



REPUBLIC OF KENYA



**Ali v Republic (Criminal Revision E013 of 2023)  
[2024] KEHC 9044 (KLR) (25 July 2024) (Revision)**

Neutral citation: [2024] KEHC 9044 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CRIMINAL REVISION E013 OF 2023**

**OA SEWE, J**

**JULY 25, 2024**

**BETWEEN**

**SAID MAZERA ALI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the sentence passed in Sexual Offences Case No. 119 of 2018 in the  
Magistrate's Court at Kwale by Hon. Wambugu, SRM on 6th May 2021)*

**REVISION**

- 1] The applicant, Said Mazera Ali, was the accused person in Kwale Sexual Offence Case No. 119 of 2018. He 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. The offence was alleged to have occurred on the 2<sup>nd</sup> day of November 2018 at Kwale County. The victim was alleged to be a female child of the age of 14 years.
- 2] The applicant was, in the alternative, charged with indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*. He denied the allegations and, upon trial of the facts, the subordinate court found the applicant guilty of the substantive charge of defilement. He was convicted and sentenced to 5 years' imprisonment on 6<sup>th</sup> May 2021.
- 3] The applicant's single cause for complaint was that the period spent by him in pre-conviction custody was not taken into consideration. Hence, the applicant relied on Article 50(2)(q) of the Constitution and Section 333(2) of the *Criminal Procedure Code* and prayed that his pre-sentence detention period be taken into account.
- 4] The applicant urged orally on 30<sup>th</sup> May 2024. In his submissions, the applicant stated that he spent 2 years and 6 months in remand. He prayed that the period be taken into account as part of his custodial sentence.



- 5] On her part, counsel for the respondent opposed the application. Her argument was that the sentence meted on the applicant was akin to a slap on the wrist, granted the seriousness of the offence. She pointed out that, since the offence carries a minimum sentence of 20 years, the applicant should be left to complete his term without further interference.
- 6] Article 50(2)(q) of the Constitution pursuant to which the applicant approached the Court stipulates that:
- (2) Every accused person has the right to a fair trial, which includes the right—
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
- 7] In the same vein, Section 362 of the Criminal Procedure Code, recognizes that:
- The High court may call for and examine the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court."
- 8] In that regard, Section and 364(1)(b) of the Criminal Procedure Code stipulates that:
- In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may ... in the case of any other order other than an order of acquittal alter or reverse the order."
- 9] Accordingly, the Court called for the record of the lower court, namely, Kwale Chief Magistrate's Court Sexual Offence No. 119 of 2018: *Republic v Said Mazera Ali*. The record of the lower court confirms that the applicant was indeed charged, tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The record further shows that the applicant was then given an opportunity to express himself in mitigation before the sentence was pronounced. The learned magistrate also called for a pre-sentence report and took time to consider all the relevant factors, including the prevalence of the offence within the jurisdiction of her court. In particular, the lower court took into account that the applicant was 19 years old when the offence took place.
- 10] It is trite law that sentence review, even on appeal, ought not to be easily done; and that certain factors must be present to warrant such interference. Some of these factors were discussed in the case of *Ogalo s/o Owuora v Republic* [1954] 21 EACA 270, as follows:
- ...The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic* [1950] 18 EACA 147 , it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."



11] Similarly, in *Bernard Kimani Gacheru v Republic* [2002] eKLR, the Court of Appeal restated that:

It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist

12] In the circumstances, the sentence of 5 years was lenient. The only issue to consider is whether the applicant's pre-sentence detention period to be taken into account in compliance with Section 333(2) of the *Criminal Procedure Code*. That provision states:

(2) 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."

13] Similarly, in the revised Judiciary Sentencing Guidelines, it is stated, under Clauses 2.3.18 and 2.3.19, that:

2.3.18 Section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders – for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.

14] Thus, in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR the Court of Appeal held:

...By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced



proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19<sup>th</sup> June 2012.

- 15] The record of the lower court shows that the applicant was arrested on 2<sup>nd</sup> November 2018 and that he remained in custody throughout his trial. There being no indication in the sentencing notes of the trial court that the applicant's pre-sentence detention period was taken into account, I am satisfied that he is entitled to consideration for purposes of Section 333(2) of the *Criminal Procedure Code*.
- 16] In the result, I find merit in the application filed herein on 13<sup>th</sup> December 2023. The same is hereby allowed and an order made that, in reckoning the applicant's 5-year imprisonment, the period he spent in custody between the date of his arrest of 2<sup>nd</sup> November 2018 and the date of 6<sup>th</sup> May 2021 when his sentence was pronounced by the lower court.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**OLGA SEWE**

**JUDGE**

