



**Edavile v Republic (Miscellaneous Criminal Application E016 of 2023)
[2024] KEHC 11394 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E016 OF 2023
JN KAMAU, J
SEPTEMBER 23, 2024**

BETWEEN

MOSES MUSASHA EDAVILE APPLICANT

AND

REPUBLIC RESPONDENT

*(Appeal at Kakamega High Court HCCA No 102 & 182 of 2018
whereby Musyoka J uphold his conviction and substituted his life
imprisonment sentence with twenty-five (25) years imprisonment)*

RULING

Introduction

1. The Applicant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) 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 on the main charge and sentenced to life imprisonment.
2. Being aggrieved with the said decision, he lodged an appeal at Kakamega High Court HCCA No 102 & 182 of 2018 whereby Musyoka J upheld his conviction and substituted his life imprisonment sentence with twenty-five (25) years imprisonment.
3. On 13th April 2023, he filed Notice of Motion application dated 27th March 2023 seeking a review of his sentence and a less severe sentence.
4. His Written Submissions were dated 27th February 2024 and filed on 29th February 2024 while those of the Respondent were dated 21st March 2024 and filed on 25th March 2024. The Ruling herein is based on the said Written Submissions that both parties relied upon in their entirety.



Legal Analysis

5. The Applicant herein placed reliance on Article 50(2) (p) and (q), Article 24(1)(e), Article 57(a, b, c and d) and Article 28(f) of the Constitution of Kenya, 2010, Section 323, 216 and 329 of the Criminal Procedure Code Cap 75 Laws of Kenya, Section 26(2) of the Penal Code and cited the case of *Maingi & 5 Others v DPP KEHC 1318 KLR* which was cited with approval in *Joshua Gichuki Mwangi v Republic* [2022] eKLR without highlighting the holding he relied on therein.
6. In his mitigation, he pointed out that he was an old man of seventy-two (72) years old and of ill health which was catalysed by his long incarceration. He contended that he had served five (5) years in prison and that if he was incarcerated without the possibility of having his life sentence reviewed, there was the risk that he could never atone for the offence.
7. He further invoked Section 26(2) of the Penal Code and Article 24(1)(e) of the Constitution of Kenya, 2010 and submitted that he had served sufficient term to meet the requirements of punishment, deterrence and rehabilitation and had been transformed into a person who no longer posed any threat to the public. He sought for the leniency of court and urged it to grant him a least prescribed punishment than the one he was serving.
8. On its part, the Respondent submitted that the Applicant's sentence was appropriate and that there were no grounds to warrant its interference. It urged the court to dismiss his application.
9. As has been seen hereinabove, the Applicant herein was charged under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. Section 8(2) of the Sexual Offences Act provides that:-

“ A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
10. The Trial Court could therefore not be faulted for having sentenced him to life imprisonment as the same was the sentence that was prescribed by the law. Having said so, sitting on appeal, Musyoka J reduced his life imprisonment sentence to twenty-five (25) years imprisonment.
11. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
12. This court took cognisance of the fact that there had been emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.
13. Notably, in the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where it held that Section 8 of the Sexual Offences Act must 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.
14. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the Sexual Offences Act.
15. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case *Joshua Gichuki Mwangi v Republic (Supra)* and stated



that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant had since been released from prison be apprehended to complete the remainder of his sentence.

16. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Applicant's sentence. Even without the directions of the Supreme Court of 12th July 2024, it would still not have interfered with the sentence that was meted against the Applicant as Musyoka J already reduced the mandatory minimum life sentence to twenty five (25) years. He was of equal and competent jurisdiction of this court and consequently, this court could not purport to sit on appeal on his decision.
17. Turning to the period that the Applicant spent in custody while his trial was ongoing, this court had due regard to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). The said Section 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).

18. 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.”

19. 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 Abamad Abolfathi Mohammed & Another v Republic[2018]eKLR.
20. A reading of the Appellate court's Judgment showed that Learned Judge, Musyoka J directed that the sentence should run from the date of conviction. As this court was of equal jurisdiction to that of Musyoka J, it could not interfere with the date from when the Applicant's sentence would run and therefore left the same undisturbed.

Disposition

21. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 27th March 2023 that was filed on 13th April 2023 was not merited and the same be and is hereby dismissed.
22. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 23RD DAY OF SEPTEMBER 2024



J. KAMAU
JUDGE

