



**Otuke v Republic (Constitutional Petition 6 (E006B) of 2022)  
[2023] KEHC 21097 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CONSTITUTIONAL PETITION 6 (E006B) OF 2022**

**PN GICHOHI, J**

**JULY 25, 2023**

**BETWEEN**

**DANCAN BORIGA OTUKE ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The petitioner herein moved this court by a Notice of Motion dated filed on October 5, 2022 under article 22, 23, 25, 27 (1) (2) (4), 50 (2) 159 and 165 of the Constitution seeking that the case be reheard for purposes of sentence reduction and have the sentence reduced as the 20 years imprisonment meted on him by the trial court is manifestly harsh and excessive.
2. He states that he does not wish to appeal to the superior court but seeks leniency considering that he is a first offender . He urges the court to consider section 333 (2) of the Criminal Procedure Code and asks the court to give him a chance to re- integrate with the community.
3. He urges the court to considers his mitigation in sentence reduction. He cites several cases including the case of Daniel Onyango Ochar v Republic Criminal Appeal No. 35 of 2019 Siaya, Wicliffe Wangu Mafura v Republic Appeal No. 22 of 2016 Eldoret and Geoffrey Odhiambo Mbolla Odhiambo v Republic Criminal Appeal No. 74 of 2019 Siaya.
4. Mr. Ayondo for the Respondent conceded the application on period spent in remand being considered during sentence under Sec. 333 (2) of the Criminal Procedure Code subject to confirmation of the trial Court’s proceedings.
5. He however opposed the application on sentence on the grounds that the trial court exercised its discretion properly in passing the said sentence.



## Determination

6. A perusal of the charge sheet in the lower court record in CM's Court Sexual Offence Case No. 16 of 2019 confirms that the Applicant was arrested on January 26, 2019. He was placed in custody and arraigned in court on January 29, 2019 and took plea on the same day on the charge of Defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on January 26, 2019 at [particulars withheld] Sublocation in Marani Sub- County within Kisii County , intentionally and unlawfully caused his penis to penetrate the vagina of BKM a child aged 13 years.
7. He was also charged with an alternative charge of Indecent Act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of the 2006 .
8. The applicant pleaded not guilty to the charges and the trial court ordered that he be released on a bond of Kshs. 200,000/= with a surety of similar amount. However, the applicant never went out on bond. He therefore remained in custody from the date of plea according to the Warrant of Commitment on Remand.
9. After hearing the four (4) witnesses for the Prosecution and the applicant's unsworn statement in defence, the Trial Magistrate Hon. O. William Oketch SRM rendered his judgment on May 17, 2019 and convicted the applicant on the main charge. He sentenced him on May 28, 2019 to serve Twenty (20) years imprisonment for the offence of Defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
10. Sec. 333 (2) of the *Criminal Procedure Code* is couched in mandatory terms and to the effect that;  

“Subject to the provisions of section 38 of the Penal Code 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.”
11. Section 38 of the *Penal Code* provides that;  

“When sentence is passed under this Code on an escaped convict, that sentence –

  - (a) if of death, or fine, shall, subject to the provisions of this Code, take effect immediately;
  - (b) if of imprisonment, shall run consecutively or concurrently, as the court shall order, with the unexpired portion of the sentence which the convict was undergoing when he escaped.”
12. There is nothing to show that Trial Magistrate complied with sec. 333 (2) of the *Criminal Procedure Code* when passing the sentence herein. That ground is properly conceded by Mr. Ayondo.
13. As regards the sentence being harsh, section 8. (1) of the Act provides that:  

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”



Section 8 (3) of the Act provides that “A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

14. When given a chance to mitigate, the applicant had none to make. When sentencing the applicant, the Trial Magistrate had this to say:

“Having looked at the Probation Officer’s Report availed in court the accused is a young man with a promising future . He however denied the offence in totality. Having been convicted and being aware that the offence of defilement is a grave issue and, on the rise, and leans towards a punitive sentence. There is an ongoing debate about the mandatory sentences in sexual offences and need for reform. Section 8 (1) and 8 (3) provides for mandatory minimum sentence of not less than 20 years imprisonment.

From the evidence the sexual attack was vicious, deliberate and calculated. Court therefore goes for mandatory minimum sentence as stipulated. Accordingly, the accused is sentenced to imprisonment of 20 years as per section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.”

15. It is noted that though there is reference to minimum mandatory sentence, the Trial Magistrate does not appear to have been influenced by the same. The sentence as prescribed by law is lawful. The Trial Magistrate’s reasoning on the sentence was geared towards gravity and circumstances under which it was committed. This court does not find it harsh or excessive. There is no justification for interfering with discretion exercised herein.
16. The application only succeeds to the extent that period that the accused spent in remand being from the date of arrest on January 26, 2019 to May 28, 2019 when he was sentenced is now put into account as part of the sentence.
17. This Court now directs that the sentence of imprisonment imposed by the Trial Magistrate runs from January 26, 2019 and it should be so computed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

**Dancan Boriga Otuke /Applicant - Present**

**Mr. Ochengo for Respondent**

**Kevin Isindu, Court Assistant**

