



REPUBLIC OF KENYA



**Ambrose v Republic (Criminal Revision E129 of 2024)
[2025] KEHC 1665 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E129 OF 2024
DO CHEPKWONY, J
JANUARY 17, 2025**

BETWEEN

GIMADU AMBROSE APPLICANT

AND

REPUBLIC STATE

RULING

1. This is a ruling in respect of a Notice of Motion application dated 1st March, 2024.
2. The Applicant was charged, tried, convicted and sentenced to serve seven(7) years for the offence of Attempted Defilement contrary to Section 9 (1) as read with Section 9 (2) of the [Sexual Offences Act](#) in respect of Githunguri Criminal Case No SO E018 of 2022.

The particulars of the offence were that:-

“On the 27th day of June, 2022 at Githunguri Sub County within Kiambu County, intentionally attempted to cause his penis to penetrate the vagina of s. N. K. a child aged 17 years”.

3. The Applicant filed a Notice of Motion application brought under Certificate of Urgency dated 18th March, 2024 seeking that the court considers the time spent in custody to be considered in the sentence computation. According to the Applicant, he has transformed his behaviour through prison rehabilitation programs and he is a family man with a wife and two children hence prays for a non-custodial sentence for the remainder of his sentence subject to Probation Report in view of the term already served and for inclusion of fine in his sentence.
4. When the matter came before court on 18th December, 2024, the Applicant orally urged the court to consider the time he had spent in custody during trial. In response, the prosecution’s counsel indicated that for the offence of attempted defilement the law does not provide for an option of fine or non-



custodial sentence. However, with respect to the time spent in custody, the Applicant stated that she had no objection to the same being computed in the sentence but maintained that the sentence of ten (10) years imprisonment issued was lawful with regard to the offence committed and the application is thus a waste of court's time.

Analysis and Determination

5. Having listened to the Applicant and the counsel for the prosecution, their respective oral submissions in respect of the application dated 15th March, 2024, this Court finds the issue for determination being whether or not the Applicant's application is deserving.
6. The High Court is bestowed with supervisory jurisdiction over subordinate courts or any person, body or authority exercising a judicial or a quasi-judicial function pursuant to the Provisions of Article 165 (3) and (6) of the *Constitution* of Kenya, 2010.

Article 165 (3) provided that:

- (3) Subject to clause (5), the High Court shall have—
 - a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

Article 165 (6) goes on to state that:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

7. The power of revision in Criminal Cases has in exercise of the High Court's supervisory jurisdiction as provided for under Sections 362 to 366 of the *Criminal Procedure Code*. Section 362 provides that: -

[362]. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”

Section 364 states as follows:-

[364]. Powers of High Court on revision (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:



Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

8. When called upon to consider the period an accused/applicant spent in custody during trial in passing sentence, the relevant and guiding provision is Section 333(2) of the [Criminal Procedure Code](#) which states: -

“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 Sub section (1) has prior, to such sentence shall take account of the period spent in custody.”

9. This provision has been restated in The [Judiciary Sentencing Policy Guidelines](#): -

“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.”

10. In this case, the Applicant was charged with the offence of Attempted Defilement Contrary to Section 9(1) as read with Section 9(2) of the [Sexual Offences Act](#), and an alternative charge of Indecent Act with a Child Contrary to Section 11(1) of the [Sexual Offences Act](#). He was arraigned in court for plea taking on 12th July, 2022. The trial commenced on 25th October, 2022 and was found guilty and convicted for the offence of Attempted Defilement whereby he was sentenced to serve seven (7) years imprisonment on 26th July, 2023.
11. This confirms that the period the Applicant spent in custody during trial was one (1) year and fourteen (14) days, which ought to have been considered in sentencing him as provided for under Section 333 of the Criminal Code. A reading of the ruling on sentence by the trial Magistrate clearly shows that this period was taken into account as it merely stated “Consequently, the accused is sentenced to serve seven (7) years imprisonment: Fourteen (14) days right of appeal. Upon completion of sentence, the accused to be repatriated back to his home country – Uganda”. Sentence to run from 12/7/2022.



12. With respect to the prayer of reduction of the sentence, it is worth noting that under Section 9 (2) of the *Sexual Offences Act*, the law prescribes for a penalty of ten (10) years for anyone found guilty of the offence of Attempted Defilement. It does not provide for alternative forms of punishment for this offence. Further, it would be against the interest of justice and rights of the minor victim who was seventeen years old at the time of commission of the offence, to release the Applicant and grant him a non-custodial sentence.
13. The upshot is that the Notice of Motion application dated 18th March, 2024, partly succeeds in the following terms: -
 - a. The period of one (1) year and fourteen (14) days the Applicant spent in custody during trial to be computed in his sentence as ordered by the trial Magistrate, that the same runs from 12th July, 2022.
 - b. The prayer for a non – custodial sentence is hereby declined.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17TH DAY OF JANUARY, 2025.

D. O. CHEPKWONY

JUDGE

