



**KWK v Republic (Criminal Miscellaneous Application
068 of 2022) [2023] KEHC 18124 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL MISCELLANEOUS APPLICATION 068 OF 2022**

**FR OLEL, J
MAY 25, 2023**

BETWEEN

KWK APPLICANT

AND

REPUBLIC RESPONDENT

RULING

A. Introduction

1. The applicant was charged and convicted of the offence of Incest contrary to section 20 (1) of the *Sexual offences Act* No 3 of 2006. He was subsequently sentenced to serve Ten (10) years imprisonment on July 7, 2022. The applicant filed this undated petition on September 14, 2022 and sought for orders that pursuant to provisions of section 333(2) of the *criminal procedure Act*, this court be pleased to review the sentence and consider the period spent in remand as allowed by law. He further stated that he was in remand for a period of nine (9) months which he prayed be factored in the sentence.
2. The respondent, through state counsel Mr Mangare did not oppose the said application and urged the court could look at the file and make relevant orders.

B. Analysis of Law

3. Section 333(2) of the criminal procedure code specifically provides as follows: -

“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 on which it was pronounced, except where otherwise provided in the code”.

“Provided that where the person sentenced under sub section (1) has prior to such sentence shall take account of the period spent in custody”.



4. It is clear from this provision that the law requires the trial court to consider and take into account the period the convict has spent in custody while sentencing.

5. In the case of *Bethwel Wilson Kibor Vs Republic* {2005} KLR , the court stated that ;

“By proviso to section 333(2) of the criminal procedure code where a person sentenced has been held in custody prior to such 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 forgoing, we are satisfied that the appellant has been sufficiently punished. We therefor 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.

6. According to, the judiciary sentencing policy guidelines;

“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 has been in custody during trial. Failure to do so impacts on the overall period of detention which may result in excessive punishment that is not proportional to the offence committed. In determination the period of imprisonment that should be served by the offender, the court must take into account the period in which the offender was held in custody during trial.

7. Section 333(2) of the *CPC* creates an obligation on the court to take into account the time spent in custody and its purpose is to prevent subjecting a person to more severe sentence than prescribed in law. Accordingly, the section pertains to fair trial and justice. Failure to give full effect of this section will lead to a violation of the applicants right as enshrined in article 50(2)(q), and article 27(1) and (2) of *the constitution* of Kenya 2010. This court must give effect to these provisions to give effect to the law. Article 165(6) of *the constitution* of Kenya 2010, also allows the high court to exercise revisionary power over the subordinate court’s and thus where there is an error of law, the court can intervene and correct the same.

8. The appellant was charged on October 5, 2021. The trial took approximately nine months. Judgement was read on June 21, 2022 and sentence handed on July 7, 2022. The period spent in custody was thus nine (9) months as he was never released on bond during the trial period.

9. In light of the above I do review the applicant’s sentence and direct that the period of nine (9) months when he was in remand be included as part of his sentence of 10 years handed down on July 7, 2022 In Kithimani SPM CR (S.O.A) No E053 of 2021.

10. It is so ordered.

Ruling written, dated and signed at Machakos this 25th day of May, 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 25th day of May, 2023.

In the presence of: -

Mr Mangare for State



Applicant present

Court assistant

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