



**Koti v Republic (Criminal Revision E165 of 2022)  
[2024] KEHC 13256 (KLR) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13256 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL REVISION E165 OF 2022  
FR OLEL, J  
OCTOBER 28, 2024**

**BETWEEN**

**KIIO KOTI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant was charged with the offence of Defilement, contrary to provisions of Section 8(1) as read with section 8(3) of the *Sexual offences Act* 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. The suit was heard on merit and the Applicant eventually convicted on the alternative count of committing an indecent Act with a child and sentenced to serve ten (10) year imprisonment term.
2. The applicant filed this application dated 29.07.2022, where he sought for orders that the court be pleased to review his sentence and consider the fact that he spent a period of one year and ten months in custody , which period was not factored in during sentencing. He was a first offender and was remorseful for the offence committed. Further he had undertaken multiple prison-based reform programs including carpentry and discipleship. The Applicant further relied on the case of *Abamad Abolifab Mobammed & Another v Republic* (2018) eKLR and the *Judiciary sentencing policy* all of which provided that it was just and proper for the trial court to consider the period spent in custody during time of sentence.
3. The respondent, through Prosecution counsel Mrs. M Otulo did not oppose this application and left it for the court to determine the same.



## B. Analysis of Law

4. I have considered the application as well as the response by the Prosecution counsel.
5. 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”.
6. 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.”
7. 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”

8. 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.”

9. 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 favorable where the circumstances allow. See [Ahmad Abolfathi Mohammed & Another v Republic](#) (2018) eKLR & [Bethwel Wilson Kibor v Republic](#) (2009) eKLR.

10. The applicant as per the charge sheet was arrested on 28<sup>th</sup> August 2017 and arraigned before court on the following day. He was granted bond of Kshs.200,000/= with a surety of a similar amount, which was later reduced to bond of Kshs.100,000/= with a surety of a similar amount. The applicant did not raise the bond amount and spent the entire period of trial in custody, until he was sentenced on 21.06.2019, which is a period of about 22 months.

11. The applicant under Article 27 of the [constitution of Kenya](#) has the right to equal protection and right to equal benefit of the law, which includes full and equal enjoyment of all rights and fundamental freedoms. The provision’s to section 333(2) of the *criminal procedure code* also obligates the court to take into account the time already served in custody if the convicted person has been in custody during trial.

### **C. Disposition**

12. This application therefore has merit and it is allowed.

13. The sentence passed by Hon E.W Wambugu (SRM) dated 21.06.2021 in Kithimani SO Case No 30 of 2017 is hereby reviewed. The period spent in custody by the Applicant of one (1) year and ten (10) months will be included in the ten (10) years sentence passed.

14. The Applicants sentence will run from 28<sup>th</sup> August 2017, when he was arrested.

15. It is hereby so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF OCTOBER, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 28<sup>TH</sup> DAY OF OCTOBER, 2024.**

In the presence of: -

Applicant present from Nairobi West prison

Mr. Mangare for ODPP



Susan Court Assistant

