

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.333 OF 2019

ABDIKADIR MUSA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Abdikadir Musa was convicted of the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** in **Makadara Chief Magistrate’s Court, Criminal Case No.513 of 2011**. He was sentenced to serve twenty (20) years imprisonment on 7th February 2013. In his application before this court, the Applicant pleads with the court to take into consideration the period of two (2) years that he was in remand custody prior to his conviction. It was his case that this period was not taken into consideration by the trial court hence he was prejudiced. The application is not opposed by the State. Mr. Momanyi for the State submitted that the Applicant is entitled to have the two (2) years that he was in remand custody prior to his conviction taken into account in computing the period that he will ultimately serve in prison.

This court has carefully considered the facts of this case and the Applicant’s grounds for seeking to have the custodial sentence meted on him reviewed by this court. It was clear from his application that the Applicant was entitled to have the period that he spent in remand custody taken into account before the trial court sentenced him to serve custodial sentence. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016** (unreported) held thus at Page 28:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

In the premises therefore, the custodial sentence of twenty (20) years imprisonment that the Applicant was sentenced to serve as from 7th February 2013 is hereby set aside and substituted by a custodial sentence of 18 years imprisonment with effect from the said 7th February 2013. This court has taken into account the period of two years that the Applicant was in remand custody prior to his conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF JUNE 2020

L. KIMARU

JUDGE