Chogo v Republic (Criminal Miscellaneous Application E034 of 2023) [2025] KEHC 9524 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9524 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION E034 OF 2023

JN KAMAU, J

JUNE 25, 2025

BETWEEN

RICHARD AIGA CHOGO ..... 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(2) 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 life imprisonment.

2. Being aggrieved by the said decision, he appealed at Kakamega High Court, HCCRA No 88 of 2017 where the court upheld his conviction and substituted his life sentence with thirty (30) years imprisonment.

3. On 14th August 2023, he filed a Notice of Motion application dated 21st December 2022 seeking a review of his sentence. He urged this court to consider Section 26(2) of the *Penal Code* and grant him a less severe sentence. He submitted that thirty (30) years was punitive, excessive and harsh considering his advanced age and his deteriorating health status. He pointed out that he was suffering from high blood pressure due to the long incarceration thus prayed for leniency.

4. He averred that he was arrested on 9th June 2014 and was convicted on 2nd September 2017 thus had spent a total of eight (8) years in custody. He pleaded with the court to consider Section 333(2) of the *Criminal Procedure Code* while reviewing his sentence.

5. He contended that he had undergone various spiritual programs such as Diploma in Biblical Studies from AFCM International Training Centre, Diploma in Theology from Emmaus Bible School among many others and that he was currently a church leader in Kisumu Maximum Protestant Church hence ready to be re-integrated back into the society.

6. His Written Submissions were dated 15th November 2024 and filed on 25th November 2024 while those of the Respondent were dated 27th December 2024 and filed on 7th January 2025. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

7. The Applicant pleaded with this court to consider reviewing his sentence through reduction, suspension or admission to a non-custodial sentence premised on his mitigating grounds of old age, terminal illness, rehabilitation and his remorsefulness. He said that he was an old man of sixty (68) years old who was a responsible man with a family. He added that he had undergone abdominal operation in 2024 and was still weak.

8. He placed reliance on Articles 25(c), 50(2)(p), 24(1)(e), 29(f) and 54 of the *Constitution* of Kenya, 2010, Sections 361(7), 362, 363, 364, 365, 366, 323,216, 333(2) and 329 of the *Criminal Procedure Code* Cap 765 (Laws of Kenya), Section 26(2) of the *Penal Code* Cap 63 (Laws of Kenya) and Paragraphs 3.2.3, 3.3, 3.3.1 and 3.3.5 of the *Judiciary Sentencing Policy Guidelines Revised 2023*.

9. He contended that he was a first offender and he was remorseful for the events that led to the commission of the offence. He asserted that he had served a total of seven (7) years in prison and had made exceptional progress towards rehabilitation and was therefore ready to be re-integrated in the community. He sought this court's leniency and urged it to consider the time he had spent in remand during trial and order that his sentence run from the date of his arrest.

10. On its part, the Respondent invoked Section 8(2) of the *Sexual Offences Act* and Section 329 of the *Criminal Procedure Code* and placed reliance on the case of *Benard Kimani Gacheru vs Republic*[2002]eKLR where the common thread was that a court would not alter a sentence unless the trial judge had acted upon wrong principles or overlooked some material factors.

11. It further relied on the case of *Republic vs 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. 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 vs 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 was its contention that the sentence that was meted on him by the High Court was lawful and this court could not review its own verdict but that he was at liberty to approach the Court of Appeal for reduction of the sentence. It argued that he had not demonstrated to this court why it should interfere with his sentence therefore his application lacked merit and should be dismissed.

13. It was, however, not opposed to his prayer under Section 333(2) of the Criminal procedure Code and asked the court to grant the same in the event the appellate court did not consider the same.

14. The Applicant herein was sentenced under Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* Cap 63A (Laws of Kenya). The said Section 8(2) of the *Sexual Offences Act* provides as follows: -

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

15. This court could not therefore fault the Trial Court for sentencing the Applicant to life imprisonment as that was lawful. In his appeal to wit, HCCRA No 88 of 2017, the High Court in Kakamega upheld his conviction and reviewed his sentence substituting the life imprisonment with a thirty (30) years imprisonment. At the time, courts were meting out lesser sentences than was prescribed in the *Sexual Offences Act* as there jurisprudence whereat courts exercised their discretion in meting out the sentences that were lower than what was prescribed in the *Sexual Offences Act*.

16. Notably, 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.

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. Going further, as the Applicant's sentence was now a definite sentence, 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)".

19. 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."

20. 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*).

21. The Charge Sheet herein showed that the Applicant herein was arrested on 9th June 2014. He was released on bond on 23rd June 2014. A reading of the appellate court's decision indicated that Majanja J (as he then was), rendered himself as follows:-

> "For the reasons I have set out, I uphold the conviction and quash the sentence of life imprisonment and substitute it with a sentence of thirty (30) years imprisonment from the date of conviction."

22. As his court was of equal status to this court, this court could not sit on appeal of his decision as he had stipulated as to when the Applicant's sentence ought to run from. He found it fit to consider the period that the Applicant had stayed in remand while his trial was ongoing as part of the sentence that the Applicant would serve. In the event the Applicant was aggrieved by this decision, the only option was for him to appeal the decision of Majanja J (as he then was) at the Court of Appeal.

Disposition

23. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 21st December 2022 and filed on 14th August 2023 was not merited and the same be and is hereby dismissed.

24. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF JUNE 2025

J. KAMAU

JUDGE