



REPUBLIC OF KENYA



**Mwaniki v Republic (Criminal Miscellaneous Application
E090 of 2024) [2025] KEHC 3886 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E090 OF 2024**

**HI ONG'UDI, J
MARCH 26, 2025**

BETWEEN

SAMUEL MWANIKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Samuel Mwaniki the applicant filed the undated notice of motion on 6th June, 2024 seeking the following orders:
 - i. Spent
 - ii. That the Applicant be granted an absolute/conditional discharge on account of his chronic health condition pursuant to section 35 of the [Penal Code](#) so as to enable him seek specialized longtime/lifelong treatment which cannot be provided and sustained by the prison's infirmary.
 - iii. That the twelve (12) year sentence imposed by the High Court on appeal be reviewed downwards pursuant to prayer (2) above and pursuant to Section 357, 362, 364 and 382 of the [Criminal Procedure Code](#) as construed with article 50(2) (p) and (q) as conjunctively read with Article 259(2) of the [Constitution](#).
 - iv. That the period spent in custody by the Applicant be computed into the sentence to be awarded upon revision pursuant to the provisions of section 333(2) of the [Criminal Procedure Code](#), the Court of Appeal's decision in [Abamad Abolfathi Mohammed Sayed Mansour Mousavi v Republic](#) (Criminal appeal 135 of 2016) 2018 KECA 743 (KLR) (Crim) (26 January, 2018) (Judgment) and the Constitutional Court's decision in [Jona & 87 others Kenya Prisons Service & 2 others](#) (Petition 15 of 2020) 2021 KEHC 457 (KLR) (18 January 2021) (Judgment).



- v. That should the eventual sentence as revised in a balance of three (3) years or less, may the honourable court be pleased to order that such sentence be served under probation.
 - vi. Any other order which the court deems fit in the interest of justice.
2. The application is supported by grounds on its face plus the applicant's supporting affidavit sworn on 8th June, 2024. The main ground is that the applicant has underlying health conditions namely: Lumbar core, diabetes, asthma & ulcers. He annexed medical records and reports showing he needs specialized medical care, which the Prison cannot offer. He has equally raised issue in respect of section 333(2) Procedure Code which he alleges was not complied with yet he was in pre-trial detention for three (3) years. He expressed his remorse over matter.
 3. He further sought reduction of the sentence which initially was 25 years and was reduced on Appeal to 12 years vide HCCRA No E083 of 2022.
 4. The application was argued orally.

Applicant's case

5. The applicant reiterated what is in his supporting affidavit and the grounds. He asked the court to have the sentence run from the day he was arrested, while the remaining sentence be served on probation. He confirmed having been convicted of defilement.

Respondent's case

6. The respondent through M/s Okok Principal State counsel opposed the application. She gave a brief background of the case. She submitted that the applicant was on 18th November, 2022 convicted of the offence of defilement and sentenced to 25 years imprisonment vide Molo Chief Magistrate Sexual Offences No E003 of 2021.
7. He filed an appeal Nakuru HCRA No E083 of 2022. The High Court dismissed the appeal against conviction but the sentence was reduced from 25 years to 12 years imprisonment. She thus argued that this being a court of concurrent jurisdiction with the Appeal court it cannot interfere with the Judgment by Chemitei J.
8. She went further to submit that the only thing she had noted was that both the lower and high court had not applied section 333(2) Criminal Procedure Code to the 15 days the applicant spent in prison remand before being released on bond.

Analysis and determination

9. I have considered the record right from the lower court (Molo CMCC – Sexual Offences No E003 of 2022) upto Nakuru High Court (Criminal Appeal No E083 of 2022) plus the present application. The issue for determination is whether this court has the jurisdiction to interfere with the Judgment passed herein in High Court Criminal Appeal No E083 of 2022.
10. There is no dispute that the applicant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offence Act vide Molo Chief Magistrate's Court Sexual Offences No E003 of 2021 on 18th November, 2022. He was then sentenced to 25 years imprisonment. It is further not disputed that the applicant filed Nakuru High Court Criminal Appeal No E083 of



2022. Justice Chemitei upheld the conviction but reduced the sentence to 12 years imprisonment. This is what Chemitei J stated at paragraph 27 of his Judgment:

“ However, taking the totality of the factors herein and the above sentiments I hereby dismiss the appeal, set aside the 25 years’ imprisonment meted against the appellant and substitute it with a custodial sentence of twelve (12) years from 18th November, 2022”.

11. The wording is very clear on this. The Hon Judge addressed the issue of sentence after considering the totality of the facts herein and sentiments and reduced the sentence from 25 years to 12 years which is more than half reduction. Secondly the record shows that the applicant was not in remand custody during the hearing of the case as he claims.
12. Section 333(2) of the [Criminal Procedure Code](#) provides:
 - (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, 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, been held in custody, the sentence shall take account of the period held in custody”.
13. The lower court record shows that the applicant was arrested on 6th January, 2021 and arraigned in court on 8th January, 2021 when he was granted bond of Kshs 200,000/= with a surety in similar sum. The surety was approved on 21st January 2021 and he was then released on bond. He was in remand custody for only 15 days which is covered in the reduced 13 years. He cannot therefore claim as stated in paragraph 2 of his supporting affidavit that his pre-trial detention was three (3) years. Even his case only took one (1) year plus ten (10) months before it was concluded by the trial court.
14. All in all, I find that since Chemitei J addressed the issue of sentence, this court being one of similar jurisdiction cannot address the same issue under section 333(2) of the [Criminal Procedure Code](#).
15. The Applicant has produced before this court reports showing he has challenges with his health. He thus requests the court to give him a non-custodial sentence based on that.
16. Section 46 of the [Prison Act](#) provides:
 1. Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.
Provided that in no case shall:
 - i. any remission granted result in the release of a prisoner until he has served one calendar month;
 - ii. any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the [Penal Code](#) (Cap. 63) or to be detained during the President's pleasure.
 2. For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.



3. A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period—
 - (a) spent in hospital through his own fault; or
 - (b) while undergoing confinement as a punishment in a separate cell.
4. A prisoner may be deprived of remission
 - (a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;
 - (b) where the Cabinet Secretary for the time being responsible for internal security considers that it is in the interests of public security or public order.
5. Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground.
17. From the above provisions, what the applicant is asking this court to do is clearly the mandate of the Commissioner General of Prisons. The provision that is applicable to the applicant is section 46(5) of the *Prison Act*. There is no way this court will take up that role.
18. The upshot is that the application lacks merit and is hereby dismissed
19. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH MARCH, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI
JUDGE

