REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION NO E009 OF 2024

EDWARD OBAGA……APPLICANT

VERSUS

REPUBLIC…… RESPONDENT

RULING

INTRODUCTION

1. The Applicant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(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 life imprisonment.
2. Being aggrieved by the said decision, he lodged a first appeal at the High Court in Kakamega **HCCRA No 05 of 2017** whereby the court dismissed his appeal for lack of merit.
3. Being aggrieved by the said decision, he lodged a second appeal at the Court of Appeal Kisumu **Criminal Appeal No 134 of 2017** whereby his life sentence was substituted with twenty-five (25) years imprisonment.
4. On 19th January 2024, he filed a Notice of Motion application dated 12th January 2024 seeking a review of his sentence. He invoked Section 333(2) of the Criminal Procedure Code and prayed that his sentence to commence from the day of his arrest. He placed reliance on the cases of **Philip Mueke Maingi & 4 Others**

Petition No E017 of 2021 and **Edwin Wachira & 9 Others Petition No 97 of 2021**(eKLR citation not given) where the common thread was that the minimum mandatory nature of sexual offences sentences was declared unconstitutional.

5. His Written Submissions were dated and filed on 27th May 2025 while those of the Respondent were dated 25th June 2025 and filed on 26th June 2025. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

6. The Applicant submitted that this court had the power to reduce his sentence pursuant to Section 26(2) of the Penal Code and Article 50(2)(p) of the Constitution of Kenya, 2010 and that failure to reduce the same amounted to discrimination violating Article 10 and 27(1) and (2) of the Constitution.
7. He contended that he had served sufficient time in prison to meet the requirements of punishment and did not pose any threat to the public. He argued that the circumstances he posed at the start of his sentence had shifted in the course of the sentence and what was the primary justification for detention at the start of the sentence was not so after the lengthy period into the service of the sentence. He pointed out that failing to reduce his sentence would amount to inhuman treatment as was held in the case of **Republic vs Berber (2009) 1 WLR 223** and **Julius Kitsao Manyeso Criminal Appeal No 12 of 2021** (eKLR citation not given).

8. He further argued that while deterrence and retribution were legitimate elements of punishment, they were not the only overriding ones. He asserted that the applicant's prospect of reformation must be weighed against that. He added that it was in the interest of justice that crime should be punished but punishment that was excessive neither served the interest of justice nor those of the society.
9. He asserted that he was transformed, reformed and well rehabilitated and requested the court to reduce his sentence to the least form of punishment as failure to do so would turn correctional facilities into detention camps failing to meet the objectives of penitentiary institutions. In this regard, he relied on the case of **Republic vs Makumbi Subui Wanyeso Criminal Appeal No 110 of 2022** (eKLR citation not given) without highlighting the holding that he was relying upon and on Article 10(3) of the International Covenant on Civil and Political Rights of 1966.
10. He further asserted that he had enrolled for rehabilitative programmes and urged the court to re-integrate him back into society since he promised to be law-abiding citizen by being an ambassador campaigning against involvement in crime. He expressed remorse for having committed the offence. He submitted that even a day in prison was sufficient to reform an offender as was held in **Meru Misc Application No 4 of 2015**. He further urged the court to exercise justice on his part as justice should not only be done to the complainant but it should also be done to the accused

person as was held in the case of **Dismas Wafula Kilwake vs Republic[2009]eKLR**.

11. On its part, the Respondent invoked Section 8(1) and 8(2) of the Sexual Offences Act and opposed the present application for review. 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.

12. It further argued that this court lacked the jurisdiction to review the sentence imposed upon the Applicant having appealed to this court and the Court of Appeal. It invoked Article 165(3) and 165(6) of the Constitution and argued that this court could only exercise that jurisdiction which was conferred upon it by the Constitution and statute and that although it had supervisory powers, it could not supervise superior courts.

13. 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.

14. In regard to his prayer under Section 333(2) of the Criminal Procedure Code, the Respondent noted that the same was canvassed by the Court of Appeal which indicated that the

Applicant's reduced sentence do run from the date he was arraigned in court. It urged the court to dismiss the application herein for lack of merit.

15. The Applicant herein was sentenced under Section 8(1) as read with Section 8 (2) of the Sexual Offences Act. The said Section 8(2) of the Sexual Offences Act provides as follows :-

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

16. This court could not fault the Trial Court for having sentenced him to life imprisonment as that was lawful. Be that as it may, the Court of Appeal had reduced it to twenty-five (25) years imprisonment because at the time, there was emerging jurisprudence to exercise discretion and mete out lower sentences than the mandatory sentences that had been prescribed under the Sexual Offences Act.

17. 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.

18. However, in a decision that was delivered on 12th 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.

19. As regards the period the Applicant spent in remand while his trial was ongoing, this court had due regard to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) which stipulates that:-

"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 (emphasis court)**"**.

20. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

"The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:…

(ix) Time already spent in prison by the convict…"

21. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of **Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR**.

22. Be as it may, a reading of the decision in **Obaga vs Republic (Criminal Appeal 184 of 2017) [2023] KECA 1453 (KLR)** showed that the Court of Appeal took into account the period the Applicant had spent in remand during trial. The court rendered itself as follows:-

"The record shows that the appellant was in custody since he was arraigned in court on 21st January, 2014. By dint of Section 333(2) of the Criminal Procedure Code, the imprisonment term shall be computed to begin running from that date."

23. 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 and/or reviewing the said sentence under Section 333(2) of the Criminal Procedure Code. It, therefore, had no option but to leave the said sentence that was meted against the Applicant herein undisturbed.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 12th January 2024 and filed on 19th January 2024 was not merited and the same be and is hereby dismissed.

25. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **25th** day of **November** 2025

J. KAMAU
JUDGE