



REPUBLIC OF KENYA



**KULOBA v Republic (Criminal Revision E128 of 2024)
[2025] KEHC 1182 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E128 OF 2024
DO CHEPKWONY, J
JANUARY 17, 2025**

BETWEEN

MILTON KULOBA APPLICANT

AND

REPUBLIC STATE

RULING

1. This is a ruling in respect of a Notice of Motion application dated 15th March, 2024, basically seeking a revision of the sentence order that was meted against the Applicant on 17th January, 2024.
2. Applicant was charged, tried, convicted and sentenced to serve ten (10) years imprisonment for the offence of committing Indecent Act with a Child Contrary to Section 11 (1) of the *Sexual Offences Act* vide Limuru Criminal Case No SO 030 of 2022.

The particulars of the offence were that:-

“On the diverse date between 18th July, 2022 and 22nd July, 2022 at unknown time in Lari Sub County within Kiambu County, intentionally and unlawfully touched the vagina of RWM, a child aged 8 years”.

3. The Applicant filed the Notice of Motion application brought under Certificate of Urgency seeking to have this Court declare that the time spent in custody of One (1) year, Five (5) months and Twelve (12) days 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 14 school going children. He thus prays to be accorded a non-custodial sentence for the remainder of his sentence subject to the Probation Report in view of the term already served.
4. When the matter came before court on 18th December, 2024, the Applicant orally urged the court to reduce his sentence because he has children who have no one to provide for them. However, the



prosecution's counsel indicated that the law does not provide for an option of a fine or non-custodial sentence for the offence of attempted defilement. However, due to the prayer that the time spent in custody be considered before passing of the sentence, the Applicant does not object to the same being computed in the sentence that was meted against him. He maintains that the sentence of ten (10) years issued was lawful with regard to the offence that was committed.

Analysis and Determination

5. Having listened to the Applicant and the counsel for the prosecution in 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 trial Court failed to consider period spent in custody during trial as expected of the provisions of Section 333 (2) of the *Criminal Procedure Code*.
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](#) as follows: -

“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. Having read through the records of the trial Court, this Court finds that the Applicant was arraigned in court on 5th August, 2022 and the sentence against him was issued on 17th January, 2024. This indeed confirms that the period the Applicant spent in custody during trial was One (1) year, five (5) months and twelve (12) days as correctly computed by the Applicant. Therefore, in accordance with the provisions of Section 333 of the Criminal Code, this period ought to have been considered by the Trial Court in passing sentence against the Applicant.
11. With respect to the prayer for reduction of the sentence, the first point of consideration is Section 11 (1) of the [Sexual Offences Act](#) which prescribes for a sentence of Ten (10) years imprisonment for the offence of committing an Indecent Act with a Child. It is worth noting that the law does not provide for alternative forms of punishment for the said offence, hence, it would be against the law, interest of



justice and rights of the minor victim who was aged eight (8) years old at the time of the commission of the offence to release the Applicant by issuing a non-custodial sentence as sought.

12. The accused was charged with the offence of Defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act*. Section 8(2) of the said Act provides for the sentence, as follows:-

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.

13. I have read the sentence on record and it goes as follows:-

“I have perused the Probation Sentencing Report dated 11th January, 2024 and the Witness Impact Assessment Report dated 11th January, 2024. The offence committed by the accused is very serious. As per this report psychologically and emotionally affected. A deterrent sentence is necessary to serve as a lesson. I sentence the accused to serve imprisonment for 10 (ten) years in the alternative charge of Indecent Act contrary to Section 11(1) of the *Sexual Offences Act*.”

14. The upshot is that the Notice of Motion application dated 15th March, 2024 partly succeeds with respect to:-

- a. The period of which the Applicant spent in custody during trial be considered in computing his sentence.
- 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

