



REPUBLIC OF KENYA



**DWG v Republic (Criminal Revision E132 of 2024)
[2025] KEHC 4882 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E132 OF 2024
FN MUCHEMI, J
APRIL 24, 2025**

BETWEEN

DWG APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application for determination is dated 8th July 2024 for review of sentence of the applicant.
2. The applicant was convicted by Gatundu Principal Magistrate, in Criminal Sexual Offences Case No 888 of 2012 with two counts of the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* and was sentenced to serve 20 years imprisonment. The applicant appealed to the High Court in Kiambu in Criminal Appeal No 45 of 2017. The said appeal was dismissed on 3rd October 2017 for lack of merit.
3. The applicant states that he was arrested on 26th September 2012 and sentenced on 12th April 2016. He avers that the trial court did not take into consideration the time he spent in custody, which is a period of 3 years and 6 months. The applicant further states that the sentence is manifestly excessive.
4. The applicant avers that he is a first offender and he is remorseful. The applicant further urges the court to consider and treat the period that he has been in custody as a sentence already served and reduce his sentence with the said period.
5. The respondent states that the applicant was charged with the offence of incest and was found guilty and sentenced to serve twenty years imprisonment. The applicant then appealed at Kiambu High Court Criminal Appeal No 45 of 2017 where the court dismissed his appeal upholding the conviction and sentence of the court below.



6. The respondent argues that the applicant has not stated that the sentence is manifestly harsh and excessive, that the sentence was illegal or improper or that the trial court acted on a wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing. The respondent further states that the applicant has given generalized reasons which do not suffice interference with the discretion of the trial court in sentencing warranting upsetting the sentence imposed by the trial court.
7. The respondent further states that both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial and high court. The respondent states that the sentence passed by the trial court was proper and legal as it considered the aggravating and mitigating circumstances. The respondent further states that the aggravating circumstances were so severe in that all along the applicant knew the complainant as his niece being the daughter of his elder brother. Further the complainant suffered from mental retardation and the applicant took advantage of her mental status and became a beast to devour her instead of protecting her as would have been expected for an uncle. The trial court correctly observed that the applicant deserved no mercy.
8. The respondent states that the applicant was once released on bond but it was cancelled due to him absconding court during the pendency of the trial.
9. The respondent argues that the High Court, Kiambu has similar jurisdiction with the instant court and therefore since the court in Kiambu has pronounced itself on the issue of sentence, this court is functus officio. As such, the applicant ought to pursue an appeal in the Court of Appeal.
10. The respondent states that the applicant is forum shopping, abusing the court process, wasting precious judicial time and thus the application ought to be dismissed.

The Applicant's Submissions

11. The applicant submits that the trial court failed to consider his mitigating factors that he is a first offender and ought to be given a lenient sentence. The applicant further submits that since incarceration, he has taken rehabilitation programmes positively and greatly benefited from them. Furthermore, the applicant argues that the trial court failed to consider his age while sentencing as he is a 66 year old man who is sick.
12. The applicant relies on the case of *Abmed Abolfathi Mobammed* Criminal Appeal No 135 of 2016 and *Sila Jona & 87 others v Kenya Prisons Service & another* Petition No 15 of 2020 (2025) KEHC 457 eKLR and submits that the trial court failed to consider the time he spent in custody. The applicant submits that he was arrested on 26th September 2012 and sentenced on 12th April 2016 which is a period of 3 years and 8 months in custody.
13. The applicant submits that he is remorseful and as a first offender he is empowered with more skills to handle life. The applicant further submits that he is a married man with 4 children and he is the sole breadwinner. The applicant urges the court to consider imposing a non custodial sentence for the remainder of his sentence by dint of Section 4 of the *Probation of Offenders Act*.

The Respondent's Submissions

14. The respondent reiterates the contents of her affidavit and prays that the application be dismissed as it lacks merit.



The Law

15. This court is empowered by Article 165(6) of the Constitution of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.

16. The applicant has come to this Honourable court by way of review provided for under Article 50 of the Constitution. It provides:-

(2) Every accused person has the right to a fair trial, which includes the right:-

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

17. In the case of Samuel Kamau Macharia v KCB & 2 others, Civil Application No 2 of 2011, it was stated:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

18. The applicant herein was convicted of the offence of incest in Thika CM Criminal Sexual Offences Case No 888 of 2012 and sentenced to serve 20 years imprisonment. He appealed to the High Court in Kiambu vide Criminal Appeal No 45 of 2017 and the court dismissed his appeal and upheld the conviction and sentence of the offence of incest on 3rd October 2017.

19. It is imperative to note that Article 50(2)(q) of the Constitution provides for either an appeal or review for a convicted person. Having filed an appeal which was heard and determined by the High Court Kiambu, the applicant cannot benefit from a review.

20. It is noted from the two-judge bench the judgment of Judges Nagilla and Ngugi Joel delivered on 3rd October 2017 that the applicant herein appealed against both conviction and sentence. However, the appeal court dealt with conviction and did not look at the merit or legality of the sentence. Under the Judiciary Sentencing Guidelines 2023 4:8:16 It is provided that: -

“A resentencing application can be made:

(iii)Alternatively, once the applicant has received judgment on appeal, and where it is submitted that neither the High Court nor the Court of Appeal considered the mitigating factors and circumstances of the case.”

21. The provision cited allows this court to deal with the issue of sentence where the appellate court did not deal with it thus conferring jurisdiction restricted to sentencing.

22. Section 20 of the Sexual Offences Act under which the applicant was charged provides for a sentence of a term of imprisonment of not less than ten (10) years where the victim is aged not less than eighteen (18) years. The complainant herein was aged 25 years. Due to the fact that the victim was mentally retarded, the court enhanced the sentence to twenty years imprisonment. In my considered view the trial magistrate used her discretion correctly in that the accused took advantage of his mentally retarded niece, a daughter of his elder brother.



23. The grounds relied on for review are that the applicant spent three (3) years six (6) months in custody pending trial. The applicant was arrested on 26/10/2012. He absconded court on 18/07/2012 and was arrested about one (1) month later on 14/08/2012. The bond of the applicant was cancelled on 4/08/2013. He remained in prison remand until he was sentenced on 22/04/2016. The applicant therefore remained in remand for three years and five (5) months. Under section 333 (2) of the *Criminal Procedure Code* the trial magistrate is obligated to take into account the period spent in custody. The record is clear that this period was not taken into account. I am of the view that the accused ought to be given his rights as provided by the law. The sentence imposed by the magistrate of 20 years shall be reviewed under Section 333 (2) of the *Criminal Procedure Code*.
24. The applicant shall serve twenty (20) years imprisonment to commence on 26th November 2012. The one (1) month the applicant absconded court has been taken into consideration herein.
25. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH OF APRIL 2025.

F. MUCHEMI

JUDGE

