



REPUBLIC OF KENYA



**Chamwada alias Doctor v Republic (Criminal Petition
E001 of 2023) [2025] KEHC 9057 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL PETITION E001 OF 2023**

JN KAMAU, J

JUNE 26, 2025

BETWEEN

KEVIN BWAGI CHAMWADA ALIAS DOCTOR PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* Cap 63A (Laws of Kenya). He was also charged with an alternative charge of an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was convicted on the main charge and sentenced to twenty (20) years imprisonment.
2. On 20th March 2023, he filed Notice of Motion application dated 8th March 2023 seeking for sentence review pursuant to Section 364 of the *Criminal Procedure Code*. He averred that it was within the jurisprudence of law under criminal justice system to treat convicts at equal length. He placed reliance on the Ruling dated 31st August 202 (sic) without giving the exact citation of the case which declared the minimum, maximum and mandatory sentences on sexual offences inconsistent with *the Constitution* of Kenya, 2010.
3. He contended that the Sexual Offences statute had greatly contravened the rights and fundamental freedom in the Bill of Rights under Articles 25(a), (c), 27, 28 and 50 of *the Constitution* of Kenya on the power of court on discretion. He added that he had been rehabilitated through vocational and spiritual measures for re-adaptation purposes for future utility (sic).
4. He sought leniency stating that he was the sole bread winner of his family of a wife and three (3) children. He invoked Section 329 of the *Criminal Procedure Code* and Article 50(2)(p) of *the Constitution* of Kenya, 2010 and promised to never engage in offensive acts again.



5. His Written Submissions were dated 8th July 2024 and filed on 18th July 2024 while those of the Respondent were dated 30th December 2024 and filed on 7th January 2025. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

6. The Petitioner invoked Articles 25(a) and 165(3)(b)(d)(i) and (ii) of *the Constitution* of Kenya and submitted that his sentence was unconstitutional and that this court had unlimited powers to determine any question in respect of interpretation of *the Constitution* of Kenya and determining issues as to whether or not any law was inconsistent or was in contravention with the said Constitution of Kenya.
7. He argued that the mandatory nature of the sentence deprived courts the exercise of discretion in considering whether a lesser sentence than the minimum prescribed would be more appropriate in the circumstances. In this regard, he relied on the case of *S vs Maglas 2001(2) SA 1222* at pg 25 where it was held that courts were free to depart from the prescribed sentence and to determine whether or not the circumstances of any peculiar case justify such a departure.
8. He further cited Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR) of 1966 which Kenya ratified in 1972 and argued that it was debatable whether or not the minimum mandatory sentences were in tandem with the provisions of the said ICCPR. He averred that his sentence was excessive, arbitrary, demeaning, degrading and inhuman and that it violated his right to benefit from a lesser severe sentence guaranteed under Section 26(2) of the *Criminal Procedure Code*.
9. He placed reliance on the case of Petition No E017 of 2021 (eKLR citation not given) where it was held that the minimum-maximum mandatory sentences under the *Sexual Offences Act* No 3 of 2006 were unconstitutional. He also relied on the cases of *William Obonda Ochola vs Republic* Petition No 47 of 2020 and *Keneri Opiyo Gilo vs Republic* Petition No 45 of 2020 (both eKLR citations not given) but did not highlight the holdings he relied on therein.
10. He sought the court's leniency stating that the main aim of sentencing was not to punish but to secure lives and ensure rehabilitation through prison/rehabilitation centre and later re-integrate them back to society as law-abiding citizens.
11. He pointed out that he was arrested at the age of twenty-four (24) years old and was now thirty-two (32) years old. He averred that he was a family man and the sole breadwinner of the family of four (4) children who were now struggling to get school fees and other basic needs.
12. He further submitted that he was a first offender and expressed remorse for having committed the offence. He pointed out that he had undergone various rehabilitative and transformative programs where he had achieved Certificate in Prisoners Fellowship, Certificate in Health Education by (V.O.P), Diploma in Discover Bible School, both Certificate and Diploma in Emmaus Bible Correspondence Courses, Certificate in Nuru Lutheran Media Ministries, Certificate in Lamp and Light of Kenya Level I, II, III and Grade III in Carpentry and Joiner tested by NITA with an ordinary pass. He contended that he had been rehabilitated and was ready to be re-integrated back to society to preach the Gospel to those who were still in darkness and promised to remain a law-abiding citizen.
13. He relied on Section 333(2) of the *Criminal Procedure Code* and placed reliance on the cases of *Ahmed Abolfathi Mohammed & Another vs Republic*[2018]eKLR and *Peter Odhiambo Abonyo vs Republic*[2021]eKLR where the common thread was that while applying Section 333(2) of the *Criminal Procedure Code* alongside its provisions, the sentence of imprisonment ought to run from the date of arrest. He contended that he remained in remand until he was convicted and sentenced



