



**Ali v Republic (Criminal Appeal E029 of 2024)
[2024] KEHC 15991 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E029 OF 2024
JN ONYIEGO, J
DECEMBER 18, 2024**

BETWEEN

MUSTAFA HASSAN ALI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Mugendi Nyaga(SRM) delivered on 01.11.2024 Wajir S.O case No. E011 of 2022)

JUDGMENT

1. The appellant was charged with the offence of attempted defilement contrary to section 9 (1) as read with section 9(2) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that, on 08.06.2022 at (particulars withheld) Location in(particulars withheld) Sub County within Wajir County he intentionally attempted to cause his penis to penetrate the anus of AHA, a child aged 8 years.
2. In the alternative, he 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 particulars of the alternative charge were that on 07.06.2022 at (particulars withheld) Location in (particulars withheld)Sub County within Wajir County he intentionally touched the buttocks/anus of AHA, a child aged 8 years with his penis.
3. He pleaded not guilty to the charge and the matter proceeded to full trial.
4. Prosecution called five (5) witnesses in its endeavour to prove its case. At the close of their case, the court found that the appellant had a case to answer and was consequently placed on his defence. He elected to give unsworn testimony and called three witnesses.
5. At the end of the trial, he was convicted of the main charge and sentenced to serve 5 years' imprisonment. Subsequently, he lodged this appeal through what is referred to as mitigating grounds



with the major ground being that, the trial court did not consider the period spent in remand custody pursuant to Section 333(2) of the CPC.

6. When the matter came up for hearing, he informed the court that he wished the court to consider the time that he spent in prison while awaiting trial which the trial magistrate failed to consider. The State did not object and urged the court to take into account that period as it was not considered.
7. The appeal herein is not challenging conviction but the extent of sentence by not considering the period spent in remand custody. A perusal of the lower court record does confirm that the trial court did not consider the same.
8. Section 333(2) of the Criminal Procedure Code (Cap 75 Laws of Kenya) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

9. In the case of Abolfathi Ahamad and Another vs Republic (2017) eKLR the Court of Appeal emphasized that the time spent in custody while awaiting trial should be taken into account to reduce the sentence which is ultimately passed on the accused. The court stated that it is not enough to state that the period spent in custody has been considered. It must be shown that the time is taken into account to reduce the sentence imposed.
10. I have perused the record of the lower court. It is evident that the appellant was arrested on 24.06.2022 and arraigned in court on 27.06.2022. He was granted bond of Kes. 200,000/- with one surety of a similar amount but he failed to raise the amount thus he stayed in custody throughout the hearing of the matter. He was thus sentenced on 01.11.2022 hence the period spent in custody was four months and seven days.
11. In view of the above holding, the sentence imposed on the appellant shall be reduced by four months and 7 days when computing the same being the period spent in remand custody.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2024.

J. N. ONYIEGO

JUDGE

