



**Owino v Republic (Miscellaneous Criminal Application E002 of 2021)  
[2022] KEHC 13316 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13316 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2021**

**JN KAMAU, J**

**SEPTEMBER 30, 2022**

**BETWEEN**

**SAMWEL DALON OWINO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Applicant herein was tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to twenty five (25) years imprisonment.
2. Being dissatisfied with the said decision, he lodged an Appeal at the High Court being HCCRA No 156 of 2011, which appeal was dismissed in its entirety. He did not appeal to the Court of Appeal as he was convinced that the Prosecution's case was overwhelming (sic).
3. On 14<sup>th</sup> January 2021, he filed this present application for review of the sentence. In his Affidavit in support thereof, he urged this court to consider that he had undergone several rehabilitation and reformation programs and was therefore ready to be reintegrated back to society.
4. In his Written Submissions that were filed on 12<sup>th</sup> July 2021, he submitted that the issue of the mandatory nature of a sentence was canvassed at the Supreme Court in the case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR where the court held that mandatory sentences deprive courts of their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person. He added that the decision was appreciated in *Christopher Ochieng vs Republic* [2008] eKLR where the Court of Appeal held that minimum mandatory sentences were unconstitutional.



5. He pleaded with this court to consider that he was arrested at the age of twenty-eight (28) years and was a young family man who had been tasked with the responsibility of pursuing his family shattered dreams (sic). He asserted that he had so far spent ten (10) years in custody from the time of arrest and was currently thirty eight (38) years old. He urged this court to grant him the opportunity to shape up the future of his family which was overwhelmed with the burden of responsibilities and hence miserable due to his long incarceration. He added that his health had deteriorated due to the said incarceration.
6. He asserted that he had trained in various courses in Bible studies such as Kenya prisons chaplaincy under St Paul Protestant Church at Kodiaga Maximum Prison and was awarded a Diploma in Biblical Studies under International School of Ministry and attained Certificates in Grade I, II and III under National Trade Test (NITA) in Carpentry. He believed that the skills he had acquired would enable him integrate well back to society, get a legal earning and live a crime free life.
7. He pointed out that he was a first offender and very remorseful for having engaged in a criminal activity. He averred that during the period he had been incarcerated, he had maintained high discipline and obedience in prison which remarkably earned him the most disciplined prisoner position.
8. He thus sought this court's leniency and urged it to consider Section 333(2) of the [Criminal Procedure Code](#) in reviewing his sentence.
9. In its Written Submissions that were dated and filed on 12<sup>th</sup> November 2021, the Respondent opposed the Petition herein on the ground that there was overwhelming evidence against the Applicant herein. It asserted that the sentence that was meted was not excessive or harsh as it was commensurate with the offence that he committed.
10. It added that he had not supplied the court any document to show that he was remorseful of his actions or informed the court of sufficient reasons as to his ability to benefit from a reduction of the sentence if at all the court was to grant his prayer. It therefore asked this court to dismiss his application and uphold the conviction and sentence.

### **Legal Analysis**

11. As the Applicant had referred to the Ruling of the Supreme Court in the case of [Francis Karioko Muruatetu & Another vs Republic](#) [2017] eKLR in his submissions, the court thought it prudent to pronounce itself on the applicability of the same in the case herein.
12. On 6<sup>th</sup> July 2021, the Supreme Court gave guidelines in the case of [Francis Karioko Muruatetu & Another vs Republic \(Supra\)](#) to the effect that the said decision was only applicable in murder offences under Sections 203 and 204 of the [Penal Code](#) and not treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the [Penal Code](#).
13. Consequently, the fact that the Applicant was remorseful and had undergone various rehabilitation programs could not assist him for the reason that he had been charged and convicted of the offence of defilement and not murder and hence the case of Francis Karioko Muruatetu & Another vs Republic (Supra) was inapplicable herein.
14. Having said so, the prayer that was brought pursuant the provisions of Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya) was not one for sentence review. It was also not dependent on how reformed the Applicant had been as had been alluded by the Respondent herein. Rather, the benefit under Section 333(2) of the [Criminal Procedure Code](#) was an entitlement and/or accrued to an



applicant who was able to demonstrate that the trial or appellate court did not consider the period that he spent in custody while trial was being conducted. This was the period between the date of arrest and the date of conviction

15. Notably, Section 333(2) of the *Criminal Procedure Code* Cap 75 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).

16. The requirement under with Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Abamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.

17. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines (under) provide 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 purport of the dismissal of the Applicant’s appeal at the High Court by Chemitei J was that the Trial Court’s judgment was upheld. A reading of it showed that the Learned Trial Magistrate did not indicate if he considered the provisions of Section 332 (2) of the *Criminal Procedure Code* while imposing the sentence upon the Applicant herein.

19. The Learned Trial Magistrate rendered himself as follows:-

“ Accused wills (sic) serve twenty five (25) years imprisonment”

20. A perusal of the Charge Sheet showed that the date of the Applicant’s arrest was not indicated therein. However, from the evidence of Edward Nyambeka who was the BMU Chairman (referred to as “PW 4”), the Applicant was escorted to Bondo Police Station on 24<sup>th</sup> May 2010. The Applicant was arraigned in court on 31<sup>st</sup> May 2010 and released on bond on 30<sup>th</sup> June 2010. He had therefore stayed in custody for one (1) month seven (7) days before he was convicted, a period which ought to be taken into account at the time of computing his sentence.

## **Disposition**

21. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s application for review of sentence that was lodged on 14<sup>th</sup> January 2021 was merited and the same be and is hereby allowed.

22. It is hereby ordered and directed that the period the Petitioner spent in custody between 24<sup>th</sup> May 2010 and 30<sup>th</sup> June 2010 being the date of his arrest and the date he was released on bond respectively be



taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

23. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2022**

**J. KAMAU**

**JUDGE**

