



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Republic (Miscellaneous Criminal Case E048 of 2023)
[2025] KEHC 6971 (KLR) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL CASE E048 OF 2023**

HI ONG'UDI, J

MAY 26, 2025

BETWEEN

STEPHEN WAINAINA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for review of sentence in Nakuru Magistrate's Court Sexual Offence No. E013 of 2022 delivered by Hon E. S. Soita Senior Resident Magistrate on 27th March, 2023)

RULING

1. Stephen Wainaina hereinafter referred to as the applicant was charged with the offence of rape contrary to section 3(1) a & c as read with Section 3(3) of the [Sexual Offences Act](#). The particulars were that the applicant on 20th day of May, 2022 at Kiamunyeki estate in Nakuru North Sub County within Nakuru county, intentionally and unlawfully caused his penis to penetrate the vagina of A. C. by use of threats.
2. He faced an alternative count of committing an indecent act with an adult contrary to section 11 (A) of the [Sexual Offences Act](#). The particulars were that on 20th March, 2022 at Kiamunyeki estate in Nakuru North sub-county within Nakuru county intentionally touched the vagina of A.C. with his penis against her will.
3. He denied the charges and the matter proceeded to full hearing, after which the court found him guilty and convicted him of the main charge. He was thereafter sentenced to ten (10) years imprisonment. This was on 27th March, 2023.
4. In his Notice of Motion supported by his affidavit and filed on 5th April, 2023 the applicant seeks the following orders:
 - i. That the honourable court be pleased to order that his sentence in Chief Magistrate's Court Nakuru Criminal Case No. S.O E013 of 2022 to run from the date he was remanded.



- ii. That the honourable court be pleased to invoke the provisions of Section 333 of the Criminal Procedure Code and all other enabling provisions in the interest of justice
- iii. That the honourable court of law be pleased to make any other order that it will deem fit in the interest of justice.

He averred that throughout the trial he was in custody serving sentence in another matter. The period of incarceration was never considered during sentencing in his case. He thus urged this court to order for the application of section 333(2) of the Criminal Procedure code.

5. M/s Okok principal prosecution counsel conceded the application. Counsel confirmed that the period spent in custody by the applicant was never considered by the sentencing court. She further stated that the applicant was arrested on 20th May, 2022 and he remained in custody until he was sentenced in this case.
6. I have perused the lower court record and confirm that the applicant was arrested on 20th May, 2022 and presented to court on 23rd May, 2022. He was convicted and sentenced on 27th March, 2023. Section 3(3) of the Sexual Offences Act provides:

“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”
7. The sentence meted on the applicant is the minimum sentence for the offence of rape. In view of the Supreme Court of Kenya decision in Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus curiae) the ten years being a minimum sentence will not be interfered with. However, it having been confirmed that the applicant had been in prison custody during the entire period of hearing of the case it follows that the said period ought to have been considered during sentencing. The trial court did not take this into account.
8. I therefore uphold the ten (10) years sentence, with an order that the said sentence runs from 20th May, 2022 when the applicant was arrested.
9. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF MAY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

