



**IKK v Republic (Criminal Miscellaneous Application
E038 of 2024) [2025] KEHC 2606 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2606 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL MISCELLANEOUS APPLICATION E038 OF 2024**

**LN MUTENDE, J
MARCH 13, 2025**

BETWEEN

IKK APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. IKK, Applicant, was charged and convicted for the offence of Incest contrary to Section 20(1) of the *Sexual Offences Act*. After full trial he was convicted and sentenced to serve Fifteen (15) years imprisonment. Through an application dated 16th September, 2024, he seeks to benefit from the least severe sentence and to have his sentence reviewed.
2. At the hearing the applicant prayed for consideration of time spent in custody during pendency of trial.
3. The Respondent through Mr. Bernard Obutu, learned Prosecution Counsel opposing the application stated that the sentence imposed was proper.
4. 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.
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 this case the the applicant did not post bond hence he was in custody throughout the trial, however, when sentencing, the trial court did not take into account time spent in custody.
7. 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 Fifteen(15) years imprisonment which will be effective from the date of arrest, 28/5/2021.
8. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH, 2025.

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L.N. MUTENDE

JUDGE

