



**AM v Republic (Criminal Petition E092 of 2023)
[2026] KEHC 1885 (KLR) (20 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E092 OF 2023
E OMINDE, J
FEBRUARY 20, 2026**

BETWEEN

AM APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By way of Chamber Summons filed on 2nd November 2023, the Applicant seeks, in a nutshell, a resentencing. He was charged and convicted of the offence of attempted incest contrary to Section 20(2) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to serve 40 years’ imprisonment in Eldoret Chief Magistrates Criminal Case No. 5531 of 2010. In his Application, the Applicant prays to court as follows;
 - i. That the court awards him a lenient and definite sentence as provided under Article 50(2)(p) (q) of *the Constitution*
 - ii. That the court invokes the provisions of Section 333(2) of the Criminal Procedure Code and review his sentence by considering the time that he spent in custody during the trial.
2. The brief background leading to the application is that the applicant appealed his conviction and sentence vide Eldoret HCCRA 162 of 2012 which appeal was dismissed in its entirety. He then appealed to the Court of Appeal vide Criminal Appeal No. 305 of 2018. The same was also dismissed in its entirety. The Applicant now seeks to have his sentence reviewed on the grounds that the sentence imposed by the trial court was manifestly excessive in the circumstances of the case, he is remorseful, he is reformed and rehabilitated and he has reconciled with the victim.



Applicants' Submissions

3. The applicant submitted that the court should consider the time he spent in custody pursuant to Section 333(2) of the Criminal Procedure Code. He placed reliance on the case of Ahamad Mohammed vs R 2018 eKLR and the Judiciary Sentencing Policy Guidelines in this regard. That as per the charge sheet, he was arrested on 10th November 2010 and convicted on 19th September 2012. He urged that there was no evidence that the court took into account the period spent in custody although in his mitigation he informed the court that he had been in custody for two years. He urged that by the trial court denying him the benefit of Section 333(2) of the CPC, his right to be treated equally before the law as provided under Article 27(1) of *the Constitution* was violated.
4. The applicant submitted that the sentence was excessive urging that the court overlooked material factors that could have lessened his custodial sentence. He urged the court to take into account that he was a first offender and was 40 years old at the time of his conviction. He cited the case of Abdalla Mwanza v Republic (2018) eKLR and urged that his sentence would last past his life expectancy. Further, that the offence was brought about by misuse of alcohol and he has since rehabilitated and reformed. He prayed the court review his sentence accordingly.
5. Relying on the case of Protus Buliba Shikuku v Attorney General [2012] eKLR, he urged that the court to be persuaded by the same and allow his prayer for the review of the sentence of 40 years' imprisonment to a lesser lighter term considering his mitigation and circumstances as adduced notwithstanding the same having been upheld both by the High Court and the Court of Appeal.

Respondents' Submissions

6. Learned counsel for the State Mr. S. G. Thuo submitted that at the onset that the State is agreeable and to remission of the pre-trial detention period to be credited to the 40year jail term as outlined under Section 333(2) of the Criminal Procedure Code as well as the authority in Ahamad Mohammed v R 2018 eKLR.
7. Further, Counsel submitted that the offence for which the applicant herein was charged and convicted attracts a minimum sentence of 10 years' imprisonment citing the reasoning of the Supreme Court of Kenya vide SCOK Pet No. E018 of 2023 R v Joshua Gichuki Mwangi & Others at page 23 where the apex court observed that the Muruatetu decision did not alter the mandatory or minimum sentences provided in the *Sexual Offences Act*.
8. Counsel submitted that the Prosecution proved beyond reasonable doubt that the applicant committed the most humiliating and heinous act to a hapless blood relative and he urged that the court applies the decision delivered on 11th April 2025 vide S.C. Petition No. E018 of 2023 R v Joshua Gichuki Mwangi & Others and uphold the conviction and sentence.

Analysis & Determination

9. On whether the time spent in custody by the Applicant was factored in the sentence meted out, from the lower court record, the accused was arrested on 10th November 2010 and was granted bail/bond on 28th July 2011. He then absconded and was produced under warrant on 28th December 2011. He remained in custody until the date of his sentence on 21st September 2012. His pre-trial detention period therefore amounted to a period of 17 months. The issue of time spent in custody was never considered by the courts before.



10. Section 333(2) of the Criminal Procedure Code, is a mandatory provision (Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR). It provides as follows:
- (2) 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."
11. The Prosecution concedes that the period that the Applicant spent in custody was not factored into his sentence of 40 years' imprisonment and therefore conceded to this aspect of the Application. In this regard, the court is satisfied that same has merit and it is allowed to the effect that the period of 17 months that the Applicant spent in custody during the trial be factored into the sentence of 40 years' imprisonment.
12. On the Application that the sentence be reviewed to a definite and lesser sentence, the first thing of note is that the sentence is not indefinite. It is definite at a term of 40 years' imprisonment. This prayer therefore lacks merit. The second issue of note is that the issue of the sentence was already considered and upheld by the Hon Lady Justice Olga Sewe. Being a judge of the High Court, her jurisdiction is equal and concurrent to this court and in this regard, this court is functus officio the application for the review of the sentence.
13. But even the fact of the court being functus officio aside, the Article 50(2)(p)(q) of *the Constitution* that the Applicant has relied upon provides as follows;
- (2) Every accused person has the right to a fair trial, which includes the right—
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
14. It is noteworthy that by appealing the sentence of the trial court both to the High Court and the Court of Appeal, the Applicant already exhausted his rights as provided under Article 50(2)(q) which grants him the right to appeal his conviction to a higher court.
15. On his right to the benefit of the least severe of the prescribed punishments of an offence as provided under Article 50(2)(p), by dint of the decision of the Supreme Court in S.C. Petition No. E018 of 2023 R v Joshua Gichuki Mwangi & Others, that affirmed the legality of the sentences prescribed under the *Sexual Offences Act*, and the fact that the Applicant has already exhausted all his avenues of appeal, there is nothing for him to benefit from under this cited provision of the law for there is no lesser sentence available since the prescribed punishment for incest has not changed.
16. The upshot of the above is that the Applicant's Application for review is allowed only to the extent that the 17 months that he spent in remand custody during the hearing is to be factored into his sentence of 40 years imprisonment. The Application that the sentence be reviewed to a definite and lesser sentence lacks merit and the same is dismissed.
17. Right of Appeal 14 days

READ DATED AND SIGNED AT ELDORET ON 20TH FEBRUARY 2026

E. OMINDE



JUDGE

