



**Madede v Republic (Criminal Appeal E032 of 2023)
[2025] KEHC 7486 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E032 OF 2023**

**JN KAMAU, J
MAY 27, 2025**

BETWEEN

DENNIS MADEDE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon M. Ochieng (PM) delivered at Hamisi in
Principal Magistrate's Court in Sexual Offence Case No 22 of 2021 on 4th November 2022)*

JUDGMENT

Introduction

1. The Appellant 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*.
2. The Learned Trial Magistrate, Hon M. Ochieng (PM) convicted him on the main charge of defilement and sentenced him to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgment, he lodged an appeal herein. His Petition of Appeal was dated 14th November 2022 and filed on 16th October 2023. He set out twelve (12) grounds of appeal. Subsequently, he filed Amended Grounds of Appeal dated 20th November 2024 on 25th November 2024.
4. His Written Submissions were dated 20th November 2024 and filed on 25th November 2024 while those of the Respondent were dated 16th December 2024 and filed on 17th December 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Amended Grounds of Appeal and his Written Submissions, this court noted that he only focused on the issue of sentencing. Therefore, the issue that had been placed before it for determination was whether or not in the circumstances of this case, the sentence that was meted out to him by the Trial Court was lawful and/or warranted.
8. He submitted that the Trial Court failed to consider his mitigation as per Section 329 of the *Criminal Procedure Code* and/or lower the degree of blame by reducing the sentence. He asserted that he was of youthful age and had lost his liberty behind bars. He pointed out that he was stigmatised by the ambiguousness of the sentence and its severity. He urged this court to do a proper analysis and evaluation of the circumstances of the offence herein as was held in the case of *Okeno v Republic*[1972]eKLR.
9. He pointed out that the Trial Court failed to consider Article 23(f), 27, 28 and 50(2)(p) of the *Constitution* of Kenya, 2010 while sentencing him. It was his further submission that many courts in Kenya had changed tides in sentencing as far as maximum sentences were concerned and that in order to ensure consistencies and certainties in the judicial process, his sentence ought to be reduced.
10. On its part, the Respondent invoked Section 8(1) and 8(3) of the *Sexual Offences Act* and Section 329 of the *Criminal Procedure Code* and submitted that the Trial Court took into account the evidence, nature of the offence and the circumstances of the case in arriving at the appropriate sentence and the sentence meted out to the Appellant was therefore proper.
11. It asserted that the Trial Court considered the Appellant's mitigation and therefore the sentence was lawful. It added that he had not demonstrated to this court why it should interfere with the sentence. It urged this court to dismiss his appeal and uphold the sentence.
12. However, it was not opposed to the Appellant's prayer under Section 333(2) of the *Criminal Procedure Code*. In that regard, it cited the said Section 333(2) of the *Criminal Procedure Code* and placed reliance on the case of *Abamad Abolfathi Mobammed & Another v Republic* [2018]eKLR where it was held that courts must take into account the period already spent in custody while sentencing accused persons.
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) which 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 having sentenced the Appellant to twenty (20) years imprisonment as that was lawful.
15. In its decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR where the Court of Appeal had reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where it had been held 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. 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 Appellant's sentence. It had no option but to leave the said sentence that was meted out to him undisturbed.
17. Going further, although the Appellant did not raise the issue of time spent in custody or submitted on the same, this court was mandated to consider the period that he spent in remand while his trial was ongoing 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* 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 *Abamad Abolfathi Mohammed & Another v Republic*(*Supra*).
20. The Charge Sheet herein showed that the Appellant herein was arrested on 16th April 2021. He was released on bond on 21st April 2021. He was convicted and sentenced on 4th November 2022.
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 sentencing him. 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 Appellant's Amended Grounds of Appeal dated 20th November 2024 and filed on 25th November 2025 was not merited save for his right pursuant to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). The conviction be and hereby upheld as it was safe.
23. It is hereby ordered and directed that the period that the Appellant spent in custody between 16th April 2021 and 21st April 2021 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 27th day of May 2025.

J. KAMAU

JUDGE

