



**Muindi v Republic (Criminal Miscellaneous Application  
E034 of 2020) [2021] KEHC 313 (KLR) (6 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 313 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL MISCELLANEOUS APPLICATION E034 OF 2020**

**MW MUIGAI, J  
DECEMBER 6, 2021**

**BETWEEN**

**JAMES MBITHI MUINDI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was charged before the Senior Principal Magistrate's Court a Kangundo by the Senior Resident Magistrate Hon. M. Opanga in SPM No.30 of 2017 with the offence of Rape contrary to Section 3(1) (a) (b) as read with Section 3(3) of the [Sexual Offences Act](#) No.3 of 2006.

**TRIAL COURT'S JUDGEMENT**

2. The Trial Magistrate convicted the Applicant. Upon considering the Applicant's mitigation, the Trial Magistrate sentenced the Applicant to 10 years in jail.

**APPLICATION**

3. The Application filed on 17<sup>th</sup> November, 2020 and Supplementary Grounds to the Application filed on 25<sup>th</sup> October, 2021, essentially seeks a reduction of the 10 years sentence based on the Applicant's mitigation. The Applicant deposed that he is remorseful. He has urged the court to consider his health status and general life expectancy which fall under the mitigating factors and reduce the sentence.

**SUBMISSIONS**

**Applicant's submissions**

4. It is submitted that the Applicant has sufficiently reformed and adequately rehabilitated based on the Prison's report regarding the Applicant's conduct while incarcerated. According to the Applicant, he has spent a considerable period of time that the court should take into account in sentence rehearing. To the Applicant, his incarceration achieved the objective of sentencing. The Applicant has urged the



court to allow him to go back to the society. Reliance was placed on the case of *Nicholas Mukila Ndeti vs. Republic* HC Cr.App.No.83 of 2018 and in *Robert Mutash Auda vs. Republic* Cr. App No.247 of 2014 where the period spent in custody was considered and sentence reduced and court stated that it was sufficient retribution.

### **Respondent's submissions**

5. The Respondent submitted that the period of 11 months and 17 days spent by the Applicant in custody prior to conviction and sentence should be factored in his sentence.

### **DETERMINATION**

6. I have considered the application and written submissions filed on behalf of the respective parties.
7. The Applicant is essentially seeking revision of the 10 years jail sentence imposed on him by the Trial Court.
8. It is trite that sentencing is a discretion of the trial court as held in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR.
9. Section 362 of the *Criminal Procedure Code* (CPC) is clear on the scope of revision in criminal trial as follows:-

“The High Court may call for and examine the record of any Criminal proceedings before any Subordinate Court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate Court.”

10. Section 364 of the CPC provides that:-

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

11. As was stated by the *High Court of Malaysia in Public Prosecutor vs. Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735:

“.....The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...”

12. The Applicant was charged and convicted with the offence of Rape whereby an offender convicted of the offence serves a sentence of imprisonment for a term of not less than 10 years. The court may also enhance the sentence to imprisonment for life.



13. Section 3(3) of the *Sexual Offences Act* provides;
- “3(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”
14. The Trial Court sentence imposed of 10 years imprisonment was proper.
15. As regards the time spent in custody by the Applicant, at page 6 and 7 of the Trial Court Judgment, it was stated as follows:-
- “Prosecution: No records
- ACCUSED IN MITIGATION
- I have stayed long in the remand. I pray for leniency
- COURT
- Mitigation well noted. The accused is sentenced to serve 10 years in jail..”
16. Based on the above extract from the Trial Court Judgment, it will be noted that the Trial Magistrate did not indicate when the sentence was to commence as required under Section 333(2) of the CPC despite stating that he noted the mitigation.
17. Section 333(2) of the Criminal Procedure Code provides that:
- “
- “(2) 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.”
18. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs. Republic* (supra) held that:-
- “..Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person...”
19. According to the Applicant, prior to sentencing on 8<sup>th</sup> August 2018, the Applicant had been in custody for 351 days (11 months, 17 days). According to the record, this period was not taken into account by the Trial Court.
20. The charge sheet shows that the date of arrest was on 23<sup>rd</sup> August, 2017 and the Applicant was arraigned in court on 24<sup>th</sup> August, 2017. The Applicant remained in custody until he was sentenced on 8<sup>th</sup> August, 2018.



21. This court notes with concern that a similar application was made before Hon. Justice G.V.Odunga Presiding Judge Machakos High Court on 25<sup>th</sup> June 2019 whereby the court ordered; that the 10 years the applicant was sentenced to serve on 8<sup>th</sup> August 2018 will run from 23<sup>rd</sup> August 2017. The court order was signed by Deputy Registrar Machakos High Court on 2<sup>nd</sup> July 2019.

**DISPOSITION**

- a. Pursuant to Section 333(2) of the Criminal Procedure Code, the 10 year imprisonment sentence will be computed to take into account the 11 months and 17 days and to run from 23<sup>rd</sup> August, 2017 the date of the arrest.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 6<sup>TH</sup> DAY OF DECEMBER, 2021.**

**M.W MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

James Mbithi Muindi – Applicant – Present (virtual)

Geoffrey - Court Assistant

