



WTM v Republic (Criminal Miscellaneous Application E026 of 2024) [2025] KEHC 10410 (KLR) (14 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E026 OF 2024**

**JN KAMAU, J
JULY 14, 2025**

BETWEEN

WTM APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged with the offence of incest contrary to Section 29(1) 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](#). He was convicted of the main charge and sentenced to twenty (20) years imprisonment.
2. Being aggrieved by the said decision, he appealed at Kakamega High Court, HCCRA No 80 of 2019 where his Appeal was dismissed and his conviction and sentence were upheld.
3. On 1st February 2024, he filed a Notice of Motion application dated 22nd January 2024 seeking a review of his sentence. He urged this court to exercise its discretion and order that his sentence run from the date of arrest being 6th February 2018 pursuant to Section 333(2) of the [Criminal Procedure Code](#). He also invited the court to consider his absolute constitutional right to a fair trial and a least severe sentence pursuant to Article 25(c) and 50(2)(p) of [the Constitution](#) of Kenya, 2010.
4. He contended that he was an old man of sixty (60) years, a first offender, remorseful and had been reformed and rehabilitated.
5. His Written Submissions were dated 21st November 2024 and filed on 25th November 2024 while those of the Respondent were dated 24th December 2024 and filed on 7th January 2025. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.



Legal Analysis.

6. The Applicant submitted that having been arrested on 6th February 2018 and lacking anyone to stand in for him as a surety, he remained in custody throughout the trial process until the date of conviction on 1st July 2019. He averred that in calculating his sentence, the Trial Court ignored the period of time of one (1) year and five (5) months that he spent in remand.
7. He submitted that that was against the principle of fair administrative action under Article 47 of *the Constitution* of Kenya and threatened his right to fair trial, equity and non-discrimination. He added that the said action also denied him the right to full and equal protection and benefit of the law in addition to being denied the right to full and equal enjoyment of all right and fundamental freedoms as granted by Article 27(1) and (2) of *the Constitution* of Kenya.
8. He cited Articles 22, 23, 165 of *the Constitution* of Kenya and submitted that the right to fair trial ought not be limited, which right included the right to the benefit of the least severe prescribed form of punishment which encompassed the inclusion of the time spent in custody during trial as part of sentence served as was set out in Section 333(2) of the *Criminal Procedure Code*.
9. He placed reliance on the case of 88 Prisoners vs the DPP, AG & The Prison Home Made Petition (eKLR citation was not given) where it was held that the accused person's liberty was lost once arrested. He asserted that the main aims of penitentiary institutions were reformation and social rehabilitation as stipulated in Article 10(3) of the International Covenant on Civil and Political Rights of 1996.
10. He contended that a time to time review of a convicted person's sentence and continuous reduction ensures a punishment which was commensurate and proportionate to the changing and ever shifting circumstances. He added that having been in prison for sometime and having undergone various social transformative and spiritual development courses had made him of valuable traits and capable of peaceful co-existence. He pointed out that he was an elderly citizen with a degenerated health. It urged the court to consider Section 26(2) of the *Penal Code*.
11. Notably, in its Written Submissions, the Respondent invoked Section 20(1) of the *Sexual Offences Act* No 3 of 2006 and Section 329 of the *Criminal Procedure Code* and submitted that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case and called for a pre-sentence report in arriving at the appropriate sentence.
12. It contended that the sentence meted upon the Applicant by the Trial Court was proper for the offence committed. It placed reliance on the case of Benard Kimani Gacheru vs Republic[2002]eKLR where it was held that sentence was a matter that rested in the discretion of the trial court and that an appellate court would not interfere with the sentence unless it was manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor.
13. It also cited the case of Republic vs Jagani & Another (2001) KLR 590 where it was held that the purpose of sentence was usually deterrence, rehabilitation and reparation for harm done to victims in particular and to society in general. It was emphatic that the sentence meted out to the Applicant was lawful and commensurate to his blameworthiness. It added that the Applicant had committed the offence knowing that the victim was his son. It urged the court not to interfere with his sentence.
14. It did not oppose the Applicant's prayer pursuant to Section 333(2) of the *Criminal Procedure Code*. In that regard, it relied on the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR where it was held that courts must take into account the period that the accused persons spent in custody before they were sentenced.



15. The Applicant herein was sentenced under Section 20(1) of the *Sexual Offences Act* Cap 63A (Laws of Kenya). The said Section 20(1) of the *Sexual Offences Act* provides as follows: -

“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, if 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 the indecent act was obtained with the consent of the female person.”

16. The Trial Court was therefore lenient for sentencing the Applicant to twenty (20) years imprisonment as the actual punishment for the offence committed was life imprisonment as the victim was an eight (8) year old.

17. Notably, on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic [2022] eKLR which had reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR to the effect 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. In its said decision, the Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

18. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Applicant’s sentence. It had no option but to leave the said sentence that was meted against the Applicant herein undisturbed.

19. This court was not persuaded to enhance the sentence to life imprisonment as the Respondent did not put the Applicant on notice that it would be seeking an enhancement of the sentence which would have allowed him to make an informed decision as to whether he would have wished to proceed with his application or if he would have wished to abandon the same. Enhancing his sentence without giving him an opportunity to respond would be contrary to the principles of fair trial provided in Article 50 of *the Constitution* of Kenya, 2010.

20. Going further, this court was mandated to consider the period the Applicant spent in remand while his trial was ongoing as provided in Section 333(2) of the *Criminal Procedure Code*. The said Section 333(2) of the *Criminal Procedure Code* stipulates 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)”.



21. This duty is also contained in the Judiciary Sentencing Policy Guidelines where it is provided 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.”
22. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another vs Republic*(Supra).
23. The Charge Sheet herein showed that the Applicant herein was arrested on 6th February 2018. His bond application was denied and the Trial Court ordered that he be remanded in custody. He was sentenced on 1st July 2019.
24. A reading of the Trial Court’s Sentence showed that it did not take into account the time that he spent in remand before his sentencing. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition.

25. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 22nd January 2024 and filed on 1st February 2024 was not merited save for his prayer that was brought pursuant to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
26. It is hereby ordered and directed that the period that the Applicant spent in custody between 6th February 2018 and 30th June 2019 be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
27. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 14TH DAY OF JULY 2025

J. KAMAU

JUDGE

