



REPUBLIC OF KENYA



**Ongwano v Republic (Miscellaneous Criminal Case
E136 of 2024) [2025] KEHC 6049 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL CASE E136 OF 2024
RN NYAKUNDI, J
MAY 15, 2025**

BETWEEN

JAMES ONGWANO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court is an application seeking the following orders:
 - i. That the applicant is seeking review of his sentence pursuant to provisions of section 333(2) of the CPC
 - ii. That this Hon. Court has the power bestowed by the constitution and the law under article 165(3) to entertain application of this nature and award a redress
 - iii. That the applicant beg to be present during the hearing and final determination of this applicationFurther it is annexed by the affidavit in support sworn by James Ogwano
 - i. That I am a male adult Kenyan citizen of sound mind versed with the fact of this matter and hence competent to sear this affidavit
 - ii. That I charged, tried, convicted and sentenced to serve 20 years imprisonment for the offence of defilement c/section 8(1) 8(3) SOA No. 3 of 2006.
 - iii. That I did not appeal against the conviction and now looking forward for sentence review for the time spent in custody and the sentence to run from the day of my arrest
 - iv. That I am seeking sentence review in accordance to section 362,364(1) and 365 of the CPC and article 27(1) (2) (4) (22 (1) 23(1) 25 of the constitution



- v. That I am seeking this Hon. Court to allow my sentence to start from the date of my arrest being 27th August 2018 and not the date of my conviction being 19th February 2024 as per the provision of section 333(2)
 - vi. That I am the first offender seeking leniency of the court
 - vii. That I am the first offender remorseful, repentant and reformed and rehabilitated person and I have learnt the incarceration and pray to be allowed by the honourable court to play role model in the society
 - viii. That may this honourable court be pleased to grant me a fair opportunity to argue my petition before the court
2. This Application is based under Section 333 (2) of the *Criminal Procedure Code* on the period of 1 year 2 months spent in pre-trial detention. This means the Applicant on arrest by the National Police Service and recommended to face trial was never released on bond under Article 149 (1) & (h) of the *constitution*. This provision was articulated and interpreted in the case of *Rwabugande Moses v Uganda* [2017] UGSC 8 where the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure with a mandatory constitutional provision. Secondly, the Supreme Court held that there has to be an arithmetic deduction of the period the Appellant spent in lawful custody in terms of Article 23(8) of the *constitution* when they said;

“It is our view that the taking into account of the period spent on remand by a Court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.

We must emphasize that a sentence couched in general terms that Court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the Court accounted for the remand period in arriving at the sentence. Article 23(8) of the *constitution (supra)* makes it mandatory and not discretionary that a sentencing Judicial Officer accounts for the remand period, as such, the remand period cannot be placed on the same scale with other factors developed under common law such as age, of the convict; fact that the convict is a first offender; remorsefulness of the convict and others which are discretionary mitigating factors which the Court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors and the Courts determination of the sentence cannot be quantified with precision.”

3. Also in the cited case Supreme Court further reconsidered and held that;

“what is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of the convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the *constitution*.

Where the sentencing Court has clearly demonstrated that it has to be taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the Appellate Court only because the sentencing Judge or Justices used different



words in the Judgement or missed to state that they deducted the period spent on remand. This may be issues of style for a lower Court would not be faulted when in effect the Court has complied with the constitutional obligation in Article 23(8) of the *constitution*.”

4. The rationale of Criminal Justice System in Kenya rests on the legitimacy of fairness, reasonableness, equality, and conformity to the Rule of Law being part of the National principles of governance and values as stipulated in Article 10 of the *constitution*. The above mentioned principles, clearly suggest that in applying Article 27 of the *constitution* as read with Section 333 (2) of the *CPC* the Applicant has a legitimate expectation that a Court should not limit certain rights entitlement legislated in his favor for him to benefit with a lesser sentence of giving credit to the period spent in pre-trial detention.
5. It is open to the trial courts to take into account the period of 16 days already served by the Applicant in pre-trial detention before he was released on bail under Article 49 1(h) of the *constitution*. The committal warrant therefore, shall be amended in compliance with parliaments intention in enacting section 333(2) of the *CPC*.

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 15TH DAY OF MAY 2025.

In the Presence of

M/s Sidi for the State

Applicant

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R.NYAKUNDI

JUDGE

