



**Nuhu v Republic (Miscellaneous Criminal Application E007 of 2022)
[2024] KEHC 11486 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E007 OF 2022
JN KAMAU, J
SEPTEMBER 23, 2024**

BETWEEN

MESHACK NUHU ALIAS NOAH APPLICANT

AND

REPUBLIC RESPONDENT

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 eight (8) years imprisonment.
2. On 3rd March 2022, he filed Notice of Motion application dated 23rd February 2022 seeking a review of his sentence. He prayed for reduction of sentence and/or he be granted a non-custodial sentence.
3. His Written Submissions were dated 2nd February 2024 and filed on 5th February 2024. The Respondent's Written Submissions were dated 23rd August 2024 and filed on 27th August 2024. The Ruling herein is based on the said Written Submissions that both parties relied upon in their entirety.

Legal Analysis

4. The Applicant herein submitted that he was a first offender, aged seventy (70) years old and sickly. He was remorseful of the offence he had committed and pleaded for the leniency of court. He pointed out that he had spent four (4) years in prison and had been transformed and rehabilitated in general character, spiritually and was ready to integrate with his family and the entire community.



5. He pointed out that he was arrested on 21st August 2013 and sentenced on 3rd February 2020 and thus, spent one (1) month in custody before being granted bond and three (3) months later before sentencing.
6. He further contended that he had served sufficient term to merit the requirements of punishment and rehabilitation. He invoked Article 50(2)(p) and Article 28 of the Constitution of Kenya, 2010 and urged the court to reduce his sentence.
7. On its part, the Respondent submitted that the Applicant herein was sentenced to the most least severe sentence when he was sentenced to ten (10) (sic) years as he ought to have been sentenced to life imprisonment. It was emphatic that the reduction of the said sentence would not be justifiable and/or merited and hence urged this court to dismiss the present application.
8. As was stated hereinabove, he 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.”
9. The Trial Court was therefore very lenient in the circumstances for having sentenced him to eight (8) years imprisonment instead of the life imprisonment that was prescribed by the law.
10. 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.
11. 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.
12. 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.
13. 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.
14. 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.
15. 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 it was below the mandatory minimum sentence.



16. This court struggled with the question of whether or not to enhance the sentence herein in view of the directions of the Supreme Court of 12th July 2024. However, as the Applicant herein did not have the opportunity to elect whether or not to proceed with the application after being duly informed of the risk of proceeding with his said application, the Ruling herein having been reserved before the decision of the Supreme Court on 12th July 2024, this court opted to leave the said sentence against him undisturbed.
17. Turning to the period that he 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. Although the Applicant indicated that he was arrested on 21st August 2013, the Charge Sheet herein showed that he was arrested on 25th August 2013. He was sentenced on 3rd February 2020.
21. He did not attend court between 31st October 2017 and 19th November 2019 when it was indicated that he had been arrested. He was then placed in custody until his sentencing on 3rd February 2020.
22. The Trial Court’s proceedings did not show when he was released on bond, although he indicated that he spent about a month in custody before being released on bond and three (3) months before he was sentenced. He thus spent about three (3) months and fifteen (15) days in custody before he was sentenced.
23. A reading of the Trial Court’s Sentence showed that it did not take into consideration the time he spent in remand before sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.



Disposition

24. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 23rd February 2022 that was filed on 3rd March 2022 was partly merited only with regard to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
25. It is hereby directed that the time the Applicant spent in custody between 25th August 2013 and 25th September 2013 and between 19th November 2019 and 2nd February 2020 be taken into account while computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
26. It is so ordered.

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

J. KAMAU

JUDGE

