



REPUBLIC OF KENYA



**Mule v Republic (Criminal Revision E122 of 2023)  
[2023] KEHC 20441 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20441 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL REVISION E122 OF 2023  
TM MATHEKA, J  
JULY 19, 2023**

**BETWEEN**

**PETER NTHIWA MULE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal dismissed on July 30, 2020 by Ong’udi J.)*

**RULING**

1. What is before me is the applicant’s application for revision of his sentence to a non-custodial sentence – preferably – probation supervision. The application is brought under Article 27(1) (2) and 51(1) and (2) of the Constitution of Kenya.
2. Article 27 provides: Equality and freedom from discrimination
  - (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
  - (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Article 51 provides: Rights of persons detained, held in custody or imprisoned
  - (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
  - (2) A person who is detained or held in custody is entitled to petition for an order of habeas corpus.
  - (3) Parliament shall enact legislation that—



- (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and
  - (b) takes into account the relevant international human rights instruments.
- 4. He submits that he is aging in custody, he is sickly and there is no one to assist him while in custody. He also submits that he would like to spend the rest of his life putting his family and ancestral matters in order in line with his customs.
- 5. He also requests that section 333(2) of the Criminal Procedure Code be applied to this case.
- 6. In its response the State has no objection to the last request, subject to confirmation as to when the applicant was arrested, and whether he spent time in custody during the trial.
- 7. On the review issue – the State is of the position that the applicant has not laid any basis for the revision as he still has a long way to go with regard to the sentence he is serving.
- 8. The applicant was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act – that on 27<sup>th</sup> August 2017 in Itetani location Mbooni West Makueni County he defiled CMK a child aged 11 years. He was found guilty, convicted and sentenced to 20 years imprisonment on December 4, 2018. He appealed against the conviction and sentence – and his appeal was dismissed on July 30, 2020 by Ong’udi J.
- 9. With respect to revision of the sentence to a non-custodial sentence this court did confirm the sentence of 20 years’ imprisonment as imposed by the subordinate court.
- 10. The applicant has not demonstrated to the provisions of Article 27 and 51 cited herein above apply to his case. There is nothing in his affidavit to demonstrate any discrimination. The fact that he is in prison means that some rights will not be enjoyed by virtue of the fact that he is serving a lawful sentence.
- 11. Article 27 (1) and (2) as read with Article 51(1) of the Constitution provide for the situation the applicant finds himself in: the exceptional situation: where his particular rights and fundamental freedoms to be home with his family are clearly incompatible with the fact that he is imprisoned.
- 12. This court (Hon Ong’udi J) having confirmed his sentence, the dissatisfaction he has with its can only be settled through an appeal to a higher court, the right provided for by Article 165(2) (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
- 13. Regarding the provisions of section 333(2) of the Criminal Procedure Code- it is evident from the orders made on 4th December 2018 by then C.A Muchoki R.M – that no consideration was made of the period spent in custody by the accused person when the sentence was meted out.
- 14. S, 333(2) of the Criminal Procedure Code provides:
  - (2) 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.
- 15. It is only on this ground that the application for revision succeeds.



16. The record shows that the applicant was in custody during the trial from the date of arrest. The sentence of 20 years' imprisonment imposed upon the applicant will run from the date of arrest which is August 17, 2017.

17. The rest of the requests are declined.

18. Orders Accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH JULY 2023**

.....

**Mumbua T Matheka**

**Judge**

CA Mwiwa

Applicant present

Mr. Tanui for state

