



REPUBLIC OF KENYA



**Opiyo v Republic (Miscellaneous Criminal Application E060 of 2021)
[2022] KEHC 11942 (KLR) (20 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11942 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E060 OF 2021**

JN KAMAU, J

MAY 20, 2022

BETWEEN

ELIUD OPIYO OPIYO APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

INTRODUCTION

1. The applicant herein was tried and convicted of the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act*. He was sentenced to five (5) years imprisonment.
2. On June 8, 2021, he filed this application on review of sentence pursuant to section 333(2) of the *Criminal Procedure Code*. In his said application that was supported by his affidavit, he averred that the trial court did not consider the period of twenty-one (21) months he spent in custody during trial.
3. In his written submissions filed on January 27, 2022, he invoked section 333(2) of the *Criminal Procedure Code* and cited the case of *Ahamad Albofathi Mohammed & another vs Republic* [2018] eKLR where the court held that sentence ought to run from the date of arrest. He urged this court to grant the orders sought.
4. He pleaded with court to consider that he was arrested at the age of nineteen (19) years and was still a young man who was the sole breadwinner in his family. He added that he had so far spent one (1) year, eight (8) months and twenty (20) days in remand from the time of his arrest and was currently twenty-two (22) years old.
5. He added that during his incarceration, he had maintained high discipline and obedience in prison which earned him a promotion to a fourth stage prisoner. He pointed out that he had undergone transformational programs and attained certificates in diploma in bible school.



6. He begged this court to grant him an opportunity of shaping his future which would otherwise be ruined by the long incarceration. He stated that he was a first offender and remorseful for engaging in a criminal activity and urged this court to allow his application.
7. On its part, the State submitted that he was arrested on June 14, 2019 and arraigned in court on June 17, 2019. It added that on June 25, 2019, he was released on bond and later remanded on February 18, 2021. It contended that he was convicted on March 8, 2021 and hence, the period he spent in custody was therefore a total of twenty-nine (29) days.
8. It further argued that the sentence of five (5) years was too lenient considering the magnitude of the offence and was therefore praying for enhancement of the sentence.
9. It urged the court to consider the period spent in custody but uphold the conviction and sentence.

Legal Analysis

10. 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).
11. 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.”
12. 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 Mohammed & another v Republic](#) [2018] eKLR.
13. A perusal of the trial court's records showed that the applicant was arrested on June 14, 2019. Two (2) persons stood surety for him and on June 25, 2019, he was released on bond. Subsequently, judgment was delivered on February 18, 2021 when the trial court ordered that he be remanded at the police station. He therefore spent about eleven (11) days in remand before conviction.
14. A further reading of the trial court's judgment showed that it did not take into consideration the time the applicant 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

15. Whereas this court agreed with the respondent that the sentence that was meted upon the applicant was too lenient, this court noted that he was convicted before the Supreme Court issued guidelines of July 6, 2021 indicating that the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR under which courts were exercising their discretion when sentencing in cases where there was a minimum or mandatory sentence was inapplicable in all offences other than murder cases. As the sentence was lawful at the time, this court was not persuaded that it should interfere with the same.
16. For the foregoing reasons, the upshot of this court's decision was that the applicant's application for review filed on June 8, 2021 was merited and the same be and is hereby allowed.
17. It is hereby ordered that the time the applicant spent in custody during trial be taken into consideration when computing his sentence as provided in section 333(2) of the *Criminal Procedure Code* cap 75 (laws of Kenya).
18. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF MAY 2022.

J KAMAU

JUDGE

