



**Awechi v Republic (Miscellaneous Criminal Application
E045 of 2022) [2023] KEHC 3944 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E045 OF 2022**

JN KAMAU, J

APRIL 24, 2023

BETWEEN

ANTONINA AWECHI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The applicant herein was tried and convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006. She was sentenced to fifteen (15) years imprisonment.
2. Being dissatisfied with the said decision, she lodged an Appeal at the High Court being HCCRA No 73 of 2019, where Cherere J upheld the conviction and substituted the fifteen (15) years sentence with eight (8) years' sentence from March 14, 2018 when she had been sentenced.
3. On April 19, 2022, she filed this present application for review of the sentence pursuant to section 333(2) of the *Criminal Procedure Code*. In her Affidavit in support thereof, she urged this court to consider the three (3) months she had spent in remand custody as part of the sentence served, a fact that she reiterated in her Written Submissions that were filed on February 16, 2023.
4. She submitted that the issue of the mandatory nature of a sentence as provided for by section 8(1) (4) as read with section 3 and 7 of the *Penal Code* was canvassed in the case of *Christopher Ochieng v Republic* [2008] KLR CRA No 202 of 20811 and appreciated in the famously known landmark ruling declared by the Supreme Court (sic). She added that the aforesaid sentiments were shared by "The Kenya Judiciary Sentencing Policy Guidelines" in regard to the requirement of section 333(2) of the *Criminal Procedure Code*.



5. She asked this court to consider that she was arrested at the age of fifty six (56) years and was now aged sixty three (63) years, having spent a period of seven (7) years in custody. She pointed out that she had been a widow who was struggling with life and that the Complainant accused her due to jealousy and hatred because of her properties. She averred that her incarceration had separated her from her children who were in need of the properties. She added that her son passed away while she was in jail.
6. She asserted that she was a first offender and had been rehabilitated and reformed. She prayed for a second chance as her family was ready to facilitate her reformation and to restore the reconciliatory links with the complainant.
7. She further stated that she had been disciplined and had been rated among the best prisoners. She also said that she had trained in various courses in Bronze Level-Completion of six (6) sessions of Prison Project Philip, Introduction to Hygiene, Liquid Soap making, Hair Shampoo, Fabric softener and Bar Soap and the Prisoner's Journey. She believed that the skills she had acquired would enable her integrate well back to society, get a legal earning and live a crime free life.
8. The respondent filed its Written Submissions dated December 13, 2022 on even date. It asserted that there was overwhelming evidence against the Applicant herein and that the sentence that was meted on her was lenient in the circumstances. However, it was not opposed to her application as it conceded that she was in remand during the entire period of her trial. It pointed out that she was arraigned in court on December 28, 2017 and was sentenced on March 14, 2018. It thus urged the court to consider the period she spent in custody.

Legal Analysis

9. In her Written Submissions, the Applicant referred to the Ruling of the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. The said case was not applicable herein. Notably, on July 6, 2021, the Supreme Court gave guidelines in the case of *Francis Karioko Muruatetu & another v Republic* (Supra) to the effect that the said decision was only applicable in murder cases under sections 203 and 204 of the *Penal Code*.
10. The above notwithstanding, this court noted that the applicant's application was brought pursuant to the provisions of section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya). The consideration of the said provision was not dependent on how reformed an applicant had been but rather it was an entitlement and/or accrued to an applicant who was able to demonstrate that the trial court did not consider the period that he or she applicant spent in custody while trial was being conducted. Such period could be from the date of arrest to the date of release on bond or from the date of release of bond to the date when the bond was cancelled or from the date of arrest to the date of conviction, which period had to be taken into account to ascertain how much time such an applicant would remain incarcerated in prison.
11. Notably, Section 333(2) of the *Criminal Procedure Code* provides that:-

“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” (emphasis court).



12. The requirement under with section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR.
13. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines provide that: -
- “The proviso 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 had been in custody during the 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 an offender, the court must take into account the period in which the offender was held in custody during the trial.”
14. Having said so, this court noted that Cherere J pronounced herself on the date when the aforesaid sentence was to start running. She rendered herself as follows:-
- “In the end, I uphold the conviction and substitute the 20 years’ sentence with 8 years’ sentence from March 14, 2018 when the appellant was sentenced (emphasis court).”
15. Notably, this court’s hands were tied by the learned judge’s pronouncement of when the applicant’s sentence was to commence. As the learned judge was of equal and competent jurisdiction as this court, this court could not purport to review and/or vary and/or sit on appeal on her decision. As she had since left the jurisdiction of this court and could not therefore review her orders, if at all there was an error, the only option that was left to the applicant herein was to appeal to the Court of Appeal if she was dissatisfied with her decision.

Disposition

16. For the foregoing reasons, the upshot of this court’s decision was that the applicant’s application for review of sentence that was lodged on April 19, 2022 was not merited and the same be and is hereby dismissed.
17. It is so ordered.

DATED and SIGNED at KISUMU this 20th day of April 2023

J. KAMAU

JUDGE

DATED and DELIVERED at KISUMU this 24TH day of APRIL 2023

M. S. SHARIFF

JUDGE

