



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT GARISSA

MISC APPLICATION NO. 55 OF 2019

DEKOW ADEN ABDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Dekow Aden Abdi**, the Applicant was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to **Section 8(1) as read with Section 8 (3) of the Sexual Offences Act**.
2. He appealed to this court differently constituted against the conviction and sentence in *Criminal Appeal No. 89 of 2012, Dekow Aden Abdi versus Republic* which appeal was dismissed.
3. The Applicant has now moved this court on the premise of **Section 333 (2) of the Criminal Procedure Code**. He states that the eight (8) months he spent in remand were not factored in the sentence. He also urges this court to consider remission of his sentence. In this regard he highlighted that he has already served 12 years of his sentence, has since rehabilitated and therefore the remainder of his sentence can be served through Community Service.
4. The Respondent on its part submitted that the applicant had already exercised his right of appeal and the matter is res judicata hence this court lacks jurisdiction. The only option available to the applicant lies in a second appeal to the Court of Appeal. The Respondent cited **John Kagunda Kariuki v Republic [2019] eklr & Julia Wangechi Githua v Republic [2021] eklr.**

Analysis and Determination

5. The court has considered the application, the submissions by both the Applicant and the Respondent as well as the relevant law. The issue before court is whether it can consider the time the Applicant served in custody in the sentence, after his Appeal has been heard and determined. Secondly whether this court has the powers to allow remission of his sentence.

6. **Section 333(2) of the Criminal Procedure Code** provides that:

“(2) Subject to the provisions of Section 38 of the Penal Code 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.”

7. The cases cited by the Respondent are distinguishable to this case. In **Julia Wangechi** (supra) Odunga J had already dealt with the aspect of review under Section 333 of the Criminal Procedure Code and remission of sentence in a Petition filed by the Applicant hence the determination by Kemei J that the court lacked jurisdiction to handle the same.

8. In this case the trial court did not consider the time the applicant was in remand. The same was also not considered by the High Court as the Applicant did not raise the issue.

9. This court has been faced with a similar issue in **Osman Mohamed Balagha v Republic [2021] eKLR** where it expressed itself as follows;

“It was not for the accused to remind the trial Court while sentencing to consider the time he spent in custody, the law obligates the court to consider the time the convict was incarcerated before conviction. From the record it appears that the trial court failed to consider the same.

In the high court the issue was not raised and therefore not considered. The issue is featuring before this court for the first time.

In the spirit of applying substantive justice, being just and fair, it is necessary in view of this court not to punish the Applicant for having not raised the issue with the court earlier but allow him the benefit provided for by the said Section of the Criminal Procedure Code, as stated earlier it behooved the court to have complied.”

10. In **Joseph Njenga Ng’ethe v Director of Public Prosecutions [2019] eKLR** the Court considered an application seeking a declaration that the Applicant’s sentence commences from the time he was taken into custody after the applicant had filed an appeal in the High Court and in the Court of Appeal and had equally applied for resentencing. The court was of the opinion that the same had not been factored and considered in both appellate courts.

11. In **Ahmed Abolfathi Mohamed v Republic [2018] eKLR** the Court of Appeal held as follows;

“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 appellant’s sentence of imprisonment to run from the date of arrest on 19th June 2012.”

12. The Judiciary Sentencing Policy Guidelines states as follows as regards the section:

“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.”

13. Guided by the law and precedent set above the court is of the view that the application ought to be considered, as failure to do so will be amount to denying the Applicant a right due to failure of Court to

discharge an obligation bestowed upon it by law.

14. As for remission, the power to do so lies elsewhere and not with the court and the prayer is declined. This discretion falls under the Commissioner General of Prisons as provided for in Section 46 (1) as read with (5) of the Prisons Act the same provides as follows;

“(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.....

(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground. [Act No. 25 of 2015, Sch.]”

15. The Application succeeds to the extent that the sentence meted out of 20 years imprisonment will start to run from the date of the applicant’s arrest, the 6th July so as to factor in the time spent in custody.

DATED SIGNED AND DELIVERED THIS 27TH DAY OF JANUARY 2022

ALI-ARONI

JUDGE