



**Paul v Republic (Miscellaneous Criminal Application
E010 of 2022) [2023] KEHC 3674 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION E010 OF 2022**

GL NZIOKA, J

APRIL 27, 2023

BETWEEN

DENNIS NJUGUNA PAUL APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged vide Criminal Case No 1055 of 2010 in the Chief Magistrate's Court at Naivasha, with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* and an alternative charge of committing an indecent assault contrary to section 11 (1) of the *Sexual Offence Act*. The particulars of each count are as per the information.
2. The applicant pleaded not guilty and the case went to full hearing. At the end of trial, he was convicted and sentenced to serve a term of twenty-five (25) year imprisonment.
3. However, by an application filed on February 22, 2022 the applicant is seeking that, the court considers pursuant to provisions of section 333 (2) of the *Criminal Procedure Code*, the period he was in custody during trial and factor it in the sentence. The application is supported by the grounds thereto and his affidavit where he averred that the learned trial Magistrate did not consider the subject period of one (1) year eight (8) months he spent in custody.
4. The Respondent was not opposed to the application and left it to the court. Having considered the application, I find that, basically what the applicant is seeking for the implementation of section 333(2) of the *Criminal Procedure Code*.
5. In that regard, the trial court record reveals that, he was arrested on May 7, 2010 and arraigned in court on May 10, 2010. The committal warrant in the trial court file indicates that he was in custody from May 10, 2010 to February 18, 2011 when judgment was delivered. He was sentenced and committed to jail on February 18, 2011. As such he was in custody for a period of eight (8) months and eight (8) days.



6. The trial court's record shows that, before pronouncing the sentence the Hon Trial Magistrate stated that the mitigation by the applicant was considered. In the subject mitigation, the accused stated "I ask for leniency. My mother is single and I support her".

7. It is clear therefore that, the Hon Trial Magistrate did not consider the period the applicant was in custody. The provisions of section 333 (2) of the *Criminal Procedure Code* states: -

"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"

8. Similarly, the Court of Appeal in the case of; *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR stated 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...."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(s) 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."

9. Therefore, pursuant to the aforesaid, I allow the application to the extent that the sentence runs from May 10, 2010.

10. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 27TH DAY OF APRIL, 2023.

GRACE L NZIOKA

JUDGE

In the presence of:

Appellant present in person, in court virtually

Mr Atika for the Respondent

Ms Ogutu: Court Assistant

