



**Kudadi v Republic (Miscellaneous Criminal Application
038 of 2021) [2022] KEHC 11662 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS CRIMINAL APPLICATION 038 OF 2021**

JR KARANJA, J

MAY 24, 2022

BETWEEN

NOAH OCHIENG KUDADI APPLICANT

AND

REPUBLIC ACCUSED

RULING

- [1] Noah Ochieng Kudadi (applicant), after being convicted by the trial court for defilement, contrary to S.8 (1) (3) of the *Sexual Offences Act*, was sentenced to a term of twenty (20) years imprisonment on the 24th November 2009, in accordance with S.8 (3) of the Act, which provides that:-

“ A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

The minimum sentence under the provision is twenty years which could be enhanced depending on the circumstances of each case.”

- [2] Being dissatisfied with the conviction and sentence, the applicant preferred a first appeal to the High Court which was heard and dismissed in its entirety on 1 July 4, 2011.

Apparently, the applicant preferred a second appeal to the Court of Appeal and although he failed to annex a copy of the judgment in his record, it was herein the second appeal was also dismissed in a judgment rendered on May 24, 2018 undisputedly pointed out by the respondent that the sentence of twenty years imprisonment was thus upheld by both the High Court and the Court of Appeal.

However, having exhausted the appeal process, the applicant now comes before this court with the present application dated September 20, 2021 made under S.333 (2) of the *Criminal Procedure Code*.



[3] The said provision provides:-

“subject to the provisions of S.38 of the Penal Code every sentence shall be deemed to commence from and to include the whole of the day of the date 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 foregoing provision imposes a duty upon the court to take into account the period an accused person had been in custody while exercising its function of sentencing. This is a cardinal duty as was acknowledged by the Court of Appeal in *Bethwei Wilson Kibor Vs Rep* (2009) eKLR and *A.A Mohamed & Another Vs. Rep* (2018) eKLR.

It is therefore a mandatory requirement that the period which an accused has been held in custody prior to being sentenced has to be taken into account by the trial court in meting out the sentence where it is not hindered by any other provision of the law.

Such hindrance, would in the opinion of this court, be in the form of mandatory minimum sentences provided order the *Sexual Offences Act*.

[5] Considering that the applicant herein faced an offence which carried a minimum sentence of twenty year imprisonment it would be doubtful whether S.333 (2) of the *Criminal Procedure Code* would in the circumstances apply.

Even if the provision were to apply in mandatory minimum sentences, the applicant would still find no solace in this court for the main reason that he appealed the sentence twice. First, at the High Court and secondly, at the Court of Appeal. In both instances the applicant was unsuccessful.

The judgement of the Court of Appeal is binding on this court and remains valid to date.

[6] It is noteworthy that the hierarchy and status of the Court of Appeal is above that of the High Court such that decisions of the High Court are appealable at the Court of Appeal. Therefore, the High Court would have no power to interfere with or review the decisions of the Court of Appeal. In the circumstances, the present application is clearly misconceived and incompetent for want of jurisdiction. It is hereby dismissed.

J.R. KARANJAH

J U D G E

[DATED & DELIVERED THIS 24TH DAY OF MAY 2022]

