



REPUBLIC OF KENYA



**Otwoma v DPP (Criminal Miscellaneous Application E058 of 2022)
[2025] KEHC 1791 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL MISCELLANEOUS APPLICATION E058 OF 2022**

S MBUNGI, J

FEBRUARY 13, 2025

BETWEEN

FRANCIS OTWOMA APPLICANT

AND

DPP RESPONDENT

RULING

1. The applicant herein was arrested, charged, convicted and sentenced to serve ten (10) years imprisonment got the offence of rape contrary to section 3(1) (1) (3) of the [Sexual Offence Act](#) No 3 of 2006.
2. Vide a motion dated 07.09.2022 the applicant seeks the following orders:
 - i. That, the Honourable court be pleased to order for the period of time spent in remand custody by the applicant prior to being sentenced under section 333 (2) of the [CPC](#).
 - ii. That, the Honourable court be pleased to exercise discretion and resentence me pursuant to order No 118(2) of the high court's decision in the case of [Philip Mueke Maingi & 5 others v DPP & another](#) Pet.No E017 of 2021 delivered on the 17.05.2022 at Machakos
 - iii. Any other order that may this court deem it fit and just.
3. The application is premised on the grounds on the face of it and supported by an affidavit sworn by the applicant.
4. The applicant has stated that the court has discretionary powers to review his sentence from the mandatory minimum sentence as decided in the case of [Philip Mueke Maingi and 5 others v DPP and another](#) in Petition No E017 of 2021. He has stated that he is a first time offender, and prays for a lenient sentence so that he can play his role as a good and loving father of the child borne by the victim.



Analysis and Determination.

5. The Supreme Court in *Francis Karioko Muruatetu & another v Republic*, Petition No 15 of 2015, as a guide in sentencing held that:

“...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a. age of the offender
- b. being a first offender;
- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;
- f. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;
- h. any other factor that the Court considers relevant.”

6. In *Dahir Hussein v Republic* Criminal Appeal No 1 of 2015; [2015] eKLR, the High Court held that the objectives of sentencing include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

7. The 2016 *Judiciary of Kenya Sentencing Policy Guidelines* lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”



8. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be considered in meting out the sentence where it is not hindered by other provisions of the law.
9. I have looked at the application, the supporting affidavit, the trial court proceedings and judgment.
10. The applicant has pleaded for a lenient sentence on the grounds that he is a first time offender and that he would love to be part of the upbringing of his child. In mitigation in the trial court, the court prosecutor prayed for a custodial sentence despite the accused being a first-time offender, since the complainant was aggrieved by the act. The accused in his mitigation, stated that the DNA results showed that he was the father to his child, and prayed that he be set free so as to take care of the child.
11. The trial magistrate before meting out the sentence observed as follows:

“...Accused is a first offender. All along the witnesses have stated that the Complainant conceived after he penetrated her with his penis against her will. He has never expressed any remorse for what he did. The court is not convinced with his offer to help in the bringing up of his child...”

12. From the foregoing, it is clear that the accused is merely using the child as a ploy for freedom.
13. The applicant has also prayed that this court exercise its discretion and met out a lenient sentence other than the minimum mandatory sentence. The applicant relied on the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) where it was held:

“In arriving at its decision, the Court was similarly guided by the decision of the Constitutional Court of Uganda in *Susan Kigula & 417 others v Attorney General*, Const. App. No 3 of 2006 that it is the duty of the courts to pass appropriate sentences on persons convicted of crime and that sentencing is an exercise of judicial function rather than of legislative function”

The Court concluded that:

“The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *Constitution*.”

14. However, going by the recent pronouncement of the supreme court of Kenya in Petition No E018 of 2023 *Republic v Joshua Gichuki Mwangi*, the supreme court affirmed that sentences meted under section 8 of the *Sexual Offences Act* are lawful and held that:

“Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, 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.”



15. Section 8(3) of the *Sexual Offence Act* No 3 of 2006 provides as follows:

“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”

16. From the above, it is clear that the sentence for the offence of rape is a minimum of ten years and may be enhanced to life imprisonment. I therefore find that the sentence imposed by the trial magistrate was lenient and proper.

17. The applicant has also prayed for review of his sentence pursuant to the provisions of section 333(2) of the *Criminal Procedure Code*.

18. According to The Judiciary Sentencing Policy Guidelines 2023:

“Section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders– for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.”

19. Section 333(2) of the *Criminal Procedure Code* provides as follows:

“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.”

20. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be considered in meting out the sentence where it is not hindered by other provisions of the law.

21. I have perused the trial court proceedings and sentence. In the court’s pronouncement, the trial court magistrate did not address the time spent by the accused person in custody during trial.

22. According to the charge sheet, the applicant was arrested on 29.12.2020. The applicant remained in remand throughout the trial until the date of sentencing by the trial court on 07.07.2022.

Disposition.

23. The court finds that the application for review under section 333(2) of the *CPC* has merit. The same is allowed.



24. The sentence of 10 years' imprisonment to commence from the date of arrest, being 29.12.2020 pursuant to section 333(2) of the CPC.
25. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF FEBRUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of:

Accused person – present

Court Prosecutor – Sirtuy

Court Assistant – Elizabeth Angong'a

