



REPUBLIC OF KENYA



**Ambale v DPP (Miscellaneous Criminal Case E040 of 2024)  
[2025] KEHC 496 (KLR) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 496 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CRIMINAL CASE E040 OF 2024**

**S MBUNGI, J**

**JANUARY 27, 2025**

**BETWEEN**

**NICHOLAS JOSHUA AMBALE ..... APPLICANT**

**AND**

**DPP ..... RESPONDENT**

**JUDGMENT**

1. The applicant was charged Criminal Case No. SO E001 of 2022 at Butere, tried, convicted and sentenced to serve 10 years' imprisonment for the offence of rape contrary to section 3(1) (a) (b) of the [Sexual Offence Act](#) No. 3 OF 2006.
2. The motion dated 28.03.2024 filed by the applicant seeks the following orders:
  - i. That this honorable Court be pleased to direct that the imposed sentence of 10 years' imprisonment to take effect from the date of the applicant's arrest.
  - ii. That the court may order any other relief in the circumstances pursuant to article 50(2)(p) of the [Constitution](#).
3. The applicant also prays for leniency and that this court orders for a downward review of his sentence.
4. The application is supported by an affidavit sworn by the applicant where he seeks that the time he spent in custody during trial be taken into account in accordance to the provisions of section 333(2) of the [Criminal Procedure Code](#).
5. The court directed that parties file submissions to dispose off the application.



### **Applicant's Submissions.**

6. The applicant submitted that section 333 of the CPC gives the court power to include the period spent by an accused person in remand during the trial period.
7. He further submitted that the minimum mandatory sentence under sexual offences act was declared unconstitutional and that the discretion of sentencing rests with the court.
8. it was the applicant's submission that he is a first-time offender, and that the 10-year sentence is excessive since he was in remand throughout trial.

### **Analysis.**

9. The applicant has cited article (50(2) (p)& (q) of the Constitution and section 333(2) of the Criminal Procedure Code.
10. Article (50(2) (p)& (q) of the Constitution provides as follows:-
  - “50(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.”
11. The Jurisdiction of the high court to review is donated by article 165 (6) & (7) of the Constitution. The article provides:-
  - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
12. Section 333(2) of the Criminal Procedure Code provides as follows:
  - “Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”
13. The jurisdiction is supervisory and it extended to the High court to review the decisions and orders of the sub-ordinate court. It grants the High Court supervisory jurisdiction over Sub-ordinate Courts.



14. The High Court exercises jurisdiction of revision over Sub-ordinate Court on orders issued by the Sub-ordinate Court. Section 362 of the [Criminal Procedure Code](#) provides as follows:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

15. The applicant was charged in Criminal Case No. SO E001 of 2022 at Butere, tried, convicted and sentenced to serve 10 years’ imprisonment for the offence of rape contrary to section 3(1) (a) (b) of the [Sexual Offence Act](#) No. 3 OF 2006. The Section provides:

“(1) (1) A person commits the offence termed rape if—

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind. “

16. The punishment for the offence of rape is provided under section 3(3) of the [Sexual Offence Act](#) No. 3 of 2006: -

“(3) 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. ”

17. The discretion in sentencing rests with the trial judge because he or she has the knowledge of the relevant facts before him or her and in many instances, has observed the accused and witnesses’ demeanor. The discretion must however be exercised judiciously. In the Nigerian case of *African Continents Bank vs Nuamani* [1991] NWLI (parti86)486, it was observed that,

“The exercise of court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”

18. In [Benard Kimani Vs Republic](#) (2002)eKLR the Court of Appeal stated that:

“It is now settled law, following several authorities by this Court and the High Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly sentence must depend on the facts of each case. On Appeal, the Appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle...”



19. The Supreme Court in *Francis Karioko Muruatetu & Another vs Republic*, Petition No. 15 of 2015, as a guide in sentencing held that:

“...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a. age of the offender
- b. being a first offender;
- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;
- f. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;
- h. any other factor that the Court considers relevant.”

20. In *Dahir Hussein v. Republic* Criminal Appeal No. 1 of 2015; [2015] eKLR, the High Court held that the objectives of sentencing include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

21. The 2016 *Judiciary of Kenya Sentencing Policy Guidelines* lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”



22. On review of the sentence, in mitigation the applicant said:

“I plead for leniency. I was intoxicated. That is what pushed me to commit the offence”

23. The trial court sought for a probation report. The probation officer named Casper W. Makokha recommended as follows;

“Given his character and problematic family background, the offender needs psycho-social support to mitigate his self-destructive alcoholic habit, improve on his self-image and become a contributing factor in effective use of family resources. In order to access this psycho-social support, community-based rehabilitation provides extensive and appropriate space to behavior change, making amends and re-integrative shaming benefits of restorative justice hence suggest that the court considers a non-custodial sentence against the offender.

#### Recommendation

Your honor, despite the mandatory sentences provided by law and the basis of the findings herein as well as the observations deduced from the information gathered I would vouch and recommend that the offender be given a chance on probation for three years upon which he will be given guidance, counselling and empowerment to build his self-esteem and economic base while the victim's emotional and psycho-social needs are also addressed. This recommendation is subject to the court's discretion to the final decision making.”

24. I have looked at the record. The circumstances under which the offence was committed were perturbing for the applicant just met the victim on the road, He was not known to her. Without even talking to her, grabbed her and fell her on the ground and raped her. And to make matters worse he ran away with the pant. This shows that the applicant is a dangerous man and is a risk to the female gender. His plea that he was intoxicated, is neither here nor there. He never raised it as a defence.

25. The applicant also raised the issue of the unconstitutionality of the minimum sentence. This aspect was recently clarified by the supreme court where it said that the mandatory sentences prescribed under the *Sexual Offences Act* No. 3 of 2006 are lawful.

26. The Supreme Court Petition-No.-E018-of-2023-*Republic-v-Joshua-Gichuki-Mwangi* also reiterated the position in the Muruatetu case regarding the unconstitutionality of Sexual Offences sentences and held thus:

“We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.” ..... 14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent SC Petition No. E018 of 2023 27 with the Constitution.”

27. The applicant also raised the issue of his sentence being reviewed, in accordance with section 333(2) of the *CPC*.

28. I have perused the trial court proceedings and judgment in Butere Criminal Case No. SO E001 of 2022 In the court's pronouncement, there is no evidence that section 333(2) of the *CPC* was complied with.

29. According to the charge sheet, the applicant was arrested on 13.01.2022 and first arraigned in court on 14.01.2022. The applicant remained in custody throughout the trial until the date of sentencing by the trial court.



30. The sentence of 10 years' imprisonment to commence from the date of arrest being 13.01.2022 pursuant to section 333(2) of the CPC.
31. Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF JANUARY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Accused person – present

Court Prosecutor – Ms. Osoro

Court Assistant – Elizabeth Angong'a

