



**DO v Republic (Criminal Miscellaneous Application E016 of 2024)
[2025] KEHC 17597 (KLR) (27 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E016 OF 2024**

**JN KAMAU, J
NOVEMBER 27, 2025**

BETWEEN

DO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged with the offence of incest contrary to Section 20(1) 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 fifteen (15) years imprisonment.
2. On 25th January 2024, he filed a Notice of Motion application dated 2nd January 2024 seeking a review of his sentence. He pleaded with the court to consider that his sentence to run from the date of his arrest.
3. His Written Submissions were dated 14th February 2025 and filed on 19th February 2025 while those of the Respondent were dated and filed on 17th March 2025. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. The Applicant submitted that his sentence should be reviewed based on time he spent in custody during trial, rehabilitation, age, disability, remorsefulness and family background. He invoked Articles 22, 23(1) and (3), 50(2)(p), 50(2)(q), 159(2)(a, b, d) and 165(3)(a) of [the Constitution](#) of Kenya, 2010, Section 333(2) of the Criminal Procedure Code, Paragraphs 4.8, 3.2, 3, 3.2.3,3, 3.3, 3, 3.3, 3.3.5 (sic) of the Sentencing Policy Guidelines Revised 2023 and placed reliance on the case of 88 Prisoners vs the DPP, AG and The Prison (eKLR citation not given) where it was held that the least prescribed sentence was that taken into account, the time spend in remand since it should be borne in mind that



although an accused person had been sentenced to a certain number of years, his/her liberty was lost once arrested (sic).

5. He pointed out that he was an old man of sixty (60) years old which was only four (4) years below the life expectancy as was discussed in the case of Makumbi Manyeso vs Republic Criminal Appeal No 110 of 2022 (eKLR citation not given) where it was held that a sentence that went beyond the life expectancy of an accused was manifestly excessive.
6. He further averred that he was a disabled person who was partially blind as one of his eyes was completely deformed while the other eye's survival was wanting. He added that the harsh conditions in prison rendered his survival very hard as he needed assistance in many activities and was hence a burden to the prison. It was his contention that he be considered under Paragraph 3.2 of the Sentencing Policy Guidelines Revised 2023 and Article 14 of the UN Convention on the rights of person with disabilities.
7. He also pointed out that his wife was dead and that his home had been left without anyone to take care of it as his parents had died long time ago. He contended that he was a first offender and expressed remorse of the events that led to the commission of the offence. He stated that he had served two (2) years in prison and had been rehabilitated, reformed and socially re-adapted and did not, therefore, pose a threat to himself and the public. He added that what seemed to be the primary justification for his sentence at the start of his sentence had shifted and that the court should evaluate that shift by reviewing his sentence to a least prescribed sentence.
8. He pointed out that he was arrested on 22nd January 2018 and bonded on 25th March 2022. He prayed that this court orders that his sentence to run from the day of his arrest.
9. In opposing the present application, the Respondent invoked Section 20(1) of the *Sexual Offences Act* and Section 329 of the Criminal Procedure Code. It contended that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case and called for a Pre-Sentence Report in arriving at the appropriate sentence. It, therefore, contended that the sentence meted out by the Trial Court was proper for the offence committed.
10. 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.
11. It further cited the cases of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003 and Benard Kimani Gacheru vs Republic[2002]eKLR (eKLR citation not given) where it was held that sentencing was a matter that rested with the discretion of the court and that an appellate court could not interfere with sentence unless it was manifestly excessive in the circumstances of the case or that the trial court overlooked a material factor or took into account some wrong material.
12. It contended that the Applicant's sentence was lenient as the Trial Court ought to have sentenced him to life imprisonment as the victim was a minor. It added that the sentence was commensurate to his blameworthiness as he committed the offence knowing very well that the victim was his daughter. It urged the court not to interfere with his sentence.
13. It conceded that courts were obliged to take into account the period spent in custody during trial by accused persons while sentencing them as was held in the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR. It was, therefore, not opposed to the Applicant's prayer under Section 333 (2) of the Criminal Procedure Code.



14. The Applicant herein was sentenced under Section 20(1) of the *Sexual Offences Act* Cap 63A (Laws of Kenya) The said Section 20(1) of the *Sexual Offences Act* provides as follows :-

“ Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

15. In the mind of this court, the Trial Court was lenient for having sentenced the Applicant to fifteen (15) years imprisonment as it had the option of sentencing him to life imprisonment as provided by law.
16. 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.
17. 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.
18. 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.
19. This court was not persuaded to enhance the sentence to life imprisonment, as the Respondent did not put the Applicant on notice that it would be seeking an enhancement of the sentence which would have allowed him to make an informed decision as to whether he would have wished to proceed with his application or if he would have wished to abandon the same. Enhancing his sentence without giving him the opportunity to respond would be contrary to the principles of fair trial provided in Article 50 of *the Constitution* of Kenya.
20. Going further, this court was mandated to consider the period the Applicant spent in remand while his trial was ongoing as provided in Section 333(2) of the Criminal Procedure Code. The said Section 333(2) of the Criminal Procedure Code 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)” .



21. 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...”
22. 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*(Supra).
23. The Charge Sheet showed that the Applicant was arrested on 24th January 2018. The surety was approved on 21st September 2018. He was convicted on 2nd March 2022. He stated that he was bonded on 25th March 2022. This was the day he was sentenced and it was, therefore, not clear what he meant when he stated that he was bonded on the said date of 25th March 2022. As there was nothing in the proceedings to show that he did leave custody when his bail/bond was approved, this court determined that he was released on bond on 21st September 2018. Indeed, when he was sentenced, the Trial Court directed that the Title Deed be returned to his Surety.
24. A perusal of the Trial Court proceedings indicated that the Trial Court did not take into account the period that the Applicant spent in custody during trial. It was irrespective that he meted out a lenient sentence to the Applicant herein. It was the considered view of this court that the period between when he was arrested on 24th January 2018 and 21st September 2018 when he was granted bail/bond and from 2nd March 2022 when he was convicted and 25th March 2022 when he was sentenced ought to have been taken into account at the time the Trial Court sentenced him.

Disposition

25. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 2nd January 2024 and filed on 25th January 2024 was not merited save for his prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya). His conviction and sentence be and are hereby upheld as they were both safe.
26. For the avoidance of doubt, the periods that the Applicant spent in custody during trial between 24th January 2018 and 21st September 2018 and from 2nd March 2022 and 25th March 2022 be and are hereby taken into account while computing his sentence pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
27. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF NOVEMBER 2025

J. KAMAU

JUDGE

