



**WM v Republic (Criminal Miscellaneous Application
E007 of 2025) [2026] KEHC 3794 (KLR) (18 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E007 OF 2025**

**JN KAMAU, J
MARCH 18, 2026**

BETWEEN

WM APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged with the offence of attempted defilement contrary to Section 9(1) (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 fifteen (15) years imprisonment.
2. On 23rd January 2025, he filed a Notice of Motion application dated 17th January 2025 seeking a review of his sentence. He pleaded with the court to consider reducing his sentence to a least prescribed one as he was a pupil and wished to pursue his studies. He added that he was a total (sic) orphan and from a pauper family. He pointed out that the sentence was ordered to commence from the date of conviction.
3. His Written Submissions were dated and filed on 28th May 2025 while those of the Respondent were dated 25th June 2025 and filed on 27th June 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 he was a minor who could not make sound decisions and that he was misled by not only adolescence stage but also drugs that he had been introduced to. He was emphatic that he was an orphan who stayed with his grandmother and that his long incarceration would lead to loss of their family property. He added that he was a student at Emahinya Primary School who had a dream and vision after completion of his studies.



5. He asserted that he was remorseful and regretted his youthful ignorance of the law which led to his action. He added that having gone through hard and harsh condition of the prison, he was fully reformed and it was his prayer that he be given a second chance and his sentences to run concurrently.
6. The Respondent partially conceded to the Applicant's said application. Whereas it agreed that the court could grant him the period that he spent in remand while the trial was ongoing as was provided in Section 333 (2) of the Criminal Procedure Code and emphasised in the case of Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR, it argued that the sentence meted out on him by the Trial Court was lawful and proper since the *Sexual Offences Act* provided for a minimum sentence of not less than ten (10) years. It, therefore, submitted that the sentence of fifteen (15) years was lawful and asked this court not to interfere with the same.
7. 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 herein was to instill a sense of responsibility for his actions and also allow for his rehabilitation.
8. 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 the 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.
9. It also relied on the case of Republic vs Joshua Gichuki Mwangi Supreme Court Petition No E018 of 2023 (eKLR citation not given) where it was held that although sentencing was an exercise of judicial discretion, it was Parliament that set the parameters of sentencing for each crime and not the Judiciary.
10. The Applicant herein was sentenced under Section 9(2) of the *Sexual Offences Act* Cap 63A (Laws of Kenya) The said Section 9(2) of the *Sexual Offences Act* provides as follows :-

“ A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.”
11. The Trial Court sentenced the Applicant to fifteen (15) years imprisonment. Although, the Applicant claimed that he was a minor, a perusal of the Trial Court proceedings indicated that when he was first arraigned in court, he informed it that he was twenty-four (24) years old. He could not, therefore, claim otherwise on appeal.
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. Having said so, Article 50(2)(p) of *the Constitution* of Kenya, 2010 provides as follows:-

“Every accused person has the right to a fair trial, which includes the right 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”
16. The Applicant was charged with attempted defilement. There were no aggravating factors that were presented during trial. The Trial Court, therefore, erred in not having justified why it meted upon the Applicant a higher sentence than what would have been least severe of the prescribed sentence. In the absence of such justification, this court found and held that it was only fair that the Applicant herein enjoy the benefit of a least severe of the prescribed sentence of ten (10) years for the offence of attempted defilement.
17. 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)”.
18. 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...”
19. 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).
20. The Charge Sheet showed that the Applicant was arrested on 27th January 2021. Although granted bond/bail, he did not seem to have posted the same. He was convicted on 28th September 2022 and sentenced on 2nd November 2022.
21. 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 this court's considered view that that was a period that ought to be taken into account while computing his sentence.



Disposition

22. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 17th January 2025 and filed on 23rd January 2025 was merited on the issue of sentence only. The sentence of fifteen (15) years be and is hereby set aside and replaced with a sentence of ten (10) years from the date of the sentence. However, the conviction be and is hereby upheld as the same was safe.
23. For the avoidance of doubt, it is hereby directed that the period that the Applicant spent in custody during trial between 27th January 2021 and 1st November 2022 be and is hereby taken into account while computing his sentence pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
24. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF MARCH 2026

J. KAMAU

JUDGE

