



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lovoni v Republic (Criminal Appeal 22 of 2021)  
[2023] KEHC 24395 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24395 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL 22 OF 2021  
JN KAMAU, J  
OCTOBER 26, 2023**

**BETWEEN**

**WILSON LOVONI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon M.L. Nabibya (SRM) delivered at Hamisi in Principal Magistrate's Court in SO Case No 29 of 2016 on 28th June 2017)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) (2) (sic) of the *Sexual Offences Act* No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(A) (sic) of the *Sexual Offences Act*. He was tried and convicted on the alternative charge by the Learned Trial Magistrate, Hon M. L. Nabibya, Senior Resident Magistrate who sentenced him to ten (10) years imprisonment.
2. Being dissatisfied with the said Judgement, on 15<sup>th</sup> March 2019, the Appellant lodged the Appeal herein. His Petition of Appeal was undated. He set out four (4) grounds of appeal.
3. He filed his undated Written Submissions on 12<sup>th</sup> April 2021. The Respondent's Written Submissions were dated and filed on 21<sup>st</sup> August 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
6. Having looked at the Appellant's Grounds of Appeal and the Respondent's Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the charge sheet was defective;
  - b. Whether or not the Prosecution proved its case beyond reasonable doubt.
7. While this court noted the Respondent's Written Submissions regarding the merit of the Appeal, it also noted that the Appellant's Written submissions focused on the issue of the period that he spent in custody while the trial was going on. He urged this court to consider the said period and/or direct that he serve the remainder of his term on Probation. He pointed out that he had served the highest percentage of his sentence which was expiring on 28<sup>th</sup> February 2024, He reiterated this position on the date this court reserved its Judgment herein.
8. As he appeared to have abandoned his substantive appeal, this court did not therefore deem it necessary to analyse the submissions on whether or not the Prosecution had proved its case beyond reasonable doubt. Instead, it focused on ascertaining whether or not his application under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) had merit.

## Legal Analysis

9. Notably, Section 332 (2) of the Criminal Procedure Code stipulates as follows:-

“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).”
10. In the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR, the Court of Appeal reiterated that where a convicted person had spent time in custody, that period had to be taken into account while computing his sentence.
11. Going 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 (emphasis).”

12. A perusal of the proceedings showed that the Appellant was arrested on 27<sup>th</sup> September 2016 and was arraigned in court on 29<sup>th</sup> September 2016. Although he was granted bail on 5<sup>th</sup> December 2016, it appeared that he was not able to post bail and therefore remained in custody for the entire duration of his trial. As he was convicted and sentenced on 28<sup>th</sup> June 2017, the period between 27<sup>th</sup> September 2016 and 27<sup>th</sup> June 2017, which was nine (9) months therefore ought to be taken into account while computing his sentence.
13. Indeed, Section 333(2) of the Criminal Procedure Code provides that “the sentence shall take account of the period spent in custody” which period should include both custody in police cells and in remand in prisons.

### **Disposition**

14. For the foregoing reasons, the upshot of this court’s decision was that although the Appellant’s Petition of Appeal that was lodged on 15<sup>th</sup> April 2019 was not merited as his conviction and sentence were safe and are hereby upheld.
15. However, it is hereby directed that the period the Appellant spent in custody from 27<sup>th</sup> September 2016 to 27<sup>th</sup> June 2017 when he was arrested and sentenced respectively be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
16. In view of the fact that the Appellant is only remaining a period of four (4) months to complete his sentence and he spent a period of nine (9) months in custody during trial, he has therefore already completed his sentence. Accordingly, it is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be otherwise lawfully held.
17. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023.**

**J. KAMAU**

**JUDGE**

