



REPUBLIC OF KENYA



**Mogambi v Republic (Miscellaneous Application E199 of 2023)
[2025] KEHC 3066 (KLR) (Crim) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS APPLICATION E199 OF 2023
CJ KENDAGOR, J
FEBRUARY 24, 2025**

BETWEEN

PETER KIMATHI MOGAMBI APPLICANT

AND

REPUBLIC RESPONDENT

*(Arising from decision in Makadara Chief Magistrate
Court Sexual Offence Case No. 218 of 2021 [E205 of 2021])*

RULING

1. The Applicant has submitted the current application dated 17th March, 2023 seeking orders for a revision of his sentence and requesting that it be altered to a non-custodial sentence for the remainder of his imprisonment term. The application is supported by an affidavit of similar date.
2. The Applicant was charged, convicted and sentenced to eight (8) years and six (6) months on 3rd March, 2023 in the Chief Magistrates Court at Makadara Sexual Offence Case No. 218 (E205) of 2021. The conviction was on the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. The Particulars of the charge is that on 22nd August, 2021 at [particulars withheld], within Nairobi County, the Applicant intentionally and unlawfully caused his penis to penetrate the vagina of D.O.N., a girl aged 17 years.
3. The Applicant has stated that he has chosen not to appeal against the conviction and is instead asking the Court to review his custodial sentence, requesting to be sentenced to a non-custodial sentence on probation for the remaining period of the imprisonment term.
4. The Applicant has referenced Articles 159 and 165 of the *Constitution*, along with Section 362 of the *Criminal Procedure Code*. Additionally, he has cited Section 4 of the *Probation of Offenders Act*, which



grants the Court the authority to allow for the conditional release of offenders. He has also pointed to Section 3 of the [Community Service Orders Act](#), detailing circumstances under which a community service order may be issued, requiring an offender to perform community service. Furthermore, he has invoked the United Nations Minimum Rules for Non-Custodial Measures (the Tokyo Rules), which provide guidelines for alternatives to imprisonment.

5. Article 50 (2) of the [Constitution](#) gives the right to every accused person of a fair trial which includes: -

(q). If convicted, to appeal to, or to apply for review by, a higher court as prescribed by law.”

6. The Applicant contends that the time he has already spent in prison is sufficient for his rehabilitation. He has requested the Court to consider as a mitigating factor that the complainant, who is his girlfriend, regularly visits him in prison and that no prejudice will be caused to the prosecution if he is released on a non-custodial sentence.

7. The Applicant was convicted under Section Section 8 (1) as read with Section 8 (4) of the [Sexual Offences Act](#). On the sentence, Section 8 (4) stipulates as hereunder;

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

8. The trial Court in meting out the sentence stated as hereunder;

“I have considered the accused’s mitigations and the facts that he is a first offender. I have noted that the accused has undergone some training while in prison.

However, considering the nature of the offence which is very rampant, I do hereby sentence the accused to serve an imprisonment term of ten (10) years less the period which he has been in custody.

Thus, the accused shall serve 8 years 6 months.”

9. Probation and Community Service Orders are non-custodial, supervised Court orders designed for offenders who have been found guilty of certain criminal offenses, allowing them to serve their sentences within the community rather than in prison.

10. It is important to note that this category of offenses under the Kenya Legal System excludes Sexual Offences. Sexual offenses are governed by the [Sexual Offences Act](#), which sets out penalties by way of imprisonment.

11. The trial Court exercised its discretion and sentenced the appellant to a reduced prison term, considering the applicant status as a first offender and the time already spent in custody.

12. The Supreme Court has provided guidance on where a sentence is specified in statute under the [Sexual Offences Act](#) in Republic v Joshua Gichuki Mwangi, Petition No. E018 of 2023. The Supreme Court determined that when a sentence is established in statute, the legislature has already outlined the course unless it is declared unconstitutional.

13. The Applicant is not eligible for a sentence revision to one on probation or community service.

14. The application is dismissed.

It is so ordered.



**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 24TH DAY OF FEBRUARY, 2025.**

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Applicant present

Ms. Njoki - ODPP, for Respondent

