



**Francis v Republic (Miscellaneous Criminal Application E027 of 2024)
[2024] KEHC 13471 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E027 OF 2024**

**JN ONYIEGO, J
OCTOBER 30, 2024**

BETWEEN

BRIAN KILONZI FRANCIS APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein was charged and convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to 15 years' imprisonment.
2. The applicant has approached this court with a chamber summons seeking for orders that his sentence be deemed to have started from the time he was arrested and that he be present during the hearing of the application. The application is supported by the annexed affidavit of the applicant deponing that he has been in prison for a period of two years and five months. That during that period, he has learnt skills and attended different courses. He stated that it is not only mete but also just that this court considers the time that he had spent in lawful custody pending hearing and determination of his case.
3. In response, Mr. Kihara for state did not oppose the application.
4. From the above, I form the view that the main issue for determination is whether the applicant is entitled to review of sentence under Section 333(2) of the [Criminal Procedure Code](#).
5. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. It therefore follows that by resentencing an applicant/petitioner, the High Court would simply be enforcing its supervisory jurisdiction over subordinate courts as provided for under article 165 (6) & (7) of the [Constitution](#).



6. Section 333(2) of the *Criminal Procedure Code* provides: -

“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, been held in custody, the sentence shall take account of the period spent in custody.”

7. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR where the Court of Appeal held that: -

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. 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 19th June 2012.”

[Also see the Court of Appeal in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR].

8. In the same breadth, The *Judiciary Sentencing Policy Guidelines* 2023 does recognize the applicability of Section 333(2) as follows:

“The provision 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”.

9. The applicant herein was arrested on 16.11.2020 and convicted on 29.03.2022. Notably, the applicant spent a period of 1 year, 4 months and 13 days in a lawful custody which in my view ought to be accounted for. As such, I opine that the said period shall be deducted from the applicant’s 15 years sentence calculated from the date of sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF OCTOBER 2024

J. N. ONYIEGO

JUDGE

