Kiboi v Republic (Criminal Revision E113 of 2024)
[2025] KEHC 1568 (KLR) (17 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1568 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL REVISION E113 OF 2024

LN MUTENDE, J

FEBRUARY 17, 2025

BETWEEN

FRANCIS NGURE KIBOI .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. Francis Ngure Kiboi, Applicant, was charged and convicted for the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. After full trial he was convicted and sentenced to serve Twenty (20) years imprisonment. Through an undated application filed herein on 22nd November,2022, he seeks review of the sentence.

2. The application is supported by an affidavit deposed by the Applicant, where he avers that following his arrest and arraignment, he spent Nine (9) months in custody, a period that was not computed as stipulated in Section 333(2) of the *Criminal Procedure Code* (CPC).

3. The Respondent through an affidavit deposed by Gladys Kariuki, Senior Principal Prosecution Counsel opposing the application stated that the sentence imposed was proper.

4. Section 333(2) of the *CPC* provides that:

   (2) 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.

5. That provision of the law applies in mandatory terms and it is the accused person's entitlement. The court is required to state that it considered the period spent in remand and it must further deduct that

period from the sentence meted out. This was stated in the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR where the Court of Appeal delivered itself thus:

> "The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. 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…"

6. In the case of *Bukenya v Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013) the Court of Appeal stated that:

> "Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement"

7. In this case the trial court delivered itself thus:

> "…I therefore do not have the luxury of discretion at my disposal to pass partial sentence prescribed under Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. I therefore sentence the accused person to twenty (20) years imprisonment. However, he had a right of appeal in fourteen (14) days."

8. The trial court did not pronounce itself on the duration the applicant spent in remand custody.

9. Section 8(3) of the *Sexual Offences Act* under which the Applicant was charged provides that;

> "(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

10. Time spent in remand custody was Nine (9) months, a period that should have been computed. It was improper for the court to remain mum on the question of the period the Applicant spent in custody prior to sentencing.

11. The upshot of the above is that the application which is meritorious is allowed. In the premises, the order of the court is set side and substituted with an order sentencing the Applicant to Twenty (20) years imprisonment which will be effective from the date of arrest 2/12/2018.

12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY, 2025.

L.N. MUTENDE

JUDGE