



REPUBLIC OF KENYA



**KENYA LAW**  
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**AMM v Republic (Criminal Revision E104 of 2024)  
[2025] KEHC 2318 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2318 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL REVISION E104 OF 2024  
MW MUIGAI, J  
FEBRUARY 28, 2025**

**BETWEEN**

**AMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Background**

1. The appellant was charged with the offence of Incest contrary to section 20(1) of the *Sexual Offences Act* before Mavoko Magistrate Court in Sexual Offence Case No 8 of 2019.
2. The particulars of the offence being that: On diverse dates between 20<sup>th</sup> January 2019 and 24<sup>th</sup> February 2019 at Athi river subcounty within Machakos county being the father of FM the appellant intentionally and unlawfully caused his penis to penetrate the vagina of FM who was in his knowledge a daughter aged 10 years .
3. The Appellant was also charged with alternative charge of indecent act by male persons contrary to section 20(1) of *Sexual Offences Act*.

**Trial Judgment And Sentence**

4. On 21/2/2020 the Hon Principal Magistrate E.Michieka delivered judgment and convicted the appellant as per Section 215 of the *Criminal Procedure Code* .The Appellant was further sentenced to serve 10 years jail term as per the Pre-Sentence Proceedings conducted by Hon. B. Kasavuli Principal Magistrate on 7/5/2020.



## **The Application**

5. Aggrieved, the applicant filed Chamber Summons under Section 364 of the [Criminal Procedure Code](#) and moved this court for revision. The applicant requests the court to direct that the period spent in remand pending conclusion of his case to be factored in the custodial sentence under Section 333(2) [CPC](#). The application is supported by his affidavit sworn on 24/5/2024 which reiterates his prayer in his chamber summons.
6. Parties filed written submissions on the application as follows:-

## **The Applicant's Submissions**

7. The applicant's case is that he was in remand for one year two months three days and that he was produced before court on 4/3/2019. He prays for another chance back to the society so that he can take care of his two children.
8. That his mitigation was not considered, he urges that he is the sole bread winner and that he came from humble background. He submits that the court had discretion in sentencing and that he was remorseful. He refers court to the Criminal Procedure Bench book and urges that sentence should be geared towards achieving retribution deterrence rehabilitation restorative justice incapacitating the offender, and denouncing the offender on behalf of the community.

## **Respondent's Submissions.**

9. The prosecution concedes to the application and refers this court to the sentencing notes of the trial court and the case of [Vincent Sila Jona & 87 Others v Kenya Prisons Service & 2 Others](#) 2021 eKLR. The Trial court was not specific on the time spent in custody by the accused.

## **Determination.**

10. This court's revisionary jurisdiction is provided by the [Constitution](#) and the [Criminal Procedure Code](#). Article 165(6) of the [Constitution](#) of Kenya 2010 provides inter alia that  
"The High Court has supervisory jurisdiction over the subordinate courts ...."
11. Section 362 of the [Criminal Procedure Code](#) spells revision in criminal cases as follows :-  
"The High court may call for and examine the record of any Criminal Proceedings before any subordinate court for purposes 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 proceeding of any such subordinate court"
12. The Applicant also applied for re-sentencing in his Submissions filed as he alleged his mitigation was not considered and his social circumstances ought to be taken into account and non-custodial sentence granted. This Court finds that this was not pleaded in the substantive Application. Secondly, the application is made on revision of sentence complying with Section 333(2) [CPC](#) and not Appeal on conviction or sentence. Thirdly, the [Community Services Order Act](#) of 1998 only prescribes CSO for specific offences and expressly excludes under Section 3 of the [Act](#), Sexual Offences among others.
13. Sentencing is a discretion of the Trial Court as the Court that 1<sup>st</sup> hand takes evidence from witnesses, observes demeanor of witnesses and considers the veracity of the evidence adduced a task the Appellate Court is not privy to in the said offences prescribed by law. It is from the hearing process that culminates



with the sentence the Trial Court considered appropriate in the circumstances of each case. Therefore, sentence and cannot be interfered with unless the applicant proves that the court considered irrelevant factors or that the wrong principle is applied. See the case of *Wanjema v R.* [1971] E.A. 493 where Trevelyan J held that :

“An appellate court should not interfere with the discretion which a Trial Court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

14. The Court’s power under Section 362 CPC is to ensure correctness, legality or propriety and regularity of the Trial Court’s decision.

