

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION NO E051 OF 2024

**EVANS LUGUSA
MALANDE.....APPLICANT**

VERSUS

**REPUBLIC.....
RESPONDENT**

RULING

INTRODUCTION

1. The Applicant herein was charged with the offence of rape contrary to Section 3(1)(a)(b)(3) 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 an adult contrary to Section 11(A) of the Sexual Offences Act. He was convicted of the main charge and sentenced to twelve (12) years imprisonment.
2. On 15th March 2024, he filed a Notice of Motion application dated 22nd August 2023 seeking a review of his sentence. He sought the court's leniency and mercy. He pleaded with the court to consider that he was fifty (50) years of age and was repentant and remorseful. He asserted that he was the sole breadwinner of his family and his needy parents. He added that he was reformed and rehabilitated and had never had indiscipline issues in prison.
3. His Written Submissions were dated and filed on 26th May 2025 while those of the Respondent were dated 9th September 2025 and filed on 10th September 2025. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

4. The Applicant invoked Article 50 (2)(q) and (p) of the Constitution of Kenya, 2010 and argued that a court could impose a sentence that benefited a particular case as the purpose of judiciary was to develop jurisprudence and offer appropriate relief. He noted that the sentence imposed on him was slightly excessive. He urged the court to consider that he had already achieved a third of the imposed sentence and had undergone different theological courses with the certificates attached herein together with his recommendation letter from the prison's authority.
5. He asserted that he had engaged in theological courses and was a totally changed person having been rehabilitated and deterred from committing any other criminal or civil offence. He added that he had a different view of life and could be easily be reintegrated back to society as was reflected in the case of **Timothy Kosgei vs Republic [2020]eKLR**.
6. He pointed out that he never absconded court while out on bond and sought for a non-custodial sentence such as probation or suspension of his sentence. He argued that the justification for detention at the start of the sentence would not be so after a lengthy period into the service and that it was on a periodic review of the justification for continued depiction that the factor or shift

could be evaluated. He urged the court to consider that he was fifty-three (53) years old and had a family which depended on him.

7. In opposing the present application, the Respondent submitted that the Section that the Applicant was charged with provided for a minimum sentence of ten (10) years once an accused person had been found guilty of rape. It added that it was now settled that all sexual offences where a minimum sentence was provided, the courts had no business lowering the sentence as the same would be illegal.
8. It placed reliance on the case of **Republic vs Joshua Gichuki Mwangi & Others Petition No E018 of 2023** (eKLR citation not given) where it was held that mandatory sentences under the Sexual Offences Act were legal. It also relied 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.
9. It submitted that the sentence meted out by the Trial Court was lenient considering the nature of the case and, therefore, this court should not interfere with it to instill a sense of responsibility and also allow for the Applicant's rehabilitation.
10. The Applicant herein was sentenced under Section 3(3) of the Sexual Offences Act Cap 63A (Laws of Kenya). The said Section 3(3) of the Sexual Offences Act provides as follows:-

“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”

11. In the mind of this court, the Trial Court was lenient for having sentenced the Applicant to twelve (12) years imprisonment as it had the option of sentencing him to life imprisonment as provided by law.
12. 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.
13. 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.
14. 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.

15. 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)”.

16. 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...”

17. 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]**.

18. The Charge Sheet showed that the Applicant was arrested on 15th September 2018. The surety was approved on 20th September 2018. He was convicted on 9th September 2020 when the bond was cancelled and he was sentenced on 21st September 2020.
19. 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 the considered view of this court that the period between 15th September 2018 when he was arrested and 20th September 2018 when he was granted bail/bond and between 9th September 2020 when he was convicted and 21st September 2020 when he was sentenced ought to have been taken into account at the time the Trial Court sentenced him.

DISPOSITION

20. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 22nd August 2023 and filed on 15th March 2024 was not merited. His conviction and sentence be and are hereby upheld as they were both safe.
21. However, for the avoidance of doubt, the periods that the Applicant spent in custody during trial between 15th September 2018 and 20th September 2018 and between 9th September 2020

and 20th September 2020 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).

22. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **18th** day of **March** 2026

J. KAMAU
JUDGE

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