



REPUBLIC OF KENYA



KENYA LAW
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**Njege v Republic (Criminal Revision E293 of 2024)
[2025] KEHC 9932 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL REVISION E293 OF 2024**

**TW OUYA, J
JULY 10, 2025**

BETWEEN

JAMES MUTEMBEI NJEJE APPLICANT

AND

REPUBLIC RESPONDENT

*(Application arising from the Principal Magistrate's Court at
Kigumo SO No. 43 of 2018 delivered on 21st December 2022)*

RULING

1. The applicant, James Mutembei Njege, approached this court vide an undated notice of motion application, seeking a revision of the sentence imposed by the trial court in Principal Magistrate's Court at Kigumo by Hon. J. Irura in SO No. 43 of 2019 on 21st December 2022.
2. The application is brought under section 362 of the *Criminal Procedure Code* for review of sentence to a non-custodial one. The application is also grounded on articles 47,48,159 and 165 of the *Constitution*. The applicant implores this court to exercise its inherent powers in the interest of justice to make an order that the applicant does serve the remaining part of his sentence through a non-custodial sentence of probation, community service orders and/or suspended sentence or any other relief that this court may deem fit.
3. The above are reiterated in the applicant's supporting affidavit where he avers that he is an inmate at Murang'a Main Prison serving 5 years sentence for the offence of Rape contrary to section 3(1) (a)(c) (3) of the *Sexual Offences Act*.
4. From the record, the applicant was indeed charged with the offence of rape contrary to section 3(1) (a)(c) (3) of the *Sexual Offences Act* where it was alleged that on diverse dates between 5th July to 10th



August 2018, in [particulars withheld] Village within Murang'a County, intentionally and illegally caused his penis to penis to penetrate the anus of JM by use of force, intimidation and threat.

5. The matter proceeded for full trial with and the trial court convicted and sentenced the appellant to five years imprisonment.
6. The learned prosecution counsel Mr. P Mwangi in his brief oral submissions, submitted that the state is opposed to the application and argued that the applicant was sentenced to five years imprisonment after taking into consideration that the applicant had spent four years in custody during the pendency of the trial. It is his contention that this should have been a case of enhancement since the minimum punishment for the offence of rape is a period of not less than ten (10) years imprisonment and that the trial magistrate sentenced him to five years.
7. He submitted further that the circumstances of the offence were heinous in that the Applicant, while working as a shamba boy in his employer's homestead, sodomised the complainant, their 19-year-old son through threats and violence.
8. For the above stated reasons, the state was opposed to the prayer for a non-custodial sentence and holds the view that the applicant should serve the remainder of the sentence in custody.
9. I have duly considered the application alongside the supporting grounds, affidavit, the lower court record and counsel's oral submissions. I have noted that the issue at hand is a revision of sentence to a non-custodial one.
10. The applicant was charged with the offence of rape contrary to section 3(1) (a)(c) (2) of the [Sexual Offences Act](#) which provides:

“3. Rape

- (1) A person commits the offence termed rape if—
 - (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
 - (b) the other person does not consent to the penetration; or
 - (c) the consent is obtained by force or by means of threats or intimidation of any kind.
- (2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.
- (3) 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.”

11. In the case of [Ian Ochieng Owaga v Republic](#) [2022] KEHC 2061 (KLR), the court stated:

“It is important to point out at the outset that as a general rule, sentencing is at the discretion of the trial court. This court in its supervisory jurisdiction whether sitting on appeal or in the exercise of its revisional jurisdiction can only interfere with the trial court's aforesaid discretion if it was satisfied that the sentence was patently illegal where it was not authorized



by the law or that when passing sentence, the trial court acted on the wrong legal principles or took into account irrelevant factors or omitted to consider relevant ones or that the sentence was manifestly harsh or excessive.”

12. The principle that flows from the above precedent and statutory provisions is that the trial court is required to consider sentencing in line with the sentencing policy guidelines and the provisions of the law. While the law provides for a minimum of 10 years which may be enhanced to life imprisonment, the trial court went against the law and pronounced a sentence that was way below the minimum. The ideal scenario should have been to pronounce the minimum sentence of 10 years and then proceed to state that the four years period spent in custody during the trial should be factored therein.
13. That notwithstanding, this court also notes that the period spent in incarceration was taken into account and factored by the trial court.
14. It is noteworthy however, that the state did not cross-appeal or issue any notice of enhancement. For the above reasons, this court will not interfere with the trial court finding on sentence.
15. Concerning the prayer for non-custodial sentence, this court finds that the same is not available due to the provisions of the law and the nature and gravity of the offence.
16. This appeal is dismissed. The sentence of five years’ imprisonment imposed by the trial court is hereby upheld. The prayer for non-custodial sentence is disallowed.

**DATED, SIGNED AND DELIVERED PARTIALLY VIRTUALLY AND ELECTRONICALLY THIS
10th July, 2025.**

HON. T. W. OUYA

JUDGE

For Applicant James Mutembei Njege (Present at Murang’a Main Prison)

For Respondent/State No Appearance

Court Assistant Brian

