



**Mukangura v Republic (Miscellaneous Criminal Application
E008 of 2023) [2024] KEHC 3307 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E008 OF 2023**

**JN KAMAU, J
MARCH 19, 2024**

BETWEEN

KENNEDY MUKANGURA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

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 had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
2. He was tried and subsequently convicted by the Learned Trial Magistrate, Hon M. L. Nabibya, Senior Resident Magistrate and sentenced to life imprisonment.
3. Being dissatisfied with the said Judgement, he lodged Kakamega HCCRA No 168 of 2018 in which Ogola J upheld his conviction and reduced the sentence of life imprisonment to eighteen (18) years imprisonment.
4. He filed the application for review of his sentence herein for the reduction to the least possible sentence. He also urged the court to take into account the time he spent in remand since his arrest on 4th December 2017 in reviewing his sentence.
5. His Written Submissions were dated 9th October 2023 and filed on 19th January 2024 while those of the Respondent were dated 5th February 2024 and filed on 6th February 2024.

Legal Analysis

6. The Applicant averred that his application was premised on Section 26(2) of the [Penal Code](#), Article 50(2)(p) and Article 24(1)(e) of the [Constitution](#) of Kenya, 2010. He placed reliance on the cases of



Philip Mueke Maingi & 4 Others Petition No E017 of 2021, *Edwin Wachira & 9 Others* Petition No 97 of 2021 and *88 Prisoners Homemade Petition vs DPP & Prison* (eKLR citations not given) where the common thread was that the law has expressly provided discretion in meting out the minimum mandatory sentence under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006.

7. He pleaded with the court to exercise its inherent powers under Article 165(3)(a) and reduce his eighteen (18) years sentence to a least prescribed sentence. He further placed reliance on the *International Covenant on Civil and Political Rights* of 1966 which Kenya ratified in 1972 which stipulates that penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. He urged the court to mete out a non-custodial sentence pursuant to Section 4(1) and (2) of the *Probation of Offenders Act* Cap 64 Laws of Kenya.
8. He pointed out that he was a first offender and that he had served sufficient term in custody to meet the requirements of punishment, deterrence and rehabilitation which had transformed him to a person who no longer posed a threat to the public. He further relied on the case of *George Mwaura vs Republic* [2019] eKLR where the court reduced a forty(40) years sentence of the Appellant charged with murder to five (5) years imprisonment. It was his case that even persons on bond and/or bail lose their liberty and ought to benefit from Section 333(2) of the *Criminal Procedure Code*.
9. On its part, the Respondent herein submitted that the sentence imposed by Ogola J was appropriate and that the Applicant had not demonstrated any grounds to warrant any interference of his sentence.
10. In his decision, in the appeal lodged by the Applicant herein Kakamega HCCRA No 168 of 2018, Ogola J reduced the sentence of life imprisonment to eighteen (18) years imprisonment. He rendered himself as follows:-

“On sentence, this court has on strength of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR the authority to make a fresh sentence since the life sentence in the matter was arrived at as a result of the mandatory sections of the law. This Court therefore sets aside and vacates the life imprisonment given to the appellant and substitutes it with a term of Eighteen (18) years in jail.”

11. Notably, the Learned Judge allowed the Applicant’s appeal on reduction of sentence. As this court was of equal jurisdiction to his, it could not sit on appeal of his decision and/or review the same as far as the length of the sentence that ought to be meted to the Applicant herein was concerned.
12. Be that as it may, this court noted that the Learned Judge did not pronounce himself on the question of whether or not the period the Applicant stayed in remand as his case was ongoing ought to be taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
13. The said Section 333(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).



14. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Abamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
15. Further, Clauses 7.10 and 7.11 of 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.”
16. According to the Charge Sheet, the Applicant herein was arrested on 4th December 2017. He was released on bond of 120,000/= with one surety on 5th January 2018. He was subsequently convicted and sentenced on 7th November 2018. This court therefore found and held that the Applicant was in custody for one (1) month and one (1) day.

Disposition

17. For the foregoing reasons, the upshot of this court’s decision was that although the Applicant’s conviction and sentence of eighteen (18) years imprisonment was safe and the same be and are hereby upheld, his undated application for review of sentence was partially merited as his prayer pursuant to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) was allowed.
18. For the avoidance of doubt, it is hereby ordered and directed that the period the Appellant spent in custody being the days between 4th December 2017 and 5th January 2018 when he was arrested and released on bail respectively be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
19. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 19TH DAY OF MARCH 2024

J. KAMAU
JUDGE

