



**Otengo v Republic (Miscellaneous Criminal Application E013 of 2023)
[2024] KEHC 11384 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E013 OF 2023**

**JN KAMAU, J
SEPTEMBER 30, 2024**

BETWEEN

AINEA KISIA OTENGO 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(3) 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 on the main charge and sentenced to fifteen (15) years imprisonment.
2. On 20th March 2023, he filed Notice of Motion application dated 8th March 2023 seeking a review of his sentence. He prayed that the period that he stayed in custody while the trial was ongoing between 11th October 2019 and 26th September 2022, when he was arrested and convicted respectively, be taken into account pursuant to Section 333(2) of the *Criminal Procedure Code*.
3. He did not file any written submissions. The Respondent was not opposed to the said application and did not therefore file any Written Submissions.

Legal Analysis

4. Notably, Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) 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).

5. 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.”
6. 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 Abamad Abolfathi Mohammed & Another v Republic [2018] eKLR.
7. Although the Applicant indicated that he was arrested on 11th October 2019 and convicted on 26th September 2022, the Charge Sheet herein showed that he was arrested on 19th October 2019 and the proceedings showed that he was convicted on 20th June 2022 and sentenced on 19th September 2022.
8. Notably, a further reading of the proceedings did not show when exactly the Applicant was released on bond after the same was granted on 22nd October 2019 after he took his plea. He was present on the first hearing on 16th December 2019. He was absent on 5th March 2020 when the matter came up for further hearing whereupon a warrant of arrest against him was issued. He was arrested with the assistance of his surety and presented in court on 19th August 2020 when his bond was cancelled.
9. As it was not exactly clear to this court how much time he spent in remand before 16th December 2019, if at all, it found it prudent to calculate the said period from the date he was re-arrested on 19th August 2020. He thus spent one (1) year and twenty nine (29) days before he was sentenced.
10. A reading of the Trial Court’s Sentence showed that it did not take into consideration the time he spent in remand before sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

11. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 8th March 2023 and filed on 20th March 2023 was merited and the same be and is hereby allowed.
12. It is hereby directed that the time the Applicant spent in custody between 19th August 2020 and 18th September 2022 be taken into account while computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
13. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF SEPTEMBER 2024

J. KAMAU

JUDGE

