



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISC.APPLICATION NO.E038 OF 2021

ROBERT KIPKURUI SIELE.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

R U L I N G

1. The Applicant filed an Application on 21/4/2021 seeking inclusion of the period spent in remand in computation of his sentence.
2. The Applicant was sentenced ten (10) years imprisonment for the offence of attempted defilement contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act No.3 of 2006.
3. I have perused the original record and I find that the trial court did not take into account the period the Accused person had been in custody when sentencing him.
4. The Accused person was first arraigned in court on 07/08/2014 and the sentence of 10 years imprisonment was metered on 15/3/2016 after a period of 1 year and seven months of incarceration.
5. The law requires that the period the Applicant has been in custody be factored in computation of the sentence.
6. Section 333 (2) of the Criminal Procedure Code states 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.”

7. Justice Odunga in *Josiah Mutua Mutunga & another versus Republic, (2019) eKLR* stated as follows:

-“Section 333(2) of the Criminal Procedure Code provides that:(2) Subject to the provisions of section 38 of the Penal Code 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.

It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so since the decision not to include the period spent in custody is an exception to the statutory provision that can only be justifiable upon reasonable grounds and as I have stated above, the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence.”

8. Further, the court of appeal in *Bethwel Wilson Kibor vs. Republic [2009] eKLR* expressed itself as follows:

“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

9. I allow the Application and direct that the sentence of 10 years start to run from 07/08/2014 and not 15/3/2016.

10. The Applicant has two (2) more years to serve.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 20TH DAY OF DECEMBER, 2021

A. N. ONGERI

JUDGE