



**Matanye v Republic (Criminal Miscellaneous Application
E031 of 2025) [2026] KEHC 2314 (KLR) (23 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2314 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E031 OF 2025**

JN KAMAU, J

FEBRUARY 23, 2026

BETWEEN

GRAFFLINE MATANYE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. He was convicted of the main charge and sentenced to serve three (3) years' probation.
2. On 21st October 2025, he filed Notice of Motion application dated 10th June 2025 seeking an order that the period of five (5) months and twenty-three (23) days he spent in remand be considered as part of his sentence. He contended that he was arrested on 3rd March 2022, released on bond on 26th August 2022 and sentenced on 7th August 2023.
3. He invoked Section 333(2) of the Criminal Procedure Code and placed reliance on the case of Ahmad Abolfathi Mohammed & Another vs Republic [2018]eKLR where it was held that sentence of imprisonment ought to run from the date of arrest. He added that the omission by the Trial Court was not in promotion of his right to fair trial as credibly spelt in Articles 19(2)(3)(a) and (b), 20(1)(3) (a) and (b) and 50(2)(p) of the *Constitution* of Kenya, 2010.
4. The Respondent was not opposed to his application and hence both parties did not file their respective Written Submissions. This Ruling is, therefore, based on the Applicant's application and his affidavit evidence.



Legal Analysis

5. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides 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).
6. 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:...

Time already spent in prison by the convict...”
7. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic*(Supra).
8. Notably, although the Applicant indicated that he was serving five (5) years imprisonment. However, a perusal of the Trial Court’s proceedings showed that he was sentenced to serve a three (3) years’ probation. Thus, Section 333(2) of the Criminal Procedure Code was not applicable in the circumstances of his case as he was not serving an imprisonment sentence and the sentence was too lenient as Section 10 of the *Sexual Offences Act* provides as follows:-
9. Notably, this court could not fault the Trial Court for having sentenced him to a lesser sentence than was prescribed in the *Sexual Offences Act* as the jurisprudence at the time he was sentenced allowed courts to exercise discretion during sentencing.
10. Notably, on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case *Joshua Gichuki Mwangi vs Republic* [2022] eKLR which had reiterated the reasoning in the case of *Dismas Wafula Kilwake vs Republic* [2018] eKLR to the effect 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. In its said decision, the Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.
11. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Appellant’s sentence. It had no option but to leave the sentence that was meted against the Applicant herein undisturbed.
12. 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 appeal or if he would have wished to abandon the same. Enhancing his sentence without giving him an opportunity to respond would be contrary to



the principles of fair trial provided in Article 50 of the Constitution of Kenya. All the same, the Respondent did not seek an enhancement of the sentence but had in fact conceded to the present application.

Disposition

13. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 10th June 2025 and filed on 21st October 2025 was not merited and the same be and is hereby dismissed.
14. As it was evident that the Applicant was erroneously put in custody to serve five (5) years imprisonment which was illegal and unlawful, it is hereby directed that the Applicant be and is hereby released from custody forthwith unless he be held for any other lawful cause.
15. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 23RD DAY OF FEBRUARY 2026

J. KAMAU

JUDGE

