



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Republic (Criminal Appeal 4 of 2020)
[2023] KEHC 21274 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 4 OF 2020
SC CHIRCHIR, J
JULY 28, 2023**

BETWEEN

AMBROSE NJUGUNA KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the judgment of Hon. Ogonda SRM
at Kigumo delivered on 31st August 2018 in SO.1935/2015.)*

JUDGMENT

1. The Appellant, was initially charged with one (particulars withheld) of the offence of Gang -rape contrary to section 10 of the [Sexual Offences Act](#). Following the testimony of the complainant, which exonerated the co- Accused, the Prosecution dropped the charges against the Co- accused and the charge sheet amended. In the Amended charge sheet the Appellant was charged with the offence of defilement contrary to section 8 (1)(3) of the [sexual offences Act](#) no 3 of 2006, laws of Kenya.
2. The particulars of the offence were that on the November 8, 2015 at (particulars withheld) he intentionally and unlawfully caused his penis to penetrate the vagina of GNM a child aged 13 years old.
3. He also faces an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the [sexual offences Act](#) no 3 of 2006.
4. After a full trial he was convicted of the main charge and sentenced to 10 years in prison.



5. The appellant was grieved by the Judgment and filed this Appeal in which he challenged both the conviction and sentence. However in the Amended the petition which he filed alongside the submission and listed only one ground, namely :

'That, this court be pleased to find and order that his rights under section 333(2) of the CPC was denied, violated and infringed.'

6. Thus, the Appeal herein is against the sentencing only.

The Appellant's submissions

7. The appellant's case is that he was not out on bail during trial ; that while sentencing him to 10 years in prison the trial court failed to take into account the period he had spent in custody; and consequently the court violated the the provisions of section 333(2) of the *Criminal Procedure Code*. He has relied on several past decisions to buttress his submissions.

Respondent's submission

8. The respondent pointed out that the penalty for this particular offence is a minimum prison term of twenty years; that the trial court considered both the mitigating and aggravating factors. Finally, it is submitted that the sentence was proportionate and appropriate to the offence, in the interest of justice and the best interest of the child.

Analysis and determination

9. This being an appeal against the sentence only, it is important to determine the circumstances under which an appellate court can interfere with sentencing by the trial court.
10. The principles guiding interference with sentencing by the appellate Court has been the subject of many past decisions of the superior courts. In the case of *Ogolla s/o Owuor vs Republic, [1954] EACA 270* for instance the court, pronounced itself on this issue as follows: - 'The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.'
11. In *Shadrack Kipkoeh Kogo - vs - R Eldoret Criminal Appeal No 253 of 2003* the Court of Appeal held: - 'sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka –vs- R (1989 KLR 306)*'
12. The Appellant herein is not contesting the period of the sentence. He has only faulted the trial court for failing to consider the period spent in custody.
13. Section 333(2) of the criminal procedure Code 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 of, the date on which it is pronounced except where otherwise provided in this code. Provided that where the person sentenced under sub-section (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody'
14. The Judiciary sentencing policy guidelines under paragraph 7.11 reiterates the above provisions of the criminal procedure code and lays emphasis on why the courts need to comply with said section of the code. It states 'Failure to do so (take into account the time spent in custody) impacts on the overall period of detention which may result in an excessive punishment, that is not proportional to the offence committed.'



15. In the case of *Abamad Abolfathi Mohammed & Another vs Republic [2018] eKLR*, the Court of Appeal held 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. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. '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.'
16. I have perused the judgment and the sentencing notes of the trial court, and noted that there is no indication by the learned trial magistrate as to whether he did take into consideration the time spent by the Applicant herein in custody. The Appellant states that he was arrested on November 8, 2015 and had been in custody since. He was sentenced on April 30, 2019. His claim is that the trial court did not consider that he had been in custody four years prior to his conviction and sentencing.
17. The trial court ought to have stated in its decision if it had considered the time spent by the accused and that it had factored it in the final sentence. Failure to do so meant that the period was not taken into consideration. In the words of the court of Appeal in Ahamad's case (supra) 'Taking into account the period spent in custody must mean considering that period so that the imposed sentence reduces proportionately the period spent in custody'
18. From the charge sheet, the Appellant was arrested on November 8, 2015 and remained in custody until the conclusion of the trial and sentencing on April 30, 2019. It is evident that he had spent a period of 3 years and 5 months in custody. It is this period which ought to have been considered in the final sentence as rightfully submitted by the Appellant. By failing to consider the period served when sentencing the Appellant, the trial court erred.
19. I take note of the fact that the Respondent has not directly addressed the provisions of section 333(2) in their response, only implying that the Appellant benefitted from a lesser sentence in any event. However the trial court passed a sentence of 10 years , and section 333(2) obligated the court to comply with the proviso to that section once it had arrived at a particular sentence. The question of whether or not the sentence of 10 years was lenient is a different matter altogether. If the Respondent considered it too lenient it ought to have appealed against it. As far as the issue of compliance with the proviso to section 333 (2) of criminal procedure code is concerned, I entirely agree with the Appellant.
20. In conclusion I make the following orders:
 - a). The Appeal herein succeeds
 - b). The Appellant will serve 10 years imprisonment with effect from November 8, 2015

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JULY 2023.

S. CHIRCHIR
JUDGE.



In the presence of:

Susan- Court Assistant

Appellant – in person

Ms. Muriu for the state.

