



REPUBLIC OF KENYA



**Maliga v Republic (Criminal Appeal E023 of 2024)  
[2025] KEHC 8272 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8272 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E023 OF 2024**

**JN KAMAU, J**

**JUNE 12, 2025**

**BETWEEN**

**HUMPHREY MALIGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon M. Ochieng (SPM) delivered at Hamisi in Senior Principal Magistrate's Court in Sexual Offence Case No 52 of 2022 on 26th March 2024)*

**RULING**

1. In its decision of 10<sup>th</sup> June 2025, this court rendered itself as follows:-

“Bearing in mind that the Trial Court had meted out to the Appellant the minimum prescribed sentence and it took into account the period that he had spent in custody while his trial was on going, this court could not review his sentence and/or take into account the said period afresh save for two (2) days, 2<sup>nd</sup> and 3<sup>rd</sup> October 2022.”

2. After delivering this decision, this court realised that it inadvertently did not consider that the Trial Court ought to have given a justification as to why it had meted out to the Appellant a sentence that was above the mandatory minimum sentence.

3. Section 8(4) of the *Sexual Offences Act* Cap 63A (Laws of Kenya) under which the Appellant herein was sentenced stipulates as follows:-

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”



4. Article 50(2)(p) of the Constitution of Kenya, 2010 states as follows:-

“Every person has the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
5. Notably, Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides 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).
6. While a court could mete out an enhanced sentence in cases where there were aggravating factors and deem the period spent in custody as part of the sentence to be served, no such circumstances prevailed in the case herein.
7. Indeed in her evidence, GE (hereinafter referred to as “PW 1”) who was aged sixteen (16) years of age at the time she testified, she that she was in a love relationship with the Appellant out of which a child was born. When she was cross-examined, she said that he was the one who took care of her after she gave birth until he was arrested. She also stated that he would have wished him to continue taking care of the child.
8. In the absence of any aggravating circumstances, it was therefore the considered view of this court that the Appellant was entitled to the period he had spent in custody which was from 2<sup>nd</sup> October 2022 when he was arrested until 16<sup>th</sup> May 2024 as he was sentenced on 17<sup>th</sup> May 2024 and the Trial Court erred both in law and fact in having found that period to have formed part of the sentence that the Appellant was to serve as the same exceeded the mandatory minimum sentence that was prescribed in Section 8(4) of the Sexual Offences Act.
9. This court proceed suo moto or on its own motion to review its Judgment of 10<sup>th</sup> June 2025 for the reason that the omission to grant the Appellant the period that he had spent in custody while his trial was ongoing occasioned him a miscarriage of justice. It is important to point out that Section 333(2) of the Criminal Procedure Code was couched in mandatory terms.
10. This court also took the view that if the court left its decision as it was, the Appellant who was acting in person would have been completely locked out from ever seeking that that period be taken into account in the High Court unless the said decision of 10<sup>th</sup> June 2025 was reversed by the Court of Appeal, which could take quite some time to be achieved, if at all.
11. To avoid the Appellant suffering hardship due to the said inadvertent omission and noting that the Respondent was not opposed to him being granted that period that he remained in custody while his trial was going on, this court found and held that this was a suitable case for it to alter and/or reverse its decision pertaining to this issue.



12. The power to alter and/or reverse a judgment was donated to court by Section 382 of the *Criminal Procedure Act* Cap 75 (Laws of Kenya) which provides as follows:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice (emphasis):

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

13. It was clear from the aforesaid provision that a judgment could be altered and/or reversed if there was an error, omission or irregularity therein and that the court could not be considered to have been functus officio in that regard.
14. The error was on the part of the court and as the Appellant could not be expected to have raised an objection earlier in the proceedings, this court reviewed its decision not to occasion him miscarriage of justice as has been stated hereinabove.

### **Disposition**

15. For the foregoing reasons, the upshot of this court’s decision was that as the Appellant had opted not to proceed on the merits of his Petition that was dated May 24, 2024 and filed on May 29, 2024, the said Petition of Appeal stood dismissed as this court found in its decision of June 10, 2025. In the same vein, the court’s finding that his conviction and sentence be are hereby upheld as they were both safe shall remain undisturbed save for the issue of Section 333(2) of the *Criminal Procedure Code*..
16. Pursuant to Section 382 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya), Paragraph 15 of the said decision of 10<sup>th</sup> June 2024 be and is hereby altered and/or reversed and replaced with the direction that the period between 2<sup>nd</sup> October 2022 and 16<sup>th</sup> May 2024 that the Appellant remained in custody before he was sentenced on 17<sup>th</sup> May 2024 to be taken into account at the time of computing the Appellant’s sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
17. For the avoidance of doubt, the disposition in this decision hereby overrides the disposition of this court’s decision of June 10, 2025 necessitating all documentation to be amended to reflect the current position to avoid confusion in future.
18. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 12<sup>TH</sup> DAY OF JUNE 2025**

**J. KAMAU**

**JUDGE**

