



**Matara v Republic (Miscellaneous Criminal Application E005 of 2022)  
[2022] KEHC 16616 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16616 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2022**

**JN KAMAU, J**

**DECEMBER 20, 2022**

**BETWEEN**

**JOSHUA NYAKUNDI MATARA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Introduction.**

1. The applicant herein was charged with 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 convicted and sentenced to twenty (20) years imprisonment.
2. He appealed against the sentence in HCCRCA No 04 of 2019 whereupon Maina J upheld his conviction but reduced his sentence to ten (10) years imprisonment.
3. He filed this application for review of the sentence on March 8, 2022. In his affidavit in support thereof, he contended that his application was premised on section 333(2) of the *Criminal Procedure Code*. In that regard, he relied on the case of *Abolfathi Mohamed & Said Mansour Mousavi v Republic* [2018] eKLR where the court held that a sentence of imprisonment ought to run from the date of arrest. He thus urged the court to consider the time he had spent in custody prior to his conviction.
4. In his written submissions that were filed on June 8, 2022, he pointed out that he spent three (3) years and five (5) months in remand custody from the date of his arrest on July 11, 2015.
5. He submitted that he was arrested at the age of twenty six (26) years and was a young man with responsibility of taking care of his family. He said that he had attained the age of thirty six (36) years. He contended that the period of eight (8) years in prison was a long incarceration which had made his



family's future miserable. He pointed out that his children were under the care of his peasant wife who was aged thirty two (32) years.

6. He pleaded with court to consider that he was a first offender and remorseful of the events that led to the crime and sought for its leniency. He promised to live a crime free life and averred that his family was ready to facilitate his integration back to the society and reconciliation with the victim. He stated that he had learnt his lesson and he was therefore seeking leniency of this court to consider the provisions of section 333 (2) of the *Criminal Procedure Code* to the effect that any period spent in custody prior to conviction had to be considered at the time of sentencing.
7. He averred that while in custody, he had been engaged in transformative programmes and acquired skills in association of faith churches and ministries (AFCM 1 diploma) and mixed farming. He added that he was currently undergoing training in masonry grade 3. He thus urged this court to allow his application.
8. The respondent opposed his prayer. In its written submissions that were filed on September 21, 2022, it submitted that despite the minimum mandatory sentence under section 8(3) of the *Sexual Offences Act* being twenty (20) years, the applicant's sentence was reduced to ten (10) years. It further contended that the issue of the applicant's sentence was exhaustively dealt with on appeal and that reducing the ten (10) years' sentence was way too lenient to the applicant. It thus asked this court to dismiss the present application as the same lacked merit.

### Legal Analysis

9. Section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya) 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.”
10. The requirement under section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & another vs Republic* (supra).
11. 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.”
12. Having said so, a reading of the judgment of September 26, 2019 showed that Maina J was clear from when the sentence would run. She rendered herself as follows:-

“Accordingly, the same is set aside and in its place is substituted a sentence of ten (10) years imprisonment from the date the appellant was sentenced by the lower court.” (emphasis court).”



13. Notably, this court's hands on reduction of the period the applicant had spent in custody from his sentence were tied by the learned judge's pronouncement. She may very well have taken into account the said period when meting out the sentence of ten (10) years on the applicant herein.
14. 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 her decision. As she had since left the jurisdiction of this court and could not therefore review her orders, if at all there was an error, the only option that was left to the applicant herein was to appeal to the Court of Appeal if he was dissatisfied with her decision.
15. The foregoing notwithstanding, this court found it prudent to address the respondent's assertions that considering the provisions of section 333 (2) of the *Criminal Procedure Code* in a lenient sentence such as the one the applicant herein was given, ought not to be allowed.
16. It is important to point out that section 333(2) of the *Criminal Procedure Code* is couched in mandatory terms. The period a convicted person spent in custody while the trial was ongoing has to be taken into account unless the court has considered it and reduced the sentence accordingly. It is not dependent on the length of a sentence that has been meted upon him.
17. Notably, it is not compulsory that the period a convicted person remained in custody be deducted from the sentence that is meted out as the court may very well mete out a lesser sentence having taking into account that period. What is critical is that the court ought to consider such period when meting out the sentence and pronounce itself of any such period to avoid any ambiguity.

#### **Disposition**

18. For the foregoing reasons, the upshot of this court's decision was that the applicant's application for review of sentence that was lodged on March 8, 2022 was not merited and the same be and is hereby dismissed.
19. It is so ordered.

**DATED AND DELIVERED AT NYAMIRA THIS 20<sup>TH</sup> DAY OF DECEMBER 2022**

**J. KAMAU**

**JUDGE**

