



**Kadevede v Republic (Miscellaneous Criminal Application  
E036 of 2024) [2025] KEHC 8318 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8318 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CRIMINAL APPLICATION E036 OF 2024**

**E OMINDE, J**

**JUNE 12, 2025**

**BETWEEN**

**LABAN AMAHENO KADEVEDE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was charged with the offence of Defilement of an imbecile contrary to Section 146 of the *Penal Code* and in the alternative, he was charged with the offence of committing and indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The particulars of the main charge were that on 10<sup>th</sup> October 2016 at (particulars withheld) in Lugari Sub County within Kakamega County, he unlawfully and intentionally caused his genital organ, namely penis to penetrate the genital organ, namely vagina, of CA who to his knowledge was an imbecile aged 15 years.
3. The particulars of the alternative charge were that on the same date at the same place within Kakamega County, he unlawfully and indecently caused his genital organ namely penis to come into contact with the genital organ namely vagina of CA who to his knowledge was an imbecile girl aged 15 years
4. The Applicant pleaded not guilty and the matter proceeded to full hearing. Upon considering the testimonies of the witnesses and the evidence tabled in court, the trial court convicted him on the alternative charge and sentenced him to 10 years' imprisonment. Being dissatisfied with the decision, the Applicant filed an Appeal Eldoret High Court Criminal Appeal No 171 of 2019. The Appeal was dismissed on 30<sup>th</sup> October 2020 for lack of merit.
5. The Applicant has now approached this court vide the Notice of Motion dated 9<sup>th</sup> April 2024 seeking resentencing. The application is titled as brought under the provisions of the law on Terminally ill and Elderly Offender and Offender with Chronic illness as guided by the current Sentencing Policy



Guidelines 2023 in reliance with Article 54(A) & (C) of the Constitution and Section 4(1) & (2) of the Probation of Offenders Act CAP 46 LOK

6. The grounds in support of the Application are as therein set out as well as the facts deposed in the affidavit in support of the same.
7. The Applicant urges in his Application that since his imprisonment, he has experienced a series of illnesses starting with High Blood Pressure, Covid 19 and is currently paralysed due to a stroke. He stated that the application is pursuant to Article 54(a) (c) and (d) of the Constitution in the matter of illness and elderly as guided under the Judiciary Policy Guidelines on the terminally ill. He is therefore seeking for a sentence review to a lesser sentence or that he be admitted to probation due to his advanced age which he stated was at 71 years at the time of filing the Application.
8. He attached to his submissions a letter dated 8<sup>th</sup> March 2023 a letter from the Moi Teaching and Referral Hospital stating that he has had left sided weakness of the upper and lower limbs and inactivity to walk and hold object secondary to ischemic infraction(stroke), he has hypertension and is on treatment and subsequently developed seizures since July 2022 and is on tegretol

### **Hearing of the application**

9. The Application was prosecuted by way of written submissions. The Applicant filed his written submissions on 29<sup>th</sup> October 2024 whereas the respondent filed submissions dated 18<sup>th</sup> December 2024 through State Counsel S.G Thuo.

### **Applicants' submissions**

10. The Applicant submitted that this court has jurisdiction to reduce his sentence. He cited the provisions of Articles 23(1) & (3)(f), 26(1) & (3), 43(1)(a) & (2), 57 (c) & (d) and 165(a) & (b) of the Constitution and urged that this court has a mandate to protect his rights. He submitted that he is seeking for judicial review as provided under Article 23 as read with Article 165(3)(a) & (b) of the Constitution. He submitted that as was held in the case of Protus Buliba Shikuku v Attorney General [2012] eKLR this Court as provided under Article 165(3) has powers without exception to determine a case where there is a violation of a fundamental right.
11. Further, that he is of ill health and is on treatment for hypertension. He has suffered a stroke and has weakness in his left upper and lower limbs from the effects of the stroke. He cited Article 43(1) of the Constitution in submitting that he has a right to the highest attainable standard of health and so under the provisions of Articles 22 and 23 he has moved the court for redress by way of a declaration of a right as provided under Article 43(1) & (2) and 23(3)(a) & (f).
12. In support of this submission, he relied on the case of Reyes v The Queen where the Privy Council held that in interpreting the Bill of Rights, the call both at the international as well as the municipal level is for the courts to interpret the Bill of Rights broadly and liberally in order to give effect to the enforcement of the right with an interpretation which favours the enjoyment of that which is alleged to have been breached or that has been threatened to be breached.
13. He cited Article 57(c) and (d) of the Constitution, which provides for the rights of older persons and urged the court to take into consideration his age. He submitted that as per the Medical Report dated 8<sup>th</sup> March 2023, he is already over 70 years old, which is the age given in the Bible as the life expectancy under this generation and that further, the life expectancy in Kenya is indicated at 64.4 for men as per the report of the World Health Organisation of 2018 and so therefore if he serves his full sentence it



will go past his life expectancy which will be inhuman. He urged the court to allow the application as prayed.

