



**Mungasia v Republic (Criminal Miscellaneous Application
E022 of 2024) [2025] KEHC 1386 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E022 OF 2024**

JN KAMAU, J

FEBRUARY 25, 2025

BETWEEN

BENSON AKOOLU MUNGASIA 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(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 twenty-five (25) years imprisonment.
2. On 25th January 2024, he filed a Notice of Motion application dated 16th August 2023 seeking a review of his sentence. He urged the court to consider the period that he had spent in remand during trial from 3rd November 2021 to 11th August 2022 when he was arrested and sentenced respectively as part of his sentence. He relied on Section 333(2) of the *Criminal Procedure Code*.
3. His Written Submissions were dated 24th June 2024 and filed on 26th June 2024 while those of the Respondent were dated 18th September 2024 and filed on 26th September 2024. The Ruling herein is therefore based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. The Applicant submitted that he was arrested at the age of thirty- one (31) years, a youthful age where he was easily driven by peer pressure, bad company or carried away by fleshly desires. He pointed out that the charges he faced were due to lack of self-control which he regretted having failed to prevent



- himself from such shameful and hurting act. He contended that he had a young family of a wife and two (2) children who depended on him.
5. He urged this court to consider that he was a first offender and remorseful. He pleaded with the court to consider that during his incarceration, he had undergone different programs that had empowered him to have a change in perspective, self-awareness, spiritual nourishment and skills in vocational training. He averred that he had reformed and was ready to be re-integrated back into the society. He sought for a second chance in life.
 6. He further contended that the sentence imposed on him was discriminatory and sought for reduction of the same to a less severe sentence. In this regard, he relied on the case of Francis Kariokor Muruatetu & Another vs Republic Petition No 15 of 2015 (eKLR citation not given) where the Supreme Court referred to Article 10(3) of the International Covenant on Civil and Political Rights of 1996 which stipulated that the penitentiary system should comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.
 7. He invoked Article 50(p), (q) and 165 of *the Constitution* of Kenya, 2010 and placed reliance on the case of Republic vs Diana Suleiman & Another [2014] eKLR where it was held that the court could review its own orders as long as the reason for reviewing was convincing to the court.
 8. He also urged the court to consider Section 333(2) of the *Criminal Procedure Code* and relied on the case of Sebastian Okwero Murefu vs Republic Petition No 151 of 2012 (eKLR citation not given) where the court substituted a death sentence for robbery with violence with the time served in prison of eight (8) years upon considering that the petitioner therein had stayed in remand for three (3) years awaiting trial.
 9. On its part, the Respondent invoked Section 362 and 364 of the *Criminal Procedure Code* and placed reliance on the cases of Ogolla s/o Owuor vs Republic [1954] EACA 270 and Shadrack Kipkoech Kogo vs R Criminal Appeal No 253 of 2003 (eKLR citation not given) where the common thread was that courts should not alter sentences unless the trial judge had acted upon wrong principles or overlooked some material factors.
 10. It was its case that the Applicant had failed to raise any irrelevant factors relied on by the Trial Court in arriving at the sentence meted out on him. It was emphatic that the Trial Court took into consideration all relevant factors prior to meting out the twenty-five (25) years sentence upon him. It therefore urged this court to dismiss the said application as the same lacked merit given that the sentence that was meted upon him lawful.
 11. It submitted that Section 333(2) of the *Criminal Procedure Code* was couched in mandatory terms as was held in the cases of Vincent Sila Jona & 87 Others vs Kenya Prsion Service & 2 Others [2021] eKLR and Ahmad Abolfathi Mohammed & Another vs Republic [2018]eKLR. To this end, it agreed with the Applicant that the time that he spent in custody before he was sentenced ought to be taken into account while computing his sentence.
 12. The Applicant herein was sentenced under Section 8(2) of the *Sexual Offences Act*. The same provides as follows: -

“ A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
 13. In the mind of this court, the Trial Court was very lenient for having sentenced him to twenty-five (25) years imprisonment as it had the option of sentencing him to life imprisonment.



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 that he 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 (Supra).



22. The Charge Sheet herein showed that the Applicant herein was arrested on 17th September 2021. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 3rd November 2022.
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 16th August 2023 and filed on 25th 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 that the Applicant spent in custody between 17th September 2021 and 2nd November 2022 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 25TH DAY OF FEBRUARY 2025

J. KAMAU

JUDGE

