



**Okumu v Republic (Petition E009 of 2023 & Miscellaneous Criminal Application E003 of 2024 (Consolidated)) [2024] KEHC 2600 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2600 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
PETITION E009 OF 2023 & MISCELLANEOUS CRIMINAL  
APPLICATION E003 OF 2024 (CONSOLIDATED)**

**WM MUSYOKA, J**

**MARCH 15, 2024**

**BETWEEN**

**JOSEPH AGOSTINO OKUMU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant herein has filed 2 processes seeking more or less similar orders, the review or revision of his sentence.
2. The first in time is the petition, No. E009 of 2023, which he premises on section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. He argues that that provision was not applied in his case. He also cites the decisions in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J), where minimum sentences for sexual offences were declared unconstitutional. He pleads that he is elderly, at age 93, and sickly. The second in time, is the miscellaneous application, No. E003 of 2024, where he seeks review of the sentence, on grounds that the period spent in remand custody be considered, the fact of his great age and state of sickness, that it would be a shame and a curse for him to die in prison, an alternative punishment be considered, and lessons have been learnt.
3. I have not seen any responses to the 2 processes by the respondent.
4. The applicant did not file written submissions, instead he pleaded for mercy and leniency. The respondent filed written submissions, on 6<sup>th</sup> February 2024, of even date. It is pointed out that the sentence imposed on the applicant was mandatory, for the category of sexual offence that he had been convicted of, and that the High Court had declared such mandatory sentences, with respect to sexual offences, unconstitutional, in *Maingi & 5 others v Director of Public Prosecutions & another* [2022]



- KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J). It is also submitted that the applicant could benefit from section 333(2) of the [Criminal Procedure Code](#), for he had spent quite a considerable period of time in remand custody, before conviction and sentence.
5. Indeed, it is true that mandatory sentences, with respect to sexual offences, were declared unconstitutional by the High Court, in [Maingi & 5 others v Director of Public Prosecutions & another](#) [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J). That alone should be sufficient ground for review of the mandatory sentence imposed on the applicant. It is also true that the appellant should spent considerable period in custody, during his trial, and before he was convicted and sentenced. That period in remand, running from 1<sup>st</sup> September 2015 to 5<sup>th</sup> April 2016, being 7 months and 5 days, should have been reckoned in sentencing.
  6. The applicant has pleaded that his being elderly should be considered in review of sentence. He claims to be 93 years old. Old age per se should not be enough ground to exercise mercy on an offender such as the instant one. The victim of the sexual offence was a minor of 14. The applicant has spent 9 years in jail. If he is 93 years old now, he must have been 84 years old at the time the offence was committed. He was a sexual predator at 84 years of age. He had a wife. He preyed on a minor, who, no doubt, believed that she was dealing with a harmless grandfather. Such sexual pests of the age of the applicant should be kept well away from minor girls. At age 84, he should have known better. He should have been a better example to younger men. Ideally, no mercy should be extended to such a person. I saw him in court, extremely elderly, and pitiable, but that, by itself, is still no guarantee that he would not prey on minor girls, if mercy is extended to him.
  7. I will review the sentence herein, only on account of the pronouncements in [Maingi & 5 others v Director of Public Prosecutions & another](#) [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J), on the unconstitutionality of mandatory sentences for sexual offences. Although the applicant claims to be sickly, no medical report has been availed, but given his great age, and the shape I saw him in, when he appeared before me last, I shall give him the benefit of the doubt.
  8. The order that I shall give is that the sentence that the trial court imposed on the applicant, on 5<sup>th</sup> April 2016, in Busia CMCSO No. 130 of 2015, is hereby reviewed or revised, by way of being substituted with an order that the applicant is sentenced to the period already served, with the rider that upon his release from prison custody, he shall serve a 1 year probation order, under the Busia County Director of Probation and Aftercare Services, to whom he shall be released forthwith. It is so ordered.

**RULING DELIVERED, DATED AND SIGNED AT BUSIA ON THIS 15<sup>TH</sup> DAY OF MARCH 2024**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Mr. Joseph Okumu Agostino, the applicant, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Respondent.

