



Onyango v Republic (Criminal Miscellaneous Application E040 of 2024) [2025] KEHC 9151 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E040 OF 2024**

JN KAMAU, J

JUNE 26, 2025

BETWEEN

NINCACIOUS O ONYANGO 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 lodged his appeal in this court Vihiga High Court, to wit, HCCRA No 41 of 2021 where his conviction was upheld and his sentence reduced to fifteen (15) years imprisonment.
3. On 6th March 2024, he filed a Notice of Motion application dated 2^{8th} February 2024 seeking a review of his sentence. He placed reliance on paragraph 50(e) and (f) of the Supreme Court Judgment in Application No 2 of 2011 (eKLR citation not given) without highlighting the holding he relied on. He urged this court to consider his mitigating circumstances, period spent in correction facility and rehabilitation among other factors in consideration of review of his sentence.
4. His undated Written Submissions were filed on 24th June 2024 while those of the Respondent were dated 16th January 2025 and filed on 17th January 2025. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.



Legal Analysis

5. The Applicant submitted that this court had original jurisdiction in both civil and criminal matters which was termed as unique jurisdiction in the case of *Protus Bhliba Shikuku v Attorney General* (eKLR citation not given) as it enabled it to review subordinate court's and appellate court's decisions. He invoked Section 326(2), 362 and 364 of the *Criminal Procedure Code* as read with Article 165(3)(a), (b), (6) and (7) of the *Constitution* of Kenya, 2010 and urged this court to allow his application.
6. He pointed out that he was a first offender. He expressed remorse for having committed the offence. He pleaded with the court to grant him a second chance. He asserted that he had learnt his lessons through experience and suffering in his long incarceration and was now fully conversant with the consequences of crime.
7. He submitted that his sentence did not meet the aim or objective of sentencing. He invited this court to consider the provisions of the Sentencing Policy Guidelines and placed reliance on the case of *Hezekiah Mwaura Kibe v Republic* (1976) KLR 118 where it was held that the antecedents of an accused person also come into play when the court is considering the appropriate sentence. He added that he was the sole breadwinner of his family who were subject to severe suffering due to his long incarceration.
8. He pleaded with this court to consider that during his incarceration, he was living peacefully with fellow inmates and was now reformed and rehabilitated. He believed that he had acquired spiritual and life skills which would enable him re-integrate well back to society and live a self-supportive life as a law-abiding citizen. He sought for leniency of court.
9. The Respondent relied on the case of *Republic v Jagani & Another* (2001) KLR 590 where it was held that the purpose of the sentence was deterrence, rehabilitation and reparation for harm done to victims in particular and to society in general.
10. It contended that the sentence that was meted out by this court to the Applicant was lenient considering the nature of the case and therefore this court should not interfere with it so as to instill a sense of responsibility for his actions and also allow for his rehabilitation.
11. It further submitted that the Applicant had previously appealed to this court which upheld the conviction and reviewed the sentence. In this regard, it placed reliance on the case of *John Kagunda Kariuki v Republic* [2019]eKLR where it was held that as the applicant's appeal had already been heard by the High Court, he could not return to the same court for review of his sentence but he was at liberty to make an argument for reduced sentence at the Court of Appeal.
12. It invoked Section 362 and 364 of the *Criminal procedure Code* and Article 165 of the *Constitution* of Kenya and argued that the powers of revision of the High Court were to be exercised only over the subordinate courts and not with respect to its own decisions. It added that a convicted person could not also appeal and seek a review of his sentence at the same time.
13. It pointed out that as this court had reviewed the Applicant's sentence on appeal, it lacked the jurisdiction to entertain an application for review of sentence in respect of the same matter again. It added that he was at liberty to approach the Court of Appeal. It was emphatic that the application herein lacked merit and ought to be dismissed.



14. 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.”
15. This court could not therefore fault the Trial Court for sentencing the Applicant to twenty (20) years imprisonment as that was lawful. Be that as it may, this court reduced his sentence to fifteen (15) years imprisonment on appeal. Notably, this court sentenced him to a lesser sentence than what was prescribed as the mandatory minimum in the *Sexual Offences Act* as the jurisprudence at the time he was sentenced allowed courts to exercise discretion during sentencing.
16. However, on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case *Joshua Gichuki Mwangi v Republic* [2022] eKLR which had reiterated the reasoning in the case of *Dismas Wafula Kilwake v 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.
17. 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.
18. With regard to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya), this court noted that it had addressed itself on the same while determining the Applicant’s appeal on its Judgment delivered on 26th September 2023 as it granted him the period between 31st January 2021 and 1st February 2021.

Disposition

19. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 28th February 2024 and filed on 6th March 2024 was not merited and the same be and is hereby dismissed.
20. It is so ordered.

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

J. KAMAU

JUDGE

