Oduor v Republic (Criminal Appeal E004 of 2020 & Criminal Petition E004 of 2024 & Miscellaneous Criminal Application E011 of 2025 (Consolidated)) [2025] KEHC 6632 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6632 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E004 OF 2020 & CRIMINAL PETITION E004 OF 2024 & MISCELLANEOUS CRIMINAL APPLICATION E011 OF 2025 (CONSOLIDATED)

WM MUSYOKA, J

MAY 23, 2025

BETWEEN

ERICK ODUOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From conviction and sentence by Hon. SO Temu, Principal Magistrate, PM, in Busia CMCSOC No. 28 of 2019, of 19th November 2019)

JUDGMENT

1. The appellant, Erick Oduor, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 6th February 2019, at Murumba Township, Butula Sub-County, within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of LA, a girl aged fifteen years. The appellant pleaded not guilty to the charge, on 11th February 2019. A trial was conducted, where seven witnesses testified. He was convicted on 19th November 2019, and sentenced on 2nd December 2019, to serve fifteen years in prison.

2. He was aggrieved, and brought the instant appeal, against both the conviction and sentence, revolving around the trial court relying on evidence which lacked probative value, amounted to hearsay and was contradictory; disregarding the defence; not considering his mitigation; and ignoring gross violations of *the Constitution*.

3. He subsequently placed on record a memorandum of appeal, on an unknown date, which is itself undated, upon having access to a certified copy of the proceedings. By the new filing, he limited his

appeal to sentence only. He pleads to be a first offender and expresses remorse. He avers that the period that he spent in custody was not considered. He cites Ahmed Abolfadhi Mohamed & another vs. Republic [2018] eKLR (K. Kariuki, PCA, M'Inoti & Murgor, JJA), submitting that his sentence ought to run from the date of arrest. He submits that at the time of arrest he was a young person who was still susceptible to peer pressure, and that he had undergone rehabilitation and reformation programmes.

4. He also filed a criminal petition, seeking review of sentence, founded on the decisions of the High Court in Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), with respect to the unconstitutionality of minimum mandatory sentences.

5. He followed that with a miscellaneous criminal application, premised on Articles 25(c) and 50(2) of *the Constitution*, and section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya.

6. Directions were given on 26th February 2025, for canvassing of the three matters by way of written submissions.

7. The only written submissions that I see in the record before me were filed by the appellant. He filed two different written submissions, presumably on different dates, but turning largely on the same issues. The two documents largely read as statements in mitigation, urging that he was a remorseful first offender, his age at the commission of offence ought to be considered, his character and demonstration of reformation should be considered, and the period spent in pre-arraignment and pre-trial custody should be accounted for in the sentence.

8. The charge against the appellant was founded under section 8(3) of the *Sexual Offences Act*, which covers child victims in the age bracket of twelve and fifteen. The defilement of minors in that bracket attracts a minimum sentence of twenty years. Upon conviction, the appellant herein was sentenced to fifteen years imprisonment, which covers child victims in the age bracket of sixteen and seventeen, where the minimum sentence is fixed at fifteen years imprisonment. The charge was not amended to reflect the age of the victim as sixteen years, although the trial court did find that she was in fact sixteen years old, given that she was born on 23rd September 2003. I agree, that was the case.

9. Should section 333(2) of the *Criminal Procedure Code* have been considered? That provision states that the duration of every sentence of imprisonment should be calculated or reckoned from the date the sentence is pronounced. There is a proviso though, to effect that where the convict had spent some time in custody, prior to sentence, the period spent in custody should be considered. The provision is in mandatory terms, and a convict is entitled to benefit from it. It is not a matter of discretion by the court.

10. Sentence was pronounced on 2nd December 2019. The trial court did not apply section 333(2) of the *Criminal Procedure Code*. The period that the appellant had spent in custody was not considered or mentioned or factored in the sentence. The sentence order did not refer to that period. According to the charge sheet, the appellant was arrested on 8th February 2019 and was arraigned in court on 11th February 2019. He was granted bond on 14th February 2019. The bond was never processed, and the appellant remained in remand custody, until his sentence was pronounced on 2nd December 2019. That entire period, running from 8th February 2019 to 2nd December 2019, ought to have been considered, in computing the fifteen-year period that he is to spend in prison custody.

11. What about the pronouncements in Wachira & 12 others [2022] KEHC 12795 (KLR) (Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), on the unconstitutionality of the minimum sentences, prescribed by the *Sexual Offences*

Act? Should the appellant benefit from those pronouncements? Should discretion be exercised, to re-sentence, excluding the minimum sentence prescribed in the charging section?

12. Wachira & 12 others [2022] KEHC 12795 (KLR) (Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) are no longer good law. The Supreme Court has recently pronounced so, in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), and has asserted that the sentences prescribed in the *Sexual Offences Act*, inclusive of the minimum sentences, are lawful and constitutional. The appellant, cannot, therefore, benefit from the discretion proposed in Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J).

13. The appeal herein succeeds to the limited extent stated in paragraph *10* hereabove, and I hereby order that the sentence of fifteen years imprisonment, pronounced on 2nd December 2019, by the trial court, shall be calculated or computed, considering the period that the appellant spent in pre-arraignment and pre-trial custody, between 8th February 2019 to 2nd December 2019, both dates inclusive. The appeal, the petition and the miscellaneous application are disposed of in those terms. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 23RD DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Erick Oduor, the appellant/petitioner/applicant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.