15. Section 333(2) of the [Criminal Procedure Code](#) provides that:

“

“(2) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

16. The Trial Court delivered judgment on 21/2/2020 and Pre-sentencing proceedings were by the Succeeding Principal Magistrate. The Court record is not clear on the period spent in custody by the Applicant during trial was included in computation of 10 years imprisonment meted on 7/5/2020.

17. The court in the case of [Bethwel Wilson Kibor v Republic](#) [2009] eKLR expressed itself as follows:

“By proviso to section 333(2) of [Criminal Procedure Code](#) where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody.”

18. In the case of *Bukenya v Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 the Supreme Court of Uganda held that ; “Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement”

19. The applicant was in remand throughout the trial and had been arrested on 1/3/2019 and arraigned in Court on 4/3/2019 when plea was taken before the Trial Court. At the close of the trial judgment was on 21/2/2020 and sentencing on 7/5/2020. The period in custody during trial as reflected in the Trial Court record is a period of 1 year and this period was /is not factored in the computation of 10 year sentence to include 1 year in custody before conviction and sentence.



## Sentence

20. The sentence is further challenged by the Applicant on ground that a minimal sentence which considered his mitigation ought to have been preferred. He mitigated before the trial court and a presenting report was also filed .The court considered both and sentenced him to 10 years imprisonment.
21. Section 20 (1) of the [Sexual Offences Act](#) provides that :- “20.Incest by male persons
  1. Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.....”
22. The applicant mitigated twice .He first stated that he was a bread winner and that he was sorry. He later stated that he was ambushed in the trial and that he had been convicted for an offence he did not do . This was also stated in the presentence report dated 9/3/2020.He was described as an evasive and reserved person.
23. The victim was his biological daughter who was 10 years old. Section 20 (1) aforesaid is specific on sentence in such situations :It states that :

“ Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life.....”
24. In *Omuse v Republic* [2009] KLR 214, the court was categorical that the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender.
25. The Appellant lived with the minor, her brother and the mother.The child’s testimony is on record, she stated on oath that she was in class 3 and that they only had one bed. That the accused / her father did it 5 times and that he used to sleep with her when mum had gone to work, the applicant would also tell her to lie on the bed when her brother was way and he would rape her.
26. The Applicant committed a serious offence which required deterrence, denunciation and protection of the victim and the community.
27. The case of *D WM v Republic* [2016] eKLR , the Court of Appeal approved the High court’s decision on appeal where the sentence was reduced from life imprisonment to 20 years jail term. The Court of Appeal noted that:-“

‘As for the sentence the 1<sup>st</sup> appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender “Shall be liable to imprisonment for life” means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant’s protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion.’”



28. This Court’s revisionary jurisdiction includes the power to alter, reduce or enhance sentence. Section 364 of the *Criminal Procedure Code* provides that :

- “(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –
- a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence”

29. The nature and circumstances of the offence were considered by the Trial Court. The evidence on record particularly by PW1 & PW2 was to the effect that the report made by the minor to mother and Police was that she was defiled by Landlord and/or Baba, the father, the Accused. The Applicant did not appeal the conviction but only resentence and computation of sentence of 10 years under section 333 (2) *CPC*. On sentence, the 10 years imprisonment is the minimum prescribed under Section 20 (1) of *Sexual Offences Act*. The Applicant’s mitigation was considered by the Trial Court. Secondly, the ODPP/Prosecution submitted and conceded to computation of 10 years imprisonment the period the Applicant was in custody was not taken into account. The Prosecution did not cross apply for revision to enhance sentence.

#### **Disposition**

30. In the upshot, the application under Section 333(2) *CPC* to include the period w.e.f. 4/3/2019 – 7/5/2020 1 year and 4 months to be included in computing the 10 years imprisonment the Applicant was sentenced to by the Trial Court.

**RULING DELIVERED SIGNED & DATED IN OPEN**

**COURT AT MACHAKOS HIGH COURT PHYSICALLY/ ONLINE THIS 28/2/2025.**

**M.W. MUIGAI**

**JUDGE**

