



**Nakochil v Republic (Miscellaneous Criminal Appeal E018 of 2023)
[2023] KEHC 25917 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E018 OF 2023
RN NYAKUNDI, J
NOVEMBER 29, 2023**

BETWEEN

NGITIRA NAKUA NAKOCHIL APPLICANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction on sentence in the Resident Magistrate Court at Kakuma Sexual Offences Case No. 15 of 2017 by Hon. J M Wekesa (PM) dated 11th January, 2018)

JUDGMENT

1. The applicant was charged together with two others in the lower court with the offence of gang defilement contrary to section 10 of the *sexual offences Act* No. 3 of 2006. The said court had 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. The applicant was convicted of the said charge and a sentence of 15 years was imposed on the main charge and 10 years in jail for the alternative charge. The applicant being aggrieved preferred an application challenging the impugned judgment on the basis of section 333(2) of the *Criminal Procedure Code*.
2. The applicant now seeks review of the sentence pursuant to Section 333(2) of the Criminal Procedure code. The applicant prays that the court considers the said provision and take into account the time he has been in custody.



Analysis And Determination

3. I have considered the application and the court's mandate is to determine the application 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.
4. 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.
5. This Court associates itself with the decision of the High Court by Hon. G. V. Odunga J in [Vincent Sila Jona & 87 others vs Kenya Prison Service & 2 Others](#) [2021] eKLR where a joint petition was filed by 51 Petitioners whose sentences had not taken into account the time spent in remand and in order to enhance fundamental rights and freedoms of Petitioners while upholding the intention of the sentencing Court sought declaration on compliance with Section 333(2) [CPC](#). The Court held as follows;

"A declaration that Trial Courts are enjoined by Section 333(2) of the Criminal Procedure Code, in imposing sentences, other than sentence of death to take into account of the period spent in custody.

A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.

A declaration that Section 333(2) [CPC](#) applies to the original sentence as well as sentence imposed during resentencing....."
6. The requirement to comply with Section 333(2) [CPC](#) is mandatory in computation of the sentence to be served by the Convict upon sentencing. The requirement is also amplified by the Judiciary Sentencing Policy and thus an integral part of sentencing process to avoid excessive punishment that is not proportional to the offence committed and sentence lawfully prescribed and contrary to Article 29 (a) & Article 50 [CoK](#) 2010.
7. The punishment prescribed by the law for the offence of gang defilement is imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life. I am alive to the fact that it is in the trial court's discretion to mete a reasonable sentence considering the circumstances of each case. Given that the applicant has not challenged the sentence, I will not interfere.
8. The Applicant was convicted on 21st December, 2017 when judgment was read out and after mitigation, he was sentenced to serve a total of 25 years imprisonment. The court in sentencing the accused person was not clear on when the sentence would start running. I share the same thoughts as the court in [Abamad 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 15th January, 2017.



9. Therefore, in consonance 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.
10. The Accused was placed in custody on 15th January, 2017 and sentenced on 21st December, 2017. The 25 years ought to start running from January 2017 when he was placed in custody to December, 2017 when he was sentenced to serve 25 years imprisonment.
11. The sentencing process and its outcome are within the mandate of the trial court. However, since circumstances vary from a case to another, this court shall intervene in exercise of revision pursuant to Article 165(3) *COK* where mandatory provisions of the law have not been complied with. A failure to take into account remand time is an error of principle. The method of taking into account remand time is to first calculate the total sentence and then deduct an amount of credit based on the amount of time served. In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody. The language of the code demands that the court shall cause to be stated in the record and on the warrant of committal the nature of the offence, of which the offender has been convicted of, the amount of time spent in pre-trial/conviction, custody, the term of imprisonment that would have been imposed before any credit is granted, the amount of time credited if any and the ultimate sentence imposed by the trial court. (See the provisions in: *International Covenant on Civil and Political Rights* (1966), Articles 9 and 14, *Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment* (1988), *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2012), *UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)* (1990), *Revised UN Standard Minimum Rules for the Treatment of Prisoners* (1955) – Section C – *Prisoners under arrest or awaiting trial*, Rules 111 – 120). It is obvious that the excessive use of pre-trial detention runs against protection of human rights and fundamental freedoms enshrined in our constitution. Even locking up suspects for long periods of time to ensure effective jurisdiction is obviously a human rights dilemma and must be only be adhered to in exceptional circumstances.
12. In this case from the application there is merit to review the sentence to give credit for pre-sentence detention based on the factual matrix of this case. As a result the 25years imprisonment imposed by the trial court be effected as at 19th January, 2019 and not the date of the verdict itself. As a consequence, the Deputy Registrar of the High Court shall cause an amendment of the committal warrant to reflect the credited period towards a resulting sentence of imprisonment. The sentence is cumulative of two counts it shall therefore run concurrently to effectuate the 15 year term of imprisonment.

It is so ordered.

DATED AND SIGNED AT ELDORET THIS 29TH DAY OF NOVEMBER, 2023

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R. NYAKUNDI
JUDGE

