



REPUBLIC OF KENYA



KENYA LAW
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**JKM v Republic (Criminal Revision E125 of 2022)
[2025] KEHC 8002 (KLR) (4 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL REVISION E125 OF 2022**

TW OUYA, J

JUNE 4, 2025

BETWEEN

JKM APPLICANT

AND

REPUBLIC RESPONDENT

*(Arising from conviction and sentence of Chief Magistrate's Court at Muranga
in Sexual Offences Case No. 25 of 2018 by Hon. M. Wachira on 27th March 2019)*

RULING

Background

1. The Applicant was charged in the principal count with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars read that on the 3rd day of July 2018 at [Particulars Withheld] in Kahuro Sub County within Muranga County, being a male person, caused his penis to penetrate the vagina of M N M a female person who was known to his knowledge his mother.
2. In the alternative count he was charged with committing an indecent act with an adult contrary to Section 11A of the *Sexual Offences Act* No. 3 of 2006. The particulars read that on the 13th day of January 2018 at [Particulars Withheld] in Wanjengi Sub County within Muranga County intentionally touched the vagina of M N M an adult with his penis.
3. The accused denied all the charges and the matter was set down for full trial with the prosecution calling 4 witnesses in support of the charges and the accused in his defence gave unsworn statement though he did not call any witness in support of his case. By judgment delivered on 27th March 2019 the trial court found the accused guilty in the principal count while acquitting him as regards the alternative count.



4. Dissatisfied with the conviction and the sentence of the trial court, the Applicant filed a Notice of Motion dated 3rd October 2022 brought under certificate of urgency seeking review of the 15 years' imprisonment sentence in which he relied on the following grounds:
 - a. That he is a first offender and highly remorseful.
 - b. That I am young energetic man of 38 years building foundation of my future and my family's future.
 - c. That I am a breadwinner to my family (wife and 2 kids) and my aging parent (mother) whom are entitled to rights of care, food, medical attention and education.
 - d. That I am trained carpenter capable of working and paying taxes to our loved country Kenya.
 - e. That I have been rehabilitated and reformed as I have been in prison since 27th August 2018 and I have participated in different trainings in prison such as religious courses and carpentry.
 - f. That while in prison I have been of high discipline and conduct and an epitome/role model to other prisoners.
 - g. That I seek my sentence to be reviewed downwards and I be granted a lenient sentence of probation/community service or any other the honourable court will be pleased to give.
 - h. That I seek this honourable court to consider the time I spent in remand between 27th August 2018 to 27th March 2019 pursuant to Section 333(2) of the [CPC](#).
 - i. That this court be persuaded by the consolidated Petition No. 97 of 2021 – [Edwin Wachira & 9 Others, Petition No. 88 of 2021 – Adan Maka Thuluand, Petition No. 90 of 2021 – Robert Mwangi and Petition No. 57 Kazungu Kalama Jojwa v Republic](#) in Mombasa High Court by Mativo, J. in support of Section 333(2).
 - j. That I seek this honourable court to consider my mitigation and circumstances and give a lenient sentence, probation/community service/fine option or any other favourable orders may deem fit.
5. In his submissions, the Applicant now filed amended grounds of revision in which he raised the following grounds:
 - a. That the honourable court has jurisdiction to hear and determine the application herein.
 - b. That the applicant prays for reduction of sentence so as to take into consideration the time spent in custody pursuant to Section 333(2) of the [CPC](#).
 - c. That the applicant prays that the sentence of 15 years be reduced to 10 years as provided for in Section 20(1) of the [SOA](#) pursuant to Section 365(1)(b) [CPC](#).
 - d. That the application is further grounded on having been remorseful, rehabilitated having participated in training courses as shown in attached certificates.
6. During the hearing of the application on 5th May 2025, the state counsel stated that the application related to Section 333(2). That the Applicant had been in custody from the time he took plea on 13th August 2018 until 27th March 2019 when he was convicted, being a period of 7 months and 2 weeks. The Applicant confirmed the same and stated that he had no other prayer.



Analysis And Determination

7. I have considered grounds of the application, averments by the Applicant and the state counsel. I wish to start by relying on Section 333 (2) of the *Penal Code* which provides:

“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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
8. The *Judiciary Sentencing Policy Guidelines* also speak to the issue of the period spent by an accused person in pretrial custody at paragraph 7 thereof as follows:

“7.10 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.

7.11 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.”
9. In the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR, the Court of Appeal held that:

“By proviso to Section 333(2) of *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J who sentenced the appellant did not specifically state that he had taken into account the 9 years’ period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”
10. The principle that flows from the above precedent and statutory provisions is that the trial court is required to consider the period that an accused person has spent in pre-trial custody during sentencing. In the present case, I note that the Applicant first appeared in court on 13th August 2018 and stayed in remand custody throughout his trial period. He was sentenced on 27th March 2019. Hon. M. Wachira who sentenced the Applicant in sentencing him only noted that she had considered his mitigation where the Applicant had asked the court to give him a sentence which was going to enable him continue with his normal life and with his family.
11. From the learned trial magistrate presentence notes, though she did not state it while sentencing the Applicant, I have no doubt in my mind that he was alive to the proviso to Section 333(2) of the



Criminal Procedure Code and fact that Section 20(1) of the Sexual Offences Act which the accused person was charged with provides:

“(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or indecent act was obtained with the consent of the female person.

12. My reading of the lower court’s record does not show or suggest that the learned trial magistrate made any error on the law applicable to sentencing or that there was any impropriety or irregularity in the manner in which the Applicant was sentenced. Although I appreciate the gravity and seriousness of the offence of incest and even if I may be of the view that the sentence imposed on the Applicant was quite lenient given the facts of this case, this by itself cannot justify interference with the sentence since it is trite that sentencing is at the discretion of the trial court and unless it is demonstrated that the sentence was illegal for one reason or another or that it was manifestly excessive, there would be no basis to disturb the sentence as doing so would amount to substituting this court’s discretion with that of the trial court.
13. In view of the foregoing, I am satisfied that the Applicant’s application dated 3rd October 2022 lacks merit and it is hereby dismissed.
14. It is so ordered.

DATED, SIGNED AND DELIVERED BOTH VIRTUALLY AND PHYSICALLY ON THIS 4TH JUNE, 2025.

HON. T. W. OUYA

JUDGE

For Applicant.....Joseph Kagiri Munyarare(in Person)

For Respondent.....P. Mwangi

Court Assistant.....Jackline

