



**Amejeva v Republic (Miscellaneous Criminal Application E002 of 2022)  
[2023] KEHC 26252 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26252 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2022**

**JN KAMAU, J  
NOVEMBER 30, 2023**

**BETWEEN**

**MESHACK AMEJEVA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. The Applicant herein was jointly charged with others on two (2) Counts and an alternative charge. Count I was in respect of the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No 3 of 2006. Count II was in respect of the offence of deliberated transmission of life threatening sexual offence contrary to Section 26(1)(a) of the Sexual Offence Act. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11 (a) of the Sexual Offences Act. He was acquitted on both Counts but was convicted on the alternative charge and sentenced to ten (10) years imprisonment.
2. On 4<sup>th</sup> January 2022, he filed a Notice of Motion application seeking to have the period that he stayed in custody while the trial was ongoing taken into account as part of the sentence that he had already served pursuant to Section 333(2) of the [Criminal Procedure Code](#).
3. In his said application that was supported by his Affidavit, he averred that the Trial Court did not consider the period of one (1) year that he spent in custody while sentencing him. He pointed out that his sentence ought to have run from 28<sup>th</sup> July 2017 which was the date of his conviction. It was his assertion that the omission by the Trial Court to consider this period contravened his right to fair trial under Article 25 (2) of the [Constitution](#).



4. He cited the case of *Abamad Albofathi Mobammed & Another vs Republic* [2018] eKLR where the court held that sentence ought to run from the date of arrest. He thus urged this court to grant him the orders he had sought.
5. He did not file Written Submissions to support his prayer. The Respondent was not opposed to the said application and did not therefore file any Written Submissions.

### Legal Analysis

6. As seen hereinabove, the Applicant's application was based on Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). The said Section provides that:

“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).

7. This duty is also contained in the *Judiciary Sentencing Policy Guidelines* (under clauses 7.10 and 7.11) where it is provided 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.”

8. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Abamad Abolfathi Mobammed & Another vs Republic* (*Supra*).
9. The Applicant was arrested on 9<sup>th</sup> December 2016. He was convicted and sentenced on 28<sup>th</sup> July 2017. Although he was granted bail, he did not appear to have come out on bond/bail while his trial was going on. He thus spent seven (7) months and eighteen (18) days in custody before he was sentenced and not one (1) year as he had contended.
10. A reading of the Trial Court's Sentence showed that it did not take into consideration the time he spent in remand before conviction and sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

### Disposition

11. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was dated 25<sup>th</sup> May 2023 and filed on 9<sup>th</sup> June 2023 was merited and the same be and is hereby allowed.
12. Taking into account the time the Applicant spent in custody between 9<sup>th</sup> December 2016 and 27<sup>th</sup> July 2017 as the trial was ongoing as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75



(Laws of Kenya), it is evident that he has since completed his sentence. It is hereby directed that the Applicant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

13. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023**

**J. KAMAU**

**JUDGE**

