



**Musyoka v Republic (Criminal Miscellaneous Application  
E042 of 2022) [2023] KEHC 3602 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3602 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL MISCELLANEOUS APPLICATION E042 OF 2022**

**FR OLEL, J  
APRIL 25, 2023**

**BETWEEN**

**DANIEL KITHIKI MUSYOKA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. The petitioner was charged and convicted for the offence of defilement contrary to section 8(1) as read together with section 8(4) of the *Sexual offences Act* No 3 of 2006. After trial the applicant was sentenced to serve Fifteen (15) years imprisonment by a judgment dated June 8, 2022. The applicant subsequently filed this application on June 28, 2022 seeking review of his sentence on the basis that the trial magistrate did not consider the time he spent in remand which was a period of 2 years , 8 months . He stated that he was arrested on October 1, 2020 and convicted and sentenced on June 8, 2022.
2. The applicant chose to rely on the affidavit supporting his application. In his submissions before the court he restated that his remand period was not considered and by dint of provisions of section 333(2) of the criminal procedure code, article 23 and 165(1) & (3) of the *Constitution of Kenya* the court had the powers to intervene.
3. The respondent, through Prosecution counsel Mr Jamsumba did not object to the said application and submitted that if based on the trial court judgment the period in remand was not considered the court could grant the prayers sought.

**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 5, 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 defense. 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. Though the applicant did not appeal as against his sentence this court has taken into consideration the finding in the case of *Vincent Sila Jona & 87 others v Republic* (2021) eKLR constitutional and Human rights Division Petition No 15 of 2020 where Justice GV Odunga made a declaration that courts are enjoined by section 333(2) of the *Criminal Procedure Code* to take into account the period spent in custody and that the said provision; section 333(2) applies to both sentencing and resentencing. The said judgment also stated that in cases of review the court would consider them on case to case basis.
8. The appellant by virtue of provisions of article 27(1) of the *Constitution of Kenya, 2010* he has legitimate expectation to be treated equally before law and have equal protection and benefit of the law.



9. I have perused the lower court file and note that the appellant did not file and appeal as against his conviction and or sentence.
10. I find that this is an application where the courts discretion can be exercised in favour of the applicant. Though the applicant says he was in custody from October 1, 2019 to June 8, 2022 the court record shows that he was released on cash bail of Kshs 100,000/= on 17/4/2020. The applicant later skipped court sessions and warrants of arrest were issued as against him on April 17, 2020. He was arrested and presented in court on July 26, 2021 when he was remanded in custody until his case was heard and determined on June 8, 2022. The period in custody was from October 2019 to April 2020 (5 months) and again from July 26, 2021 to June 8, 2022 (11 months).
11. I find this application is merited and hereby invoke provision of section 333{2} of the Criminal Procedure Code and order that the time the applicant spent in remand as tabulated above being 16 months (one year and four months) be included and computed as part of his sentence.
12. It is hereby so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF APRIL 2023.**

**RAYOLA FRANCIS**

**JUDGE**

Delivered on the virtual platform, Teams this April 25, 2023.

In the presence of;

.....for the Applicant

.....for Respondent

.....Court Assistant

