

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VIHIGA**  
**CRIMINAL MISCELLANEOUS APPLICATION NO E068 OF 2024**  
**RICHARD ONYANJE OLUBAKA.....APPLICANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant herein was charged with the offence of attempted defilement contrary to Section 9(1) and (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 of the main charge and sentenced to ten (10) years imprisonment.
2. On 27<sup>th</sup> May 2024, he filed a Notice of Motion application dated 12<sup>th</sup> June 2024 seeking a review of his sentence. He averred that he had benefited from the period of one (1) and a half ( $\frac{1}{2}$ ) years that he spent in remand after he appealed against the sentence. He contended that he was old, aged sixty-eight (68) years old, a first offender, remorseful and rehabilitated. He pleaded with the court to grant him a non-custodial sentence as he had only four (4) years remaining in the spirit of decongestion of prisons.
3. His Written Submissions were dated 4<sup>th</sup> March 2025 and filed on 10<sup>th</sup> March 2025 while those of the Respondent were dated 27<sup>th</sup> March 2025 and filed on 28<sup>th</sup> March 2025. The Ruling herein is based on

the said Written Submissions which parties relied upon in their entirety.

### **LEGAL ANALYSIS**

4. The Applicant reiterated the averments that he had raised in his application. He urged this court to consider his right as an older person as envisaged under Article 57(c) of the Constitution of Kenya, 2010. He added that the court also needed to consider his health complications against the harsh demeaning condition of the prison environment.
5. He asserted that it was in the interest of the National Covenant through its departments of rehabilitation and correctional services that prisons be decongested. He argued that the said decongestion could only be a reality if the courts acted by considering alternative forms of sentencing as provided for under the Sentencing Policy Guidelines.
6. He invoked Section 4 of the Probation of Offenders Act and Section 39 of the Sexual Offences Act and urged the court to release him on a non-custodial sentence. He contended that such a sentence would offer him the opportunity to salvage his family as he was the sole bread-winner and take a role in the community development by being an anticrime ambassador.
7. He urged the court to grant him fair treatment which guarantees him equality and non-discrimination before the law and allow him to

enjoy the benefits and protection of the law under Article 27 of the Constitution.

8. On its part, the Respondent opposed the Applicant's application for review and submitted that the sentence meted on him by the Trial Court was lawful considering the nature of the case.
9. It placed reliance on the case of **Republic vs Jagani & Another (2001) KLR 590** where it was held that the purpose of sentence was to assist in rehabilitation of the offenders. It contended that the sentence that was imposed upon the Applicant was to instill a sense of responsibility for his actions and also allow for his rehabilitation.
10. It further argued that this court lacked the jurisdiction to review the sentence imposed that was imposed upon the Applicant having appealed to this court. It invoked Article 165(3) and 165(6) of the Constitution of Kenya and argued that this court could only exercise that jurisdiction which was conferred upon it by the Constitution of Kenya and statute. It was emphatic that although the court had supervisory powers, it could not supervise superior courts.
11. It further cited the case of **John Kagunda Kariuki vs Republic [2019] eKLR** where it was held that as the applicant's appeal had already been heard at the High Court, he could not go back for review of the sentence as he had the liberty to make an argument for reduced sentence at the Court of Appeal.
12. The Applicant herein was sentenced under Section 9(1) and (2) of the Sexual Offences Act Cap 63A (Laws of Kenya). The said Section provides as follows:-

**“(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.**

**(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.”**

13. This court could not fault the Trial Court for having sentenced him to ten (10) years imprisonment as that was lawful.

14. In the case of **Joshua Gichuki Mwangi vs Republic [2022] eKLR**, the Court of Appeal reiterated the reasoning in the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR** where it held that Section 8 of the Sexual Offences Act had to 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.

15. However, in a decision that was delivered on 12<sup>th</sup> July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case **Joshua Gichuki Mwangi vs Republic** (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

16. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce

the Applicant's sentence. It had no option but to leave the said sentence that was meted against the Applicant herein undisturbed.

17. Be that as it may, Section 39 of the Sexual Offences Act Cap 63A (Laws of Kenya) provides as follows:-

1. xxx.....

2. **Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.(3)For purposes of subsection (2), long term supervision means supervision of a rehabilitative nature for a period of not less than five years.**

3. **For purposes of subsection (2), long term supervision means supervision of a rehabilitative nature for a period of not less than five years.**

18. Section 5(1) of the Probation Act Cap 64 (Laws of Kenya) stipulates that:-

**"A probation order shall have effect for such period, of not less than six months and of not more than three years, from the date of the order as may be specified therein, and shall require the probationer to submit during that period to the**

**supervision of a probation officer appointed for or assigned to the district or area in which the probationer will reside after the making of the order, and shall contain such provisions as the court considers necessary for securing the supervision of the offender, and such additional conditions as to residence and other matters as the court, having regard to the circumstances of the case, considers necessary for securing the good conduct of the offender or for preventing a repetition of the same offence or the commission of other offences.”**

19. It is evident that whereas a court could make a probation order under Section 39(2) of the Sexual Offences Act, the said provision of the law was in conflict with Section 5 (1) of the Probation Act. This is because the long supervision of a sexual offender envisaged under Section 39(2) of the Sexual Offences Act could not be less than five (5) years while the Probation Office could only supervise an offender for not more than three (3) years.

20. It was the considered view of this court that the contradiction in Section 39 (2) of the Sexual Offences Act and Section 5(1) of the Probation Act ought to be resolved by way of amendment to either Act. In view of the ambiguity of the supervision of sexual offenders by the Probation Office under Section 39(2) of the Sexual Offences Act, this court was not able to review the Applicant's sentence as he had sought.

**DISPOSITION**

21. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 27<sup>th</sup> May 2024 and filed on 12<sup>th</sup> June 2024 was not merited and the same be and is hereby dismissed.

22. It is so ordered.

**DATED** and **DELIVERED** at **VIHIGA** this **27<sup>th</sup>** day of **November** 2025

**J. KAMAU**  
**JUDGE**