



**Dinda v Republic (Criminal Miscellaneous Application  
E080 of 2024) [2025] KEHC 3657 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3657 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL MISCELLANEOUS APPLICATION E080 OF 2024**

**OA SEWE, J  
MARCH 20, 2025**

**BETWEEN**

**IRINE ATIENO DINDA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant, Irine Atieno Dinda, filed an undated Notice of Motion herein seeking orders that the period spent by her in remand pending trial be taken into consideration for purposes of Section 333(2) of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya. She relied on her Supporting Affidavit filed alongside the Notice of Motion in which she explained that she was charged, convicted and sentenced to 10 years' imprisonment for the offence of gang defilement.
2. The applicant also cited Article 165(3) of the Constitution as well as the case of Ahmed Abolfathi Mohammed and another v Republic [2018] eKLR to support her submission that the period spent in custody prior to her conviction and sentence ought to be taken into account in computing her sentence. She relied entirely on the grounds set out in her application and its Supporting Affidavit.
3. Directions were given on the 21<sup>st</sup> January 2025 that the application be served on the respondent and that the lower court record be availed for perusal. When the parties attended court on 12<sup>th</sup> March 2025, counsel for the respondent indicated that, having perused the lower court record and confirmed that the applicant was taken to court on 12<sup>th</sup> July 2021 and was thereafter released on bond on 16<sup>th</sup> February 2022, she had no objection to the application.
4. The respondent further conceded that the learned trial magistrate did not take into consideration the provisions of Section 333(2) of the *Criminal Procedure Code* at the time of passing the sentence of 10 years on the applicant; and added that, as far as she could ascertain, the applicant had not filed an appeal against her conviction or the sentence imposed on her.



5. Accordingly, the issue for determination in this application is whether the applicant has made out a good case to warrant reconsideration of her sentence for purposes of Section 333(2) of the [Criminal Procedure Code](#). That provisions states:

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.

6. The Judiciary Sentencing Guidelines, 2023 also provide as follows in Clauses 2.3.18 and 2.3.19:
- 2.3.18 Section 333 (2) of the [Criminal Procedure Code](#) obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.
- 2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders – for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.
7. A perusal of the record of the lower court confirms that the applicant was indeed arrested, charged and arraigned before the court of the Senior Principal Magistrate at Oyugis in Magistrates Court Sexual Offence Case No. 13 of 2021: Republic v Irene Atieno Dindi. She was charged with two substantive counts, namely gang defilement contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006, and benefiting from child prostitution contrary to Section 15(d) of the [Sexual Offences Act](#). The victim was said to be a child then aged 17 years, who was also a relative of the applicant. The offences were alleged to have occurred on the 5<sup>th</sup> July 2021 at Kanyadhiang Location in Rachuonyo North Sub County within Homa Bay County.
8. The applicant denied the allegations, and upon trial, the lower court found her guilty of the two counts. She was convicted thereof and sentenced to 10 years' imprisonment in respect of Count I and 5 years' imprisonment on Count II. The sentences were to run concurrently.
9. A perusal of the record further confirms that, upon arraignment on the 12<sup>th</sup> July 2021, the applicant applied for release on bond but the same was declined by the lower court on the ground that some of the culprits were still at large. It was not until the 13<sup>th</sup> October 2021 that an order was made for her release on bond of Kshs. 200,000/= with a surety in similar amount; and even then she was not released until 16<sup>th</sup> February 2022 when her surety was approved and her release sanctioned. There is therefore no disputation that the applicant spent about 7 months in custody before her release on bond on the 12<sup>th</sup> February 2022.
10. A perusal of the proceedings of the Sentencing Hearing held on 22<sup>nd</sup> November 2022 confirms that the learned trial magistrate did not take into consideration the provisions of Section 333(2) of the



Criminal Procedure Code. In Ahmad Abolfathi Mohammed & Another Criminal [2018] eKLR, the Court of Appeal held:

...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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012...”

11. Accordingly, I find merit in the applicant’s Notice of Motion. The same is hereby allowed and an order granted to the effect that the period of the petitioner’s detention between 12<sup>th</sup> July 2021, when she was arrested, and 12<sup>th</sup> February 2022 when she was released on bond, be taken into account in reckoning her sentence, as provided for in Section 333(2) of the Criminal Procedure Code and that her sentence be reduced proportionately.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 20<sup>TH</sup> DAY OF MARCH 2025.**

**OLGA SEWE  
JUDGE**

