



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH COURT CRIMINAL REVISION E346 OF 2019**

**PATRICK KAMAU KUNG’U.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant has vide a notice of motion application dated 23<sup>rd</sup> August 2021, sought for orders that; the court takes into account a period of 2 ½ years he was in custody, while on trial and review the 15 years imprisonment sentence he is serving.
2. The application is supported by an affidavit of even date, sworn by the applicant. The Respondent was given seven (7) days to file a response to the application. However, at the time of writing the ruling herein, there is no response to the application nor submissions thereto by any party.
3. I have considered the application and I note that, the applicant was charged with the offence of; defilement contrary to section 8(1) (4) of the Penal Code. He pleaded not guilty to the charge and the case was fully heard. He was found guilty, convicted and sentenced to serve a custodial period of 15 years.
4. I note that, the appellant is not challenging the conviction or the legality of the sentence in totality. Indeed, the only thing he wants is for the period stated, deducted from the 15 years. I realize from the lower court file that; the court has not indicated as to whether the period he was in custody if any was considered.
5. However, in my considered opinion, the provisions of section 333(2) of the Criminal Procedure Code that governs the subject matter herein states that; *“The sentence imposed upon conviction of an accused person shall take account the period spent in custody.”* In that case, the court to consider the period is the trial court or the appellate court where it is pronouncing the sentence.
6. The failure to consider that period does not render the sentence illegal, improper or incorrect. Therefore, the provisions of section 362 of Criminal Procedure code, which empowers the court to revise an order or sentence does not apply. The applicant should file an appeal if the applicant holds the view that, the sentence meted out is harsh or unconscionable.
7. I therefore disallow the application for being incompetent.

It is so ordered.

**DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2021**

**GRACE L NZIOKA**

**JUDGE**

In the presence of:

Kiragu for the for the Respondent

Applicant present in person

Edwin Ombuna – Court Assistant