



**Ismael v Republic (Miscellaneous Criminal Application E001 of 2024)
[2024] KEHC 16072 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2024
JN ONYIEGO, J
DECEMBER 19, 2024**

BETWEEN

DAUD MAALIM ISMAEL 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. It was alleged that on 06.03.2022 within Mandera County, he intentionally caused his genital organ to penetrate the genital organ of NHA, a girl aged 7 years old.
2. He was convicted and thereafter sentenced to serve 30 years' imprisonment.
3. Being aggrieved with the said conviction and sentence, he filed Criminal Appeal No E001 of 2023, seeking this court to quash his conviction and set aside his sentence. Upon consideration of the appeal, this court confirmed and upheld his conviction but reduced his sentence to 20 years' imprisonment.
4. Undeterred, the applicant approached this court with an application dated 25.10.2024 seeking for orders that:
 - i. Spent.
 - ii. The Honourable Court be pleased to grant revision of his sentence by considering the time spent while in remand custody.
5. The application is supported by the annexed affidavit of the applicant sworn on 25.10.2024 in which he averred that he was charged before the Chief Magistrates court at Mandera vide S.O. Criminal Case No E008 of 2022 and thereafter, convicted and sentenced to 30 years' imprisonment. That upon being dissatisfied with determination by the trial court, he appealed to the High Court vide Criminal Appeal



- No E001 of 2023 where conviction was upheld but sentenced reduced to 20 years' imprisonment. That the court did not take into account the time spent in custody during his trial. He also averred that he did not lodge an appeal to the Court of Appeal and therefore, he prayed that his application be allowed.
6. The application was canvassed orally whereby the applicant reiterated that he sought for the court to consider the time spent in custody and therefore revise his sentence accordingly. The respondent on the other hand opposed the application urging that the applicant did not deserve the same in the given circumstances.
 7. Having perused the application and the submissions by the parties, I find 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*.
 8. 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.
 9. It bears repeating that, the High Court has the jurisdiction under Article 165 (3) of the *Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the *Constitution*. Of importance too is the provision of article 50(2)(p) of the *Constitution* which provides for the benefit of the least severe of the prescribed punishments for an offence. [See *Stephene Kimathi Mutunga v Republic* [2019] eKLR ; *Michael Kathewa Laichena & another v Republic* [2018] eKLR].
 10. Similarly, 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."
 11. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody.
 12. The provision of section 333(2) of the *Criminal Procedure Code* was the subject of the decision of the Court of Appeal in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR where the court expressed itself as follows: -

"By provision to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

[Also see *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR].
 13. According to The *Judiciary Sentencing Policy Guidelines*, it is trite that the proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to consider the time already served in custody if the convicted person had been in custody during the trial. Thus, 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.

14. In the instant application, the applicant was arrested on 06.03.2022, arraigned before the court on 08.03.2022 and sentenced on 25.10.2023. Of importance to note is the fact that at the time of sentencing, the trial magistrate noted that he had taken notice of the time the applicant spent in custody before bond. The forgoing notwithstanding, this court is alive to the fact that it is not enough for a trial court to state that it has taken notice of the time spent in custody without literally taking account of the same while sentencing. It therefore follows that the period spent in custody is a legal entitlement of the applicant.
15. I have considered the application and all the information available. It is thus clear that upon arrest, the applicant stayed in custody till 04.10.2022 when he was granted bond. In total therefore, he spent 6 months and 29 days in custody pending his trial. As such, it is my finding that the period of 6 months and 29 days be factored in his sentencing.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE

