



**Khazalwa v Republic (Miscellaneous Criminal Application
E090 of 2024) [2025] KEHC 6068 (KLR) (13 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E090 OF 2024**

JN KAMAU, J

MAY 13, 2025

BETWEEN

JACKSON KHAZALWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* Cap 63A (Laws of Kenya). He was also charged with an alternative charge of the offence of attempted defilement contrary to Section 9 of the *Sexual Offences Act*. He was convicted on the main charge and sentenced to twenty (20) years imprisonment.
2. On 10th September 2022, he filed a Notice of Motion application dated 26th July 2024 seeking for a reduction of the sentence pursuant to Section 333(2) of the *Criminal Procedure Code* and a reduction of the sentence to a shorter time.
3. In his Supporting Affidavit that was sworn on 26th July 2024, he pointed out that he opted not to appeal the sentence. He stated that he was a first offender, remorseful, reformed, rehabilitated and had obtained Certificates and Diploma from Emmaus Bible School and a Certificate from Prisoner's Journey. He added that he was the sole breadwinner of a family that consisted of school going children. He contended that longer incarceration would cause them irreparable suffering. He thus urged this court to allow his application.
4. He did not file any Written Submissions. The Respondent was not opposed to the said application and did not therefore file any Written Submissions. The Ruling herein is based on the affidavit evidence of the Applicant herein.



Legal Analysis

5. As it was not clear if the Applicant had sought a reduction of sentence other than through the reduction under Section 333(2) of the Criminal Procedure Code Cap 75(Laws of Kenya) which the Respondent had opposed, this court found it prudent to address itself to the aspect of normal reduction of sentence.

6. Notably, the Applicant was sentenced under Section 8(2) of the Sexual Offences Act that provides as follows:-

“ 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.”

7. In the case of Joshua Gichuki Mwangi v Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwaka v Republic [2018] eKLR where it held that Section 8 of the Sexual Offences Act had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the Legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be appropriate sentences.

8. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi v Republic (*supra*) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

9. Notably, the said sentence was meted out against the Applicant herein before the Supreme Court overturned the Court of Appeal decision of Joshua Gichuki Mwangi v Republic (*supra*). During this time, courts used to exercise their discretion when sentencing persons who had been charged under the Sexual Offences Act as aforesaid.

10. Although the sentence that was meted upon the Applicant herein was much lower than what was prescribed under the law, it was meted out before the case of Joshua Gichuki Mwangi v Republic (*supra*) was overturned by the Supreme Court. As he and the Respondent had not appealed against the said sentence, this court left the same undisturbed.

11. Going further, so, this court was mandated to consider the period the Applicant spent in remand while his trial was ongoing as provided in Section 333(2) of the Criminal Procedure Code. The said Section 333(2) of the Criminal Procedure Code stipulates 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)”.

12. This duty is also contained in the Judiciary Sentencing Policy Guidelines where it is provided 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.”

13. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Abamad Abolfathi Mohammed & another v Republic* [2018]eKLR.
14. The Charge Sheet herein showed that the Applicant herein was arrested on 5th September 2021. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 9th September 2022. A reading of the Trial Court’s Sentence showed that it rendered itself as follows:-

“...Accused person to serve 20 years in jail which period includes the time he has been in custody that is from the time he took plea on 7th September 2021.”

Disposition

15. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 26th July 2024 and filed on 10th September 2024 was partially merited only the aspect of the period that the Applicant had spent in custody during trial and not on reduction of the sentence.
16. It is hereby directed that the period the Applicant spent in custody from 5th September 2021 and 6th September 2021 before he took his plea be and is hereby taken into account while computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
17. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 13TH DAY OF MAY 2025

J. KAMAU

JUDGE

