



**Makaya v Republic (Miscellaneous Criminal Application  
E011 of 2025) [2025] KEHC 4242 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4242 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
MISCELLANEOUS CRIMINAL APPLICATION E011 OF 2025**

**LN MUTENDE, J**

**APRIL 1, 2025**

**BETWEEN**

**THOMAS ZEKERIA MAKAYA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Thomas Zekeria Makaya, 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 thirty (30) years imprisonment. Through an application dated 17<sup>th</sup> February, 2025, he seeks review of the sentence and in particular consideration of the period he spent in remand custody pursuant to Section 333(2) of the *Criminal Procedure Code*.
2. The application is supported by an affidavit deposed by the Applicant where he avers that he was in remand custody since 10.07.2015 to 29.05.2017 during trial. That he has the right to benefit from the least severe punishment guaranteed by *the constitution*. That his character is commendable, he has been rehabilitated and the sentence meted out was harsh and excessive.
3. The Respondent through Mr. Obutu, learned Prosecution Counsel opted to leave it to court to exercise its discretion.
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 *Ahamad Abolfathi Mohammed & Another vs. 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 *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 Applicant was not able to post bail during trial, therefore, he should have benefited from the provisions of the law.
8. The upshot of the above is that the application is allowed. The order of the court sentencing the Applicant/Accused to thirty (30) years imprisonment is upheld, save that it will be effective from the date of arrest, 10.07.2015.
9. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1<sup>ST</sup> DAY OF APRIL, 2025.**

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**L.N. MUTENDE**

**JUDGE**

