



**Orwa v Republic (Miscellaneous Criminal Application E013 of 2021)  
[2022] KEHC 14378 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14378 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CRIMINAL APPLICATION E013 OF 2021**

**JN KAMAU, J**

**OCTOBER 24, 2022**

**BETWEEN**

**ERICK ODHIAMBO ORWA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The applicant herein was tried and convicted for the offence of defilement contrary to section 8(2) 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 wherein the court dismissed it in its entirety. The proceedings of the High Court were not placed before this court.
3. The applicant filed this petition for review of the sentence on February 9, 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 August 5, 2022, he pleaded with court to consider that he was remorseful and grant him a second chance. He added that he was a first offender and promised to be a responsible person in the society.
5. He contended that he had completed his standard eight (8) Kenya Certificate of Primary Education (KCPE) and had undergone spiritual courses such as prisoner's journey and emmaus and had been awarded certificates respectively.
6. He urged the court to exercise mercy and leniency according to section 333(1) and (2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).



7. The respondent did not oppose his prayer. In its written submissions that were filed on September 21, 2022, it conceded that the applicant spent the entire period in remand having been arrested on July 27, 2010 and judgment being delivered on November 16, 2010. It therefore urged this court to consider the said period.

### Legal Analysis

8. The applicant'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.”

1. The requirement under section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Abamad Abolfatbi Mohammed & another v Republic* [2018]eKLR.
2. 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.”

11. This court noted that Hon K Muneeni (Mr) (PM), the learned trial magistrate did not pronounce himself on the date from when the aforesaid sentence was to start running. In his Judgment that he delivered on November 26, 2010, he merely stated as follows:-

“ Accused shall serve 20 years in jail.”

12. This court was thus persuaded to find and hold that the learned trial magistrate ought to have considered the provisions of section 333(2) of the *Criminal Procedure Code* while sentencing the Applicant herein.

### Disposition

13. For the foregoing reasons, the upshot of this court's decision was that the applicant's application that was lodged on February 9, 2021 was merited and the same be and is hereby allowed. Accordingly, the court hereby upholds the conviction and sentence of the applicant for the offence of defilement.
14. However, it is hereby ordered and directed that the period the applicant spent in custody between July 27, 2010 and November 26, 2010 being the date of arrest and the date he was sentenced respectively be taken into account when computing his sentence in accordance with section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).



15. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER 2022**

**J. KAMAU**

**JUDGE**

