



**Ojieng v Republic (Criminal Miscellaneous Application  
E046 of 2023) [2025] KEHC 7109 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7109 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL MISCELLANEOUS APPLICATION E046 OF 2023**

**JN KAMAU, J**

**MAY 27, 2025**

**BETWEEN**

**WILSON BEZILING OJIENG ..... 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 fifteen (15) years imprisonment.
2. On 17<sup>th</sup> August 2023, he filed a Notice of Motion application dated 12<sup>th</sup> June 2023 seeking a review of his sentence. He placed reliance on the cases of Philip Mueke Maingi & 4 Others Petition No E017 of 2021 and Edwin Wachira & 9 Others Petition No 97 of 2021 (eKLR citation not given) where the common thread was that the minimum mandatory nature of sexual offences sentences was declared unconstitutional.
3. His Written Submissions were dated 21<sup>st</sup> November 2024 and filed on 25<sup>th</sup> November 2024 while those of the Respondent were dated and filed on 10<sup>th</sup> January 2025. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.

**Legal Analysis**

4. The Applicant submitted that he was a young man of thirty-two (32) years old and the sole breadwinner of his family. He added that he was also taking care of his sickly parents.



5. He pointed out that he had served two (2) years in jail and was reformed and rehabilitated during that time. He averred that he was no longer a threat to the public and was ready to be integrated into society. He added that he was a first-offender.
6. He contended that he was arrested on 22<sup>nd</sup> July 2022 and sentenced on 29<sup>th</sup> March 2023. He urged the court to consider the period he spent in custody from the date of his arrest pursuant to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) and Paragraph 5.1.21 of the Judiciary Policy Sentencing Guidelines SPGs Revised 2023.
7. On its part, the Respondent invoked Section 8(1) and 8(3) of the *Sexual Offences Act* No 3 of 2006 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 sentence.
8. It placed reliance on the cases of Benard Kimani Gacheru vs Republic [2002]eKLR where it was held that an appellate court would not interfere with sentence unless that sentence was manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong principle. It further cited the case of Republic vs Jagani & Another (2001) KLR 590 where it was held that the purpose of sentence was to assist in rehabilitation of the offenders.
9. It contended that the sentence that was imposed upon the Applicant was too lenient and he had not demonstrated why the said sentence should be reduced.
10. In regard to the Applicant's prayer under Section 333(2) of the *Criminal Procedure Code*, it referred this court to the case of Ahamad Abolfathi & Another vs Republic [2018]eKLR where it was held that courts were obliged to take into account the period that the accused spent in custody before they were sentenced. However, it submitted that as the sentence meted was illegal, it was mischievous for the Applicant who was already enjoying a lenient sentence to seek for the benefit of the said Section 333(2) of the *Criminal Procedure Code*. It was categorical that the said Section would only apply if the Applicant was serving a lawful sentence.
11. The Applicant herein was sentenced under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. 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.”
12. This court noted that Trial Court sentenced the Applicant to fifteen (15) years imprisonment instead of the twenty (20) years mandatory minimum sentence. This court could not fault the Trial Court for having sentenced him to a lesser sentence than was prescribed in the *Sexual Offences Act* as the jurisprudence at the time he was sentenced allowed courts to exercise discretion during sentencing.
13. 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* 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.
14. However, in a decision that was delivered on 12<sup>th</sup> 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.
15. 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.
  16. This court was not persuaded to enhance the sentence to twenty (20) years, as the Respondent had submitted as it did not put the Applicant on notice that it would be seeking an enhancement of the sentence which would have allowed him to make an informed decision as to whether he would have wished to proceed with his application or if he would have wished to abandon the same. Enhancing his sentence without giving him to respond would be contrary to the principles of fair trial provided in Article 50 of *the Constitution* of Kenya, 2010.
  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*(Supra).
  20. The Charge Sheet herein showed that the Applicant herein was arrested on 22<sup>nd</sup> July 2022. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 29<sup>th</sup> March 2023.
  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. It was irrespective that he was serving a lesser sentence than what was prescribed under the law. This was because Section 333(2) of the *Criminal Procedure Code* was not conditional on the legality or otherwise of the sentence as it was couched in mandatory terms. This court also explained that until 12<sup>th</sup> July 2024, the jurisprudence was to exercise discretion in meting out sentences under the *Sexual Offences Act*. 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 12<sup>th</sup> June 2023 and filed on 17<sup>th</sup> August 2023 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 22<sup>nd</sup> July 2022 and 28<sup>th</sup> March 2023 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 27<sup>TH</sup> DAY OF MAY 2025**

**J. KAMAU**

**JUDGE**

