



**Mswala v Republic (Miscellaneous Criminal Application
E055 of 2022) [2023] KEHC 17616 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CRIMINAL APPLICATION E055 OF 2022**

GMA DULU, J

MAY 18, 2023

BETWEEN

DANSON KIMBICHI MSWALA APPLICANT

AND

REPUBLIC RESPONDENT

*(From conviction and sentence of the Sexual Offence Case No. 24 of
2018 at Wundanyi Law Courts by Hon. E. M. Nyakundi (RM))*

RULING

1. The convict (applicant) has brought this chamber summons filed on December 20, 2022.
2. It is a request for review of sentence, as he claims that he was wrongly handed down a mandatory minimum prison sentence under section 11(1) of the *Sexual Offences Act* No 3 of 2006 in Wundanyi Magistrate's Criminal Case No 24 of 2018, wherein he was sentenced to 10 years imprisonment.
3. The application was filed with an affidavit which the applicant swore on October 25, 2022 in which he relies on the case of *Francis Karioko Muruatetu & another v Republic* (201) eKLR and another case of *Edwin Wachira & 9 others v Republic* – petition No. 97 of 2021 Mombasa High Court.
4. During submissions, the learned principal prosecuting counsel Mr Okemwa orally informed this court that the same applicant had earlier on applied for review of sentence in the same matter, and Mativo J (as he then was) reviewed the sentence by reducing the 11 months period the applicant was in custody during trial.
5. Though the applicant had already filed written submissions herein, when asked by this court, he agreed that his sentence had been reduced, but added that he now wanted to be put on probation sentence instead of prison sentence.



6. This court thus ordered the filing of a pre-sentence report, which was filed by the probation officer on April 13, 2023 in which the conclusion was that the victim was still traumatised as if the incident had happened yesterday. The probation officer thus did not recommend a non-custodial sentence.
7. On my part, though I have been informed that the applicant has developed asthma in prison and has also had a dislocation of the leg, in my view the circumstances of this case do not warrant further review of his prison sentence.
8. The first reason for declining the request for review of sentence is that the applicant failed initially to disclose to this court that his sentence had already been reviewed by this court, and also explained any changed circumstances from the time of such review of sentence to justify further review.
9. Secondly, this being a sexual offence and the victim being in the same homestead where the applicant is likely going to live, a non-custodial sentence will not teach the applicant a lesson as a deterrence.
10. Thirdly, the interest of the victim have to be taken into account in sentencing. As the victim still has reason to feel the pain and trauma for this sexual offence committed against her, she needs to be shown that justice has been done by sufficiently punishing the applicant.
11. I thus disallow the request for further review of the sentence. The applicant will thus serve the remaining prison sentence which he has almost completed serving anyway, as it is now less than 3 years to go.
12. I decline to review the sentence, and the application is thus hereby dismissed.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF MAY, 2023.

GEORGE DULU

JUDGE

In the presence of:-

The applicant

Mr. Sirima for state

Mr. Otolu court assistant

