



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maliga v Republic (Criminal Appeal E023 of 2024)  
[2025] KEHC 8196 (KLR) (10 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8196 (KLR)

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

**JN KAMAU, J**

**JUNE 10, 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)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. The Learned Trial Magistrate, Hon M. Ochieng (SPM), convicted by on the charge of defilement and sentenced him to fifteen (15) years imprisonment.
3. Being dissatisfied with the said Judgement, he lodged an appeal herein. His Petition of Appeal was dated 24<sup>th</sup> May 2024 and filed on 29<sup>th</sup> May 2024. He set out three (3) grounds of appeal.
4. When the matter came up for hearing on 14<sup>th</sup> May 2025, he informed the court that he did not wish to proceed with the Appeal herein but prayed that the period that he spent in remand during trial be taken into account while computing his sentence. He pointed out that he had remained with nine (9) years to complete his sentence.



5. As the Respondent was not opposed to his said application, none of the parties filed Written Submissions. The Ruling herein is therefore based on the oral submissions that the Accused person made to this court.

### Legal Analysis

6. Having looked at the Appellant's Petition of Appeal and his oral application, it appeared to this court that the only issue that had been placed before it for determination was whether or not his sentence ought to run from the date of his arrest.
7. 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).
8. Further, the Judiciary Sentencing Policy Guidelines provide that:-

“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. 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. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
10. The Appellant was arrested on 2<sup>nd</sup> October 2022. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 17<sup>th</sup> May 2024. A perusal of the lower court file showed that the Trial Court took into account the period that he was custody. The Trial Court rendered itself as follows:-

“I have taken into account the Accused has been in remand from 4<sup>th</sup> October 2022 as well as the resentencing manual and he provisions of the *Sexual Offences Act* on sentence. I shall therefore hand the Accused person the minimum sentence as provided by law. Under the circumstances, the Accused to serve 15 years in jail.”
11. As at the time the Trial Court delivered its decision on 17<sup>th</sup> May 2024, there was emerging jurisprudence that sentences under the *Sexual Offences Act* could be reviewed downwards. In the case of *Joshua Gichuki Mwangi vs Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake vs Republic* [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.



12. However, in a decision that was delivered on 12<sup>th</sup> July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.
13. 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.

### **Disposition**

14. For the foregoing reasons, as the Appellant had opted not to proceed on the merits of his Petition that was dated 24<sup>th</sup> May 2024 and filed on 29<sup>th</sup> May 2024, the said Petition of Appeal be and is hereby dismissed. Accordingly, the Appellant's conviction and sentence be and is hereby upheld as they were both safe.
15. For the avoidance of doubt, it is hereby directed that two (2) days to wit, 2<sup>nd</sup> and 3<sup>rd</sup> October 2022, to be taken into account at the time of computing the sentence in line with Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).
16. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 10<sup>TH</sup> DAY OF JUNE 2025**

**J. KAMAU**

**JUDGE**