### Respondents submissions

14. Learned counsel for the state submitted that the offence that the applicant was charged and convicted of attracts a minimum sentence of not less than 10 years imprisonment and therefore, the applicant benefitted from getting the least permissible sentence. He submitted that in SCOK Pet No E018 of 2023 *Republic v Joshua Gichuki Mwangi & others*, the Supreme Court observed that the *Muruatetu* decision did not alter mandatory sentences under the *Sexual Offences Act*.
15. Counsel sympathized with the health condition of the applicant but urged the court to consider the interests of the scarred victim of tender years, with a mental condition, who may never recover physically or mentally from the heinous acts of a fully-grown assailant old enough to be his grandparent. He urged that the conviction was safe and prayed the court to dismiss the application in its entirety.
16. In the process of preparing the Ruling, the court noted that the Application did not have sufficient documentation to enable the court determine the Application on its merits. In its order dated 13<sup>th</sup> March therefore, the court summoned the Officer in Charge of Eldoret Main Prison where the Applicant is incarcerated to attend court accompanied by the relevant officer and avail to court the treatment records held by themselves if any relating to the ill health that the applicant has hinged his application on.
17. The Second in Command of the Prison Mr. Moses Isachi attended Court on 25<sup>th</sup> March 2025 accompanied by the Ms. Esther Cheronon a Clinical Officer and the in Charge of Eldoret Main Prison. In a nutshell, the Officers did confirm that the Applicant was admitted to the facility on 24<sup>th</sup> February 2020 and he was suffering from hypertension then. That on 11<sup>th</sup> April 2020 he suffered a stroke. As a result, his left upper and lower limbs were affected causing paralysis of the left side which has affected his mobility such that he cannot walk well without support.
18. That he has been and still is on medication and is attending the Moi Teaching and Referral Hospital (MTRH) Out Patient Clinic for physiotherapy on a monthly basis and is also being managed at the Prison Dispensary. That when he got the stroke he was unconscious and was admitted at the MTRH for a period of two weeks and upon discharge he was walking and talking. That even though he has improved, the said improvement is not much.

### Analysis & Determination

19. In the case of *Owners of the Motor Vessel Lillian "S" v Caltex Oil Kenya Ltd* [1989] KLR I and *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others*, Application No 2 of 2011 jurisdiction of Courts and where it emanates from was discussed and the Supreme Court in the Samuel Kamau case reiterated the holding in the MV Lillian "Case by stating as hereunder;  

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court 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...”
20. The relevant Constitutional provisions that grants this court the requisite jurisdiction are as hereunder;
21. Article 22 of the *Constitution* of Kenya provides;



1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
22. Article 23 of the Constitution provides thus: -
  1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.’
  2. In any proceedings brought under Article 22, a court may grant appropriate relief, including: -
    - (f) an order of judicial review
23. Article 165(3)(b) of the Constitution provides that:  
Subject to clause (5), the High Court shall have -
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
24. Proceeding to the Petition itself, the court notes that one of the grounds that the Applicant has sought to rely on in this Petition among other grounds in seeking that his sentence be reviewed is his advanced age. I have perused the Applicant’s Appeal filed in HCCRA No 171 of 2019. In his Amended Grounds of Appeal in the said appeal which was against both conviction and sentence, the Applicant’s advanced age was one of the grounds therein.
25. The Hon Lady Justice L. Achode, Judge of the High Court (as she then was), in her judgement delivered on 30<sup>th</sup> October 2020 stated that she had considered the grounds upon which the appeal was premised, including the ground on the age of the Applicant and found them to be devoid of merit and dismissed the Appeal.
26. In this regard, it is worth noting that this court is of equal and concurrent jurisdiction to the Hon Lady Justice Achode. By virtue of the fact of the judgement delivered by the Hon Judge, this court is now *functus officio* and cannot make any further determination touching on the sentence imposed based on age. As such, the Applicant’s Application to this effect is misconceived and I now hereby so find.
27. On the ground based on ill health, the relevant Constitutional provision provides as follows;
  - a. Right to health  
Article 43 of the Constitution provides;
    - (1) Every person has the right—
      - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
28. The provision of the updated Sentencing Policy Guidelines 2023, Gazetted on 1<sup>st</sup> September 2023 has been relied upon by the Applicant in his Petition and even though he has not cited any particular provision therein, having perused the same it is apparent the provisions relevant to offenders suffering from illness would be the following:
  - 3.3.1 As with the case of offenders with disability the consideration should be whether in view of the illness or age, the sentence rendered is excessive. There are two dimensions worth considering. Firstly, whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody and whether the conditions in custody would be termed



inhuman bearing in mind the offenders' state. Secondly, whether the offender's condition is one that would cause undue burden on other offenders and/or prison officers taking care of them.

- 3.3.4 When imposing sentencing orders against terminally ill and elderly offenders, a court should ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age, as well as in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness or age of the offender.
- 3.3.5 Non-custodial sentences - or suspended sentences - should be considered unless, in light of the nature and seriousness of the offence committed and other factors, justice would demand the imposition of a custodial sentence.
29. In determining whether the Petition under this ground of illness is merited, the evidence of the Officers from Eldoret main Prison will act as a guide. From the said evidence as herein summarised, I am satisfied that the Petitioner has improved significantly from the stroke that he suffered to the extent that he is now walking and talking from the unconscious state that he was in when he suffered the stroke.
30. I am further satisfied that he is receiving the highest attainable standard of health and including health services both at the Prison Dispensary and at the MTRH as is required under Article 43 herein cited. Further, in noting that the trial court sentenced him to the minimum sentence provided against the backdrop of the heinous nature of the offence that he committed I do not find that the said sentence amounts to cruel inhuman and degrading treatment even in the circumstances of his condition.
31. Lastly, compared to his victim who will remain scarred for life, his sentence is determinate and he will regain his freedom upon completion. In view of the above, I am not satisfied that the circumstances of the Applicant herein meet the threshold for his release on the ground of illness. I therefore find that the Application lacks merit and the same is accordingly dismissed in its entirety.
32. Right of Appeal 14 days.

**READ DATED AND SIGNED AT ELDORET ON 12<sup>TH</sup> JUNE 2025**

**E. OMINDE**

**JUDGE**

