



**Sitati v Republic (Miscellaneous Criminal Application
E062 of 2022) [2023] KEHC 21240 (KLR) (7 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E062 OF 2022
RN NYAKUNDI, J
AUGUST 7, 2023**

BETWEEN

SAMWEL SITATI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Coram: Before Justice R. Nyakundi

Mr. Mugun for the State

1. The Applicant herein filed an application on August 8, 2022, seeking review of sentence of 10 years' imprisonment 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 and seeks that for the remainder of his sentence he be commuted to a non-custodial sentence.

At the trial Court the prosecution tendered its evidence and on closing its case, the Court ruled that the Applicant had a case to answer. On being put on his defence, the applicant chose to keep quiet and the trial Court reserved the matter for judgment.

The request is premised on the grounds that he is now reformed, remorseful and rehabilitated and is now ready to be integrated back into society. He also urged the Court to consider the period he has spent in remand and further prayed for a lenient sentence.

The application was canvassed vide written submissions. The Applicant filed his submissions on September 20, 2022, whereas the State did not file any.



The Applicant's Submissions

2. The Applicant submitted that he is a first-time offender and argued that sentencing should have the goal of salvaging and rehabilitating the offenders and should therefore be treated with compassion and understanding as was held in the case of *Republic v Thomas Patrick Gilbert Cholmondeley [2009] eKLR*.

The Applicant further submitted that the 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

' Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.'
3. The Applicant also relied on the provisions of Section 333 (2) of the *Criminal Procedure Code* in urging the Court to consider the time he already spent in remand custody. In the end the Applicant urged the Court to consider the aforementioned factors and exercise its discretion and review his sentence.

Analysis and Determination

4. I have given due consideration to the application for revision of sentence as well as the submissions on record. In the premises, the issue for determination is whether the Applicant has recourse to non-custodial sentence under Section 39(1) and (2) of the *Sexual Offences Act*, on the basis of the period so far served. That provision states that:
 - (1) 'A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has--
 - (a) More than one conviction for a sexual offence;
 - (b) Been convicted of a sexual offence which was accompanied by violence or threats of violence; or
 - (c) Been convicted of a sexual offence against a child
 - (2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.'



5. From the foregoing provisions it is evident that whereas the Applicant qualified for declaration as a dangerous sexual offender for purposes of Section 39 of the *Sexual Offences Act*, granted the fact that he was convicted of a sexual offence against a child, it is noteworthy that he was not so declared by the Court that convicted and sentenced him. Section 39(2) of the Act is explicit that:

'The court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.'

6. With the foregoing in mind, I am of the view that the orders sought by the Applicant are untenable under Section 39(2) of the *Sexual Offences Act*.

It is further worth noting that Applicant herein was 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 and was sentenced to serve 10 years' imprisonment. The said provision states:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

7. In the present case, at the time of the trial the complainant was aged (16) years having been born on March 12, 2004 and the offence having been committed on July 10, 2020.

The trial Magistrate in exercising its discretion took into account that the Applicant was a first-time offender, the gravity of the offence, the Applicant's mitigation and handed him a sentence of 10 years' imprisonment. Those are the factors the Court was mandated to consider. The trial Magistrate further ordered that the sentence to run from the date when the Applicant was arrested.

It is not the Applicant's case that any impropriety or illegality was committed to warrant the conventional revision of the sentence by this court. The Applicant wants the remainder of his sentence to be substituted with a non-custodial sentence owing to fact that he is now reformed and has gained a skill while in prison which he ought to use meaningfully for his own good and for the good of the society.

8. According to the Sentencing Policy Guidelines, non-custodial sentence, except fines, is best suited for minor offences and prescribed limited length of sentences. The offence of defilement is quite grave and serious. I take the view that the Applicant herein already benefitted from the trial Court's leniency in handing him a 10 years' sentence, for an offence whose prescribed minimum sentence is 15 years imprisonment. He does not deserve a non-custodial sentence.

Be as it may however, the Applicant has also relied on the provisions of Section 333 (2) of the Criminal Procedure Code. Section 333(2) of the Criminal Procedure Code provides:-

'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 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.'



9. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. The provisions of Section 333(2) of the Criminal Procedure Code was the subject of the decision in *Abamad Abolfathi Mohammed & Another vs Republic [2018]eKLR* where 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. It must be remembered that the proviso to section 333(2) 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012.'

Further, 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 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.'

10. The Applicant herein was arrested on July 14, 2020 and was sentenced on June 10, 2021. By virtue of Section 333(2) of the Criminal Procedure Code, this duration ought to have been considered during sentencing. The Applicant herein had already spent (10) months in remand custody during the pendency of his trial. Section 333(2) CPC mandates that the (10) years imprisonment sentence granted by the trial Court on June 10, 2021, served by the Applicant shall be computed to include the period the Applicant was in custody before sentence, to commence from July 14, 2020; (10) months prior to the date of sentence. The Applicant will therefore serve (10) years imprisonment with effect from the date of arrest being July 14, 2020.

In light of the foregoing observations, the application for review of sentence has no merit and the same is hereby dismissed.

It is ordered so.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF AUGUST 2023

.....
R. NYAKUNDI



JUDGE

