



**Ongaya v Director of Public Prosecution (Criminal Miscellaneous Application E048 of 2024) [2025] KEHC 1967 (KLR) (11 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1967 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL MISCELLANEOUS APPLICATION E048 OF 2024**

**S MBUNGI, J**

**FEBRUARY 11, 2025**

**BETWEEN**

**NICHOLAS ONGAYA ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. The applicant herein was charged for the offence of defilement contrary to section 8(1)(3) of the [Sexual Offences Act](#) No 3 of 2006, convicted and sentenced to serve twenty (20) years in prison.
2. He then filed an appeal in this court, which appeal was heard and determined. The learned judge realized that the victim was 17 years old, and ordered the applicant to serve fifteen (15) years imprisonment in accordance with section 8(1)(4) of the [Sexual Offences Act](#) No 3 of 2006.
3. The present motion filed by the applicant is brought under article 22(1), 19(3), 25, 27 (1) (2), 23(1) (3), 50(2) and 165 of the [Constitution](#) of Kenya.
4. The applicant prays for this court's leniency to review of his sentence. The applicant also prays that the court takes into account the period he spent in custody during trial in accordance with the provisions of section 333(2) of the [CPC](#).
5. The application is premised on the grounds that he has been rehabilitated, is of good character, he is a first-time offender and remorseful.
6. The applicant has also submitted that the sentence of 15 years substituted by the high court is a minimum mandatory sentence, which denies the accused right of fair hearing where the court has discretionary powers to provide an alternative sentence.
7. The court ordered the parties to put in submissions to canvass the application.



### **Applicant's Submissions.**

8. The submissions by the applicant reiterated the statements in his application and supporting affidavit.
9. He also submitted that during his incarceration period, he has managed to live peacefully with his fellow inmates and prison authorities. He has also engaged in various rehabilitation programs and acquired various certificates in biblical studies. The applicant submitted that these acquired qualities will aid in his reintegration back to society and avoid conflict with the law.
10. The applicant has also submitted that he was the sole breadwinner in his family and his continued incarceration is detrimental to his extended family.
11. Lastly, the applicant submitted that the aim of sentencing, is to rehabilitate and reform the offender, which he has. He prayed for the court to consider his mitigation and reduce his sentence in line with Article 50(2) of the Constitution of Kenya.

### **Respondent's Submissions.**

12. The prosecution counsel gave oral submissions in court and prayed that the application be dismissed.
13. He submitted that this court is functus officio, since the by way of appeal, the court had already reduced the applicant's sentence to fifteen (15) years.
14. It was his submission that the applicant, if dissatisfied should go to the Court of Appeal.

### **Analysis and Determination.**

1. The applicant has cited (50(2) (p)& (q) of the Constitution provides as follows:-
  - “ 50(2) Every accused person has the right to a fair trial, which includes the right—
    - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
    - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”
2. The Jurisdiction of the high court to review is donated by article 165 (6) & (7) of the Constitution. The article provides: -
  - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
3. The jurisdiction is supervisory and it extended to the High court to review the decisions and orders of the sub-ordinate court. It grants the High Court supervisory jurisdiction over sub-ordinate Courts.



4. The High Court exercises jurisdiction of revision over sub-ordinate Court on orders issued by the sub-ordinate Court. Section 362 of the [Criminal Procedure Code](#) provides as follows: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

5. The discretion in sentencing rests with the trial judge because he or she has the knowledge of the relevant facts before him or her and in many instances, has observed the accused and witnesses’ demeanor. The discretion must however be exercised judiciously. In the Nigerian case of *African Continents Bank v Nuamani* [1991] NWLI (part 86)486, it was observed that,

“The exercise of court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”

6. In [Benard Kimani v Republic](#) (2002)eKLR the Court of Appeal stated that:

“It is now settled law, following several authorities by this Court and the High Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly sentence must depend on the facts of each case. On Appeal, the Appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle...”

7. 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.”

8. 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.”

9. 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.”

15. I have looked at the application, the supporting affidavit, the submissions by both parties and the trial court record.

16. The applicant was charged with the offence of defilement contrary to section 8(1)(3) of the [Sexual Offences Act](#) No 3 of 2006. The section states:

“Defilement

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

17. The appellant was sentenced to twenty years’ imprisonment term by the trial court. By way of appeal to the High Court, the applicant appealed against both his conviction and sentence. Upon determination, the court substituted the trial court sentence with a 15 years’ jail term.

18. The applicant has again approached this court praying for a lenient sentence. In rebuttal, The respondent submitted that this court cannot review the applicant’s sentence since it is functus officio.



19. The Court of Appeal in the case of *Telkom Kenya Limited v John Ochanda* [2014] eKLR, stated that: -
- “Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...
- The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”
20. The applicant herein exercised his right of appeal to the High court on both conviction and sentence. His sentence was reviewed by the court to 15 years. I agree with the respondent, this court already pronounced itself on the issue of sentence and is thus, functus officio. The only remedy to the applicant, if dissatisfied with his sentence, is to proceed by way of appeal to the Court of Appeal.
10. The applicant has also prayed the court be pleased order that his sentence runs from the date of arrest as per the provisions of Section 333(2) of the CPC.
11. 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.”
12. 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.”
13. 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.
14. 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.
15. According to the charge sheet, the applicant was arrested on 09.11.2018. The applicant remained in remand throughout the trial until the date of sentencing by the trial court on 30.11.2020.



16. The application therefore, partially succeeds to the extent that I do order that the sentence of fifteen (15) years imprisonment shall run from the date of arrest being 09.11.2018 pursuant to the provisions of Section 333(2) of the *Criminal Procedure Code*.

17. Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of:

Accused person – present

Court Prosecutor – Sirtuy

Court Assistant – Elizabeth Angong'a

