



**Omukuyia v Republic (Miscellaneous Criminal Application
E059 of 2023) [2024] KEHC 13533 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E059 OF 2023**

JN KAMAU, J

OCTOBER 29, 2024

BETWEEN

JOHN OKANG'A OMUKUYIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) 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 of the main charge and sentenced to fifteen (15) years imprisonment.
2. On 16th October 2023, he filed Notice of Motion application dated 16th October 2023 seeking a review of his sentence. He prayed for a least severe sentence and urged the court to consider Section 333(2) of the Criminal Procedure Code while reviewing his sentence.
3. He relied on Articles 24(i) and (e), 27(1) and (2), 29(f) and 50(2)(p) of the [Constitution](#) of Kenya, 2010 and placed reliance on the case of [Ahmed Abolfathi Mohammed & Another vs Republic](#) [2018] eKLR where it was held that sentence ought to run from the date of arrest as per Section 333(2) of the [Criminal Procedure Code](#).
4. When this matter was mentioned on 24th July 2024, this court notified him that on 12th July 2024, the Supreme Court directed that there would be no further reduction of sentences of defilement cases. He abandoned his prayer for a review of the sentence and chose to proceed with prayer under Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya) only.
5. He did not file any Written Submissions. The Respondent was not opposed to the said application and did not therefore file any written submissions. The Ruling herein is therefore based on his affidavit evidence.



Legal Analysis

6. Section 333(2) of the *Criminal Procedure Code* 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)”.

7. 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.”

8. 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 *Ahamad Abolfathi Mohammed & Another vs Republic* (Supra).

9. The Charge Sheet herein showed that the Applicant herein was arrested on 21st August 2019. He was sentenced on 10th March 2020. He thus spent six (6) months and sixteen (16) days in custody before he was sentenced.

10. A reading of the Trial Court’s Sentence showed that it did not take into account the time that he spent in remand before sentencing him. 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 7th October 2023 and filed on 16th October 2023 was merited with regard to his prayer pursuant to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) only.

12. For the avoidance of doubt, it is hereby ordered and directed that the period the Applicant spent in custody between 21st August 2019 and 9th March 2020 be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

13. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF OCTOBER 2024.

J. KAMAU

JUDGE

