



**Chumba v Republic (Criminal Petition E020 of 2022)  
[2023] KEHC 26761 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26761 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E020 OF 2022  
RN NYAKUNDI, J  
DECEMBER 20, 2023**

**BETWEEN**

**STEPHEN CHUMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being a Review on sentence on the Judgement from the Lower  
Court Case No 212 of 2017 delivered by Hon. Kigen on 31/8/2018)*

**RULING**

1. The applicant was charged with the offence of Sexual Assault contrary to section 5(1) (b) (2) of the [Sexual Offence Act](#) no 3 of 2006. The accused faces an alternative charge of Indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) no 3 of 2006. Brief facts are that on the 6<sup>th</sup> day of November, 2017 at 4[Particulars withheld] area in [Particulars withheld] sub county within Uasin-Gishu county unlawfully manipulated his hand by touching the breast of one CJ a girl aged 17 years.
2. The applicant aggrieved with both conviction and sentence of the trial court appealed to this court and on 25/4/2019, the appeal was dismissed in its entirety. Before this court a Notice of Motion has been filed under Art. 47, 48, & 50 of the [Constitution](#) seeking to enforce Section 333(2) of the [Criminal Procedure Code](#). According to the affidavit in support the applicant's desirous of having the period of 9 months and 18 days be credited to the entire sentence imposed by the trial court.

**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 2023* 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. In *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.”

6. The Applicant was convicted and sentenced on 3<sup>1st</sup> August, 2018. The judgment was read out and after mitigation, he was sentenced to serve 10 years imprisonment for the offence. 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 *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 7<sup>th</sup> November 2017.
7. Therefore, in compliance with Section 333(2) of the *Criminal Procedure Code*; computation of the sentence ought to include the period the Applicant was in custody pending the hearing and determination of the case before sentence was meted out.
8. The applicant in this case was placed in custody on 7<sup>th</sup> November 2017. It seems he never qualified for bond as required under Article 49 (1) (h) of the *constitution*. He was therefore tried, found guilty, convicted and sentenced by the trial court on 14<sup>th</sup> September, 2020. In both instances, being the primary court at the High Court there is no mention of application of Section 333(2) of the *criminal procedure code* in computing the final sentence of ten (10) years imprisonment. That is the gist of this application. The sentencing process and its outcome are within the mandate of the trial court. However, since circumstances vary from one case to another, this court shall intervene in exercise of



revisionary jurisdiction pursuant to Article 165(3), Art. 50 (2) (p) (q), 6(a) & (b) of the Constitution of Kenya as read together with Section 362 & 364 of the Criminal Procedure Code.

9. That from the a fore-stated settled principles and the record of the case the aspects which emerges is that the applicant was on pre-trial detention pending trial and conclusion of his case *vide* judgement delivered by the learned trial magistrate delivered on 31/8/2018. There is no evidence that the trial court factored in the provisions of Section 333(2) of the Criminal Procedure Code. It is also crystal clear that the appellate court affirmed the same orders on conviction and sentence. My reading of this section is that the sentencing trial court is also required to give reasons for any credit granted and to state the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited if any and the sentence imposed. However, this is not meant to be particularly onerous task for the trial court but plays an important role in explaining the nature of the sentencing process and the reasons for giving credit to the public. As a consequence, the sentence so awarded by the trial court shall therefore commence on the 7/11/2017. The committal warrants shall therefore be amended in consonant with Section 382 of the CPC as read together with Section 333(2) of the Criminal Procedure Code

Orders Accordingly

**DATED AND SIGNED AT ELDORET THIS 20<sup>TH</sup> DAY OF DECEMBER 2023**

**In the presence of**

**Mr.Mugun for the State**

**Appellant**

.....

**R. NYAKUNDI**

**JUDGE**

