Procedure Code*.
17. As Majanja J did not pronounce himself on the period that the Applicant spent in custody, this court was persuaded that it could take the same into consideration.
18. This court perused the lower court file and noted that it was difficult to ascertain when exactly the Applicant was released on bond. However, it did appear that when he appeared in court on 17<sup>th</sup> June 2015, he was out on bond. He put the said period at three (3) months. Having been arrested on 14<sup>th</sup> November 2011, he must have been released in January 2015. The court therefore adopted the period of three (3) months as the period that he spent in custody before he posted bail/bond.
19. Having said so, this court could not set aside the sentence of the said court meted upon him and place him on probation on two (2) grounds. The first ground was that Majanja J had already pronounced himself on the nature of sentence that he was to serve and this court could not therefore purport to change the same.
20. The second reason was that recommendations for revision of sentences for offenders who have sentences that are three (3) years and below are initiated by the prisons where the offenders are incarcerated and are dependent on the conduct and rehabilitation of the offenders. The Sentence Review Reports filed by the Probation Office pursuant to such recommendations are intended to assist the High Court ascertain whether offenders can be released from custody to serve the remainder of their sentences either under Community Service Orders and Probation under the *Community Service Orders Act* No 10 of 1998 and *Probation of Offenders Act* Cap 64 (Laws of Kenya) or not.
21. Until such recommendation is given by prisons and favourable Sentence Review Reports are filed by the Probation Office, courts have no mandate to review custodial sentences and replace the same with non-custodial sentences on their own motion.

## Disposition

22. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Chamber Summons application that was filed on 21<sup>st</sup> January 2021 was not merited and the same be and is hereby dismissed.



23. However, the period the Applicant spent in custody between 14<sup>th</sup> November 2014 and 19<sup>th</sup> January 2015 while his trial was ongoing be and is hereby taken into account while computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
24. The Prison where the Applicant is incarcerated is at liberty to recommend his release whereupon the Probation Office will be required to file a Sentence Review Report to guide the court on the appropriate sentence to mete upon him, if at all as there is currently an ongoing revision exercise to decongest prisons.
25. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2023**

**J. KAMAU**

**JUDGE**

