



**Seda v Republic (Criminal Miscellaneous Application E015 of 2024)
[2025] KEHC 1192 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E015 OF 2024**

JN KAMAU, J

FEBRUARY 27, 2025

BETWEEN

JOSEPH OTIENO SEDA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(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 a child contrary to Section 11(1) of the *Sexual Offences Act*. He was convicted of the main charge and sentenced to twenty (20) years imprisonment.
2. On 24th January 2024, he filed Notice of Motion application dated 15th December 2023 seeking a review of his sentence. He pointed out that he was arrested on 18th March 2016 and convicted on 26th September 2017. He urged the court to consider the period of eight (8) years he had spent in prison since his arrest and conviction.
3. He invoked Section 216, 329 and 333(2) of the *Criminal Procedure Code* and placed reliance on the case of Petition No 17 of 2021 (eKLR citation not given) where he asserted that it was held that mandatory minimum sentence be applicable (sic).
4. His Written Submissions were dated 19th July 2024 and filed on 30th July 2024 while those of the Respondent were dated 14th October 2024 and filed on 15th October 2024. The Ruling herein is therefore based on the said Written Submissions which parties relied upon in their entirety.



Legal Analysis

5. The Applicant invoked Article 23(f), 27, 28, 50(2)(p) of *the Constitution* of Kenya, 2010, Section 354(3)(i) of the *Criminal Procedure Code* and urged the court to apply its discretion independently in adherence to the provisions of Sentencing Policy Guidelines given that the mandatory sentences deprive courts of discretion in sentencing. He pleaded with court to consider reducing his sentence to a proportionate relief.
6. He pointed out that he was a first offender and remorseful. He asserted that during his incarceration, he had undergone various programs such as painting and decoration in Grade III and II and was awarded Certificate of Completion. He believed that the skills he had acquired had led to his reformation and hence sought a second chance in life. He added that he had maintained exemplary and disciplinary measures between the prison's authority and fellow inmates.
7. He further contended that he was the sole bread winner of his family which was overwhelmed with needs. He asserted that he was ready to restore reconciliation between the parties involved in the offence committed.
8. He urged the court to consider the one (1) and a half (½) years that he had spent in custody since his arrest until when he was sentenced pursuant to Section 333(2) of the *Criminal Procedure Code*.
9. On its part, the Respondent referred to Section 8(3) of the *Sexual Offences Act* and placed reliance on the case of Republic vs Joshua Gichuki Mwangi Petition No E018 of 2023 (eKLR citation not given) where it was held that mandatory sentences left no discretion to the judicial officers where minimum sentences set the floor rather than the ceiling of such sentences.
10. It also relied on the case of Francis Karioko Muruatetu & Another vs Republic, Katiba Institute & 5 Others (Amicus Curiae) 2021 KLR where it was clarified that the authority in Muruatetu case only applied in respect of sentences of murder under Section 203 as read with Section 204 of the *Penal Code*.
11. It further cited Section 329 of the *Criminal Procedure Code* and submitted that the Trial Court considered the relevant factors and the legal principles of law before meting out the sentence of twenty (20) years upon the Applicant. It was emphatic that the sentence was lawful and befitting of the offence committed and thus urged this court to dismiss his application for lack of merit.
12. The Applicant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows: -

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
13. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful.
14. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
15. Notably, 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* must 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.
16. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.
 17. 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. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.
 18. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of 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.
 19. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was on going as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). The said Section 333(2) of the *Criminal Procedure Code* 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)”.
 20. This duty is also contained in the Judiciary Sentencing Policy Guidelines where it is provided that: -

“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
 21. 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]eKLR.
 22. The Charge Sheet herein showed that the Applicant herein was arrested on 18th March 2016. Although he was granted bond, he did not seem to have posted the same. He was convicted and sentenced on 26th September 2017.
 23. A reading of the Trial Court's Sentence showed that it did not take into account the time that he spent in remand before sentencing him. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.



Disposition

24. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 15th December 2023 and filed on 24th January 2024 was not merited save for his prayer that was brought pursuant to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
25. It is hereby ordered and directed that the period the Applicant spent in custody between 18th March 2016 and 25th September 2017 be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
26. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF FEBRUARY 2025.

J. KAMAU

JUDGE

