



REPUBLIC OF KENYA



KENYA LAW
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**Esto v Republic (Miscellaneous Criminal Appeal E062 of 2023)
[2023] KEHC 24051 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E062 OF 2023
RN NYAKUNDI, J
OCTOBER 25, 2023**

BETWEEN

JAMES LOBOLE ESTO APPLICANT

AND

REPUBLIC RESPONDENT

(Being a review from original conviction and sentence in Lodwar Senior Principal Magistrates Court criminal Case No. 74 of 2017, Hon. C M Wekesa PM on 5th April, 2018)

RULING

1. The applicant was convicted with the offence of defilement contrary to section 8 (1) as read with section 8(4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence are that on diverse dates between 1st December, 2016 and 31st December, 2016 in Turkana Central Sub- County within Turkana County intentionally caused his penis to penetrate the vagina of CA a child aged 16 years. The applicant was convicted of the said charge and a sentence of 15 years was imposed.
2. The applicant seeks review of the sentence pursuant to Section 333(2) of the [Criminal Procedure Code](#). The applicant prays that the court considers the provisions of section 333(2) of the [CPC](#) and take into account the time he has been in custody. Further he prays for release on probation pursuant to the provisions of section 64 of the Probation of offender's Act and section 333(1) of the [Civil Procedure Code](#).

Analysis and determination

3. Even though the Applicant appears to have reformed whilst in prison, it ought to be remembered that when he committed the offence, he broke the trust and responsibility that was bestowed on him by the community. When the offence is committed against a vulnerable member of the society, such as



minors, the offender must appreciate that that calls for much greater effort on his part, to regain the trust of the society.

4. I have equally considered the application on account of section 333(2) of the [Criminal procedure Code](#). The section provides as follows:

- (2) 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.

5. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

6. In the case of [Abamad Abolfathi Mohammed & another v 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.”

7. It follows then that the court should state in its decision that it indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.

8. The punishment prescribed by the law for the offence of defilement with a child between the age of 16 and 18 years, is liable to imprisonment for a term of not less than 15 years. I note that the accused person has already served 5 years imprisonment.

9. The Applicant was convicted on 5th April 2018 when judgment was read out and after mitigation, he was sentenced to serve 15 years imprisonment. The court in sentencing the accused person considered that he was a first-time offender but did not consider the period that he was in custody. I share the



same thoughts as the court in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR that the trial court should have directed the applicant's sentence of imprisonment to run from the date of arrest on 27th April, 2017.

10. Therefore, in compliance with Section 333(2) *Criminal Procedure Code*; computation of the sentence ought to include the period the Accused person was in custody during hearing and determination of the case before sentence was meted out.
11. The Accused was placed in custody on 27th April 2017 and sentenced on 5th April 2018. The 15 years sentence ought to start running from April 2017 when he was placed in custody to April 2018 when he was sentenced to serve 15 years imprisonment.
12. The offence is serious. In the circumstances, 15 years' imprisonment is an appropriate sentence. I see no reason for release of the applicant to serve on a probationary term. The application fails on this count.
13. The Applicant's Miscellaneous Application is partly allowed as follows;
 - a. Section 333(2) *CPC* mandates the court to give credit to the period spent in remand custody by the prisoner pending hearing and determination of the alleged offence. In this case the applicant was found guilty, convicted and sentenced to 20 years imprisonment which on appeal was reduced to 15 years imprisonment. In conformity with the above provisions the committal warrant to prison be and is hereby amended to reflect the commencement date of 12th May, 2017.
 - b. It is so ordered.

DATED AND SIGNED AT LODWAR THIS 25TH DAY OF OCTOBER, 2023

In the presence of;

The Applicant

Mr. Yusuf for the DPP

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R. NYAKUNDI

JUDGE