which period was not considered during his sentencing. He pleaded with court to grant him a non-custodial sentence or any other lesser sentence that would occasion prejudice on his part.

14. On its part, the Respondent submitted that it was trite that sentencing was the sole discretion of the trial court, which discretion was to be exercised in accordance with set standards and principle of law. It invoked Section 8(4) of the *Sexual Offences Act* No 3 of 2006 and placed reliance on the case of Francis Karioko Muruatetu vs Republic; Katiba Institute & 5 Others (Amicus Curiae)[2021]eKLR which clarified that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with *the Constitution* but that the said section only applied in respect of sentences of murder.
15. It further cited Section 329 of the *Criminal Procedure Code* and contended that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at the appropriate sentence. It placed reliance on the case of Benard Kimani Gcehru vs Republic[2002]eKLR where it was held that sentencing was a matter that rested with the discretion of the trial court and that an appellate court would not interfere with such sentence unless that sentence was manifestly excessive or that the trial court overlooked some material factor.
16. It further placed relied on the case of Republic vs Jagani & Another (2001) KLR 590 where it was held that the purpose of the sentence was usually deterrence, rehabilitation and reparation for harm done to victims in particular and to society in general. It also cited the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that although sentencing was an exercise of judicial discretion, it was Parliament and not Judiciary that set the parameters of sentencing for each crime.
17. It was its contention that the sentence meted by the Trial Court upon the Petitioner was lawful and that he had not demonstrated to this court as to why it should interfere with the same.
18. It was, however, not opposed to his prayer under Section 333(2) of the *Criminal Procedure Code*. In this regard, it relied on the case of Ahmed Abolfathi Mohammed & Another vs Republic (Supra).
19. The Petitioner herein was sentenced under 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”
20. This court could not fault the Trial Court for having sentenced the Petitioner to twenty (20) years imprisonment as that was lawful. This court noted that previously, there had been emerging jurisprudence where courts were exercising their discretion to mete out sentences below the mandatory minimum prescribed sentence for the offence of defilement.
21. 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 of Joshua Gichuki Mwangi vs Republic [2022] eKLR where the Court of Appeal 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. The Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.



22. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce sentences for sexual offenders.
23. Going further, this court had to consider the Petitioner's prayer under Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). The said Section 332(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).
24. Further, the Judiciary Sentencing Policy Guidelines provide 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.”
25. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in Ahmed Abolfathi Mohammed & Another vs Republic (Supra).
26. Notably, the Petitioner was arrested on 2nd February 2018. His application for bond was not allowed. He was convicted and sentenced on 21st September 2018. A reading of the Trial Court's decision showed that it did not take into account the period he spent in remand during trial. This was a period that therefore ought to be taken into consideration while computing his sentence.

Disposition

27. Accordingly, the upshot of this court's decision was that the Petitioner's Notice of Motion application dated 8th March 2023 and filed on 20th March 2023 was not merited and is hereby dismissed. His conviction and sentence be and are hereby upheld as they were both safe.
28. For the avoidance of doubt, the period between 2nd February 2018 and 20th September 2018 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
29. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF JUNE 2025

J. KAMAU

JUDGE

