



**Malova v Republic (Criminal Miscellaneous Application
E060 of 2024) [2025] KEHC 2068 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL MISCELLANEOUS APPLICATION E060 OF 2024**

LN MUTENDE, J

FEBRUARY 5, 2025

BETWEEN

ERICK AGUYA MALOVA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Erick Aguya Malova, the Applicant, was tried, found guilty and convicted for the offence of committing a Sexual Offence contrary to Section 5(1)(a)(i) (2) of the [Sexual Offences Act](#). Following the conviction, he was sentenced to Ten (10) years imprisonment. The victim was a child aged Twelve (12) years old.
2. Discontented, the Applicant has approached this court seeking compliance with Section 333(2) of the [Criminal Procedure Code](#) so that the time he spent in custody can be taken into consideration. In an affidavit in support of the application the applicant urges that he was in custody for Nine (9) months prior to determination of the matter. That having served three years out of the Ten (10) years he should be given a second chance as his family is suffering.
3. Section 333(2) of the [Criminal Procedure Code](#) 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.”



4. 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 *Abamad 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...”

5. Section 5 (1)(a)(i)(2) of the *Sexual Offences Act* provides thus:

“(1) Any person who unlawfully—
(a) penetrates the genital organs of another person with—
(i) any part of the body of another or that person; or
(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”

6. It is apparent that the sentence imposed was the minimum available sentence, hence the court did not misdirect itself.
7. In the result, the application lacks merit. Accordingly, it is dismissed.
8. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF FEBRUARY, 2025.

L.N. MUTENDE

JUDGE

