



**Muema v Republic (Criminal Revision E027 of 2024)  
[2024] KEHC 11548 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11548 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL REVISION E027 OF 2024**

**FR OLEL, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**PETER MUENDO MUEMA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant was charged In Kithimani SPM CR (SO) Case No 10 of 2018, with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act* No 3 of 2006 and in the alternative was charged with the offence of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. After trial he was convicted for the offence of defilement and sentenced to serve 10 years imprisonment. The applicant filed this review application on 26<sup>th</sup> February 2024 and specifically sought that the time spent in remand before conviction and sentence, be factored in the sentence in line with section 333(2) of the *Criminal Procedure Act*.
2. The applicant chose to rely on his affidavit filed in support of his application and oral submissions made in court where he restated what was in his affidavit. The respondent, through Prosecution counsel Ms Otulo did not oppose this application and stated that the court in its discretion could determine the issue raised after considering the proceedings in the primary file.

**B. Analysis of Law**

3. I have considered the application as well as the response by the Prosecution counsel.



4. The powers of the High court in revision are contained in Section 362 through to 366 of the *Criminal Procedure Code* (cap.75). Section 362 specifically provides as follows: -

“The High Court may call for and examine the record 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”.

5. What the High Court can do under its revision jurisdiction is stated under Section 364 of the *Criminal Procedure Code* Cap 362, which states as follows: -

“(1) in the case of a proceeding in a 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 –

(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

(b) In the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

6. Section 333(2) of the *Criminal Procedure Code* provides that;

“Subject to the provisions of section 38 of the penal code, 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 sub section (1) has prior, to such sentence shall take into account of the period spent in custody”



7. The provisions of Judiciary sentencing policy Guidelines also state that;

“The provision’s 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 has been in custody during 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 the offender, the court must take into account the period in which the offender was held in custody during the trial.”

7. The applicant has a legitimate expectation that during trial he is subject to equal treatment before law and is accorded a fair hearing, which includes his right to have all relevant provisions of the law to be applied in his favour where the circumstances allow. See Abmad Abolfathi Mohammed & Another vs Republic (2018) eKLR & Bethwel Wilson Kibor vs Republic (2009) eKLR.

8. The applicant was arrested on 9<sup>th</sup> April 2018 and arraigned before court on the following day. He was granted bond of Kshs.200,000/= with one surety, but he was unable to raise the same thus spent the entire trial period in custody. On 2<sup>nd</sup> February 2021, he was sentenced to serve a term of ten (10) years imprisonment having been convicted for the offence of defilement under section 8(1) as read with section (3) of the Sexual Offences Act, No 3 of 2006.

9. I have had a chance to peruse the trial file and specifically the sentencing proceedings of 2<sup>nd</sup> February 2021, I do note that when the trial magistrate sentenced the applicant, he specifically noted that the applicant had been in custody from 2018, and subsequently proceeded to sentence him to serve a period of 10 years imprisonment. The applicant’s contention that the period in remand was not considered is therefore not correct. The penalty of the offence of defilement under section 8(3) of the Sexual Offences Act, carries a minimum sentence of 20 years imprisonment and I do find that the sentence proffered was appropriate considering that the Applicant had already spent three years in remand. There is therefore no basis upon which I can exercise my discretion under section 333(2) of the Criminal Procedure Code, Cap 362 to have the matter reconsidered afresh. The applicant’s only option, if dissatisfied was to file an Appeal as against the said sentence.

10. This application therefore has no merit and the same is dismissed.

12. It is hereby so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 30<sup>th</sup> day of September 2024.

In the presence of: -

Applicant present from Machakos main prison

Mr. Mongare for ODPP

Susan/Sam Court Assistant

