



**Muchuka v Republic (Criminal Miscellaneous Application
E047 of 2024) [2025] KEHC 7174 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E047 OF 2024**

JN KAMAU, J

MAY 28, 2025

BETWEEN

DUNCAN KOMBA MUCHUKA 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. Being aggrieved by the said decision, he appealed at Kakamega High Court, HCCRA No 21 of 2019 where his Appeal was dismissed with his conviction and sentence being upheld.
3. On 13th March 2024, he filed a Notice of Motion application dated 2nd November 2023 seeking a review of his sentence. He urged this court to exercise its inherent and unlimited powers under Article 165(3) of *the Constitution* of Kenya to mete upon him the least prescribed sentence.
4. His Written Submissions were dated 15th November 2024 and filed on 19th November 2024 while those of the Respondent were dated 10th December 2024 and filed on 11th December 2024. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

5. The Applicant submitted that the mandatory nature of minimum sentences in the *Sexual Offences Act* No 3 of 2006 was unconstitutional and infringed on fair trial guaranteed under Article 50 of *the Constitution*. He asserted that the mandatory nature of the said sentences prejudiced prisoners by



- depriving them the right to mitigate and the right to a lesser severe sentence unlike the offenders (sic) which amounts to discrimination contrary to Article 27 of *the Constitution*.
6. He pointed out that the mandatory nature of the said sentences jettisoned the discretion of the trial court forcing it to impose those sentences which were pre-determined by the legislature contrary to the doctrine of separation of powers under Article 160(1) of *the Constitution*. He added that sentencing was part of the principles of a fair trial.
 7. In that regard, he relied on several cases among them the cases of Petition No 97 of 2021, Edwin Wachira & 9 Others vs Republic (Consolidated with Adan Maka Thulu vs The DPP and Petition No 90 of 2021 Robert Mwangi vs the DPP (eKLR citations not given) without highlighting the holdings he relied upon.
 8. He stated that he was a young man of twenty-nine (29) years old, an orphan with no family and had not made any development in his life. He averred that if he served his whole sentence, he would not be in a position to do any good to himself or the community for he would have wasted most of his time in jail.
 9. He further submitted that he was a first offender and had reformed and socially rehabilitated. He stated that he was remorseful hence not a threat to the public.
 10. He pointed out that what seemed to be the primary justification for detention at the start of his sentence may not be so after a lengthy period of six (6) years into the service of his sentence and that it was only by carrying out a review of justification for continued detention that such factors could be properly evaluated.
 11. He pleaded with the court to reduce his sentence and direct that the same run from the time of his arrest. In this regard, he relied on the case of 88 Prisoners vs the DPP, AG & The Prison Home Made Petition (eKLR citation not given) where it was held that the sentence was deemed to start when the liberty was lost. He contended that he was arrested on 8th February 2017 and sentenced on 14th March 2018.
 12. Notably, in its Written Submissions, the Respondent indicated that the Applicant was sentenced to life imprisonment and thus submitted on the constitutionality of life sentence. This court disregarded the said submissions as the Applicant was sentenced to twenty (20) years imprisonment. The Respondent was called upon to be keen when submitting to avoid confusion.
 13. The Applicant herein was sentenced under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* Cap 63A (Laws of Kenya). The said Section 8(3) of the *Sexual Offences Act* 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.”
 14. This court could not therefore fault the Trial Court for sentencing the Applicant to twenty (20) years imprisonment as that was lawful.
 15. On 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case Joshua Gichuki Mwangi vs Republic [2022] eKLR which had reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR to the effect that Section 8 of the *Sexual Offences Act* had to 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. In its said decision, the Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

16. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising 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.
17. Going further, this court was mandated to consider the period the Applicant spent in remand while his trial was ongoing as provided in Section 333(2) of the [Criminal Procedure Code](#). The said Section 333(2) of the [Criminal Procedure Code](#) stipulates 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)”.
18. 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.”
19. 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.
20. The Charge Sheet herein showed that the Applicant herein was arrested on 8th February 2017. He was released on bond on 20th February 2017. Judgment was delivered on 15th February 2018 and he was remanded. He was sentenced on 14th March 2018.
21. A reading of the Trial Court's Sentence showed that it did not take into account the time that he spent in remand before his release on bond and before sentencing him after he was remanded after Judgment was delivered. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

22. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 2nd November 2023 and filed on 13th March 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).
23. It is hereby ordered and directed that the period that the Applicant spent in custody between 8th February 2017 and 19th February 2017 before he was released on bond and the period between 15th February 2018 when he was remanded after he was convicted and 13th March 2018 before he was



sentenced be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

24. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF MAY 2025

J. KAMAU

JUDGE

