



REPUBLIC OF KENYA



**Otanga v Republic (Criminal Petition E056 of 2021)
[2022] KEHC 13125 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL PETITION E056 OF 2021
JN KAMAU, J
SEPTEMBER 27, 2022**

BETWEEN

FRANCIS STINDO OTANGA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. He was sentenced to twenty (20) years imprisonment.
2. Being dissatisfied with the said decision, he lodged an appeal at the High Court in HCCA No 74 of 2014 wherein Majanja J affirmed the conviction but reduced his sentence to fifteen (15) years imprisonment from the date of conviction and sentence.
3. He filed this Petition for review of the sentence on 3rd November 2021. In his affidavit in support thereof, he contended that his application was premised on Section 333(2) of the [Criminal Procedure Code](#).
4. In his Written Submissions that were filed on 13th January 2021, he pleaded with court to consider that he was remorseful and grant him a second chance. He contended that while in custody, he had been training and acquiring skills for personal development such as theological training, Level 1 and 2 in Lamp and Light Bible Course and a Certificate in Rhode Kenya in Juice making. He believed that the skills he had acquired would enable him integrate well back to society. He asserted that he was a first offender and sought the leniency of court.
5. He referred to several cases amongst them the case of [Abolfathi Mohamed and Said Mansour Mousavi vs Republic](#) [2018] eKLR where courts were required to consider periods accused persons spent in



custody during trial. He pointed out that he had spent two (2) years and three (3) months in custody which ought to be deducted from his sentence.

6. The Respondent did not oppose his prayer. In its Written Submissions that were filed on 23rd March 2022, it conceded that the Petitioner spent the entire period in remand having been arrested on 30th April 2012 and sentenced on 14th August 2014. It therefore urged this court to consider the said period.

Legal Analysis

7. The Petitioner's prayer was based on Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). The aforesaid Section provides as follows:-

“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.”

8. The requirement under with Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* (Supra).

9. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines (under) provide 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.”

10. Having said so, this court noted that Majanja J pronounced himself on the date when the aforesaid sentence was to start running. He rendered himself as follows:-

“The appeal is allowed only to the extent of that the sentence is reduced to 15 years' imprisonment from the date of conviction and sentence (emphasis court)”

11. Notably, this court's hands were tied by the learned judge's pronouncement of when the Petitioner's sentence was to commence. As the learned judge was of equal and competent jurisdiction as this court, this court could not purport to review and/or vary and/or sit on appeal on his decision. As he had since left the jurisdiction of this court and could not therefore review his orders, if at all there was an error, the only option that was left to the Petitioner herein was to appeal to the Court of Appeal if he was dissatisfied with his decision.

Disposition

12. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition for review of sentence that was lodged on 3rd November 2021 was not merited and the same be and is hereby dismissed.
13. It is so ordered.



DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF SEPTEMBER 2022

J. KAMAU

JUDGE

