



REPUBLIC OF KENYA



**Nyanuga v Republic (Criminal Revision E039 of 2023)
[2025] KEHC 12775 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E039 OF 2023
DKN MAGARE, J
SEPTEMBER 17, 2025**

BETWEEN

EDWIN ONGERI NYANUGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a ruling over an application dated 14.8.2023 and filed by the Applicant seeking to review sentence meted out against him in Mukurweini PMSO No. E002 of 2023 vide the Judgment dated and delivered by Honourable D.N. Bosibori, Senior Resident Magistrate.
2. The trial court sentenced the Applicant having found him guilty on the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*.
3. The Applicant stated that the sentence was harsh and did not consider that he was first offender, remorseful, undergone rehabilitation and had spent time in custody.

Submissions

4. The Applicant filed submissions on 21.4.2024. It was submitted that the court had jurisdiction to impose sentence not being minimum sentences under Section 8 of the *Sexual Offences Act*. The Applicant cited inter alia the Court of Appeal decision in Dismas Wafula Kilwake v Republic [2018] eKLR.
5. It was also submitted that the Appellant had undergone rehabilitation and was first offender which ought to be considered. The Appellant also relied on Ahamad Abolfathi Mphamed v Republic Criminal Appeal No. 135 of 2016 to submit that time spent in custody from his arrest on 1.2.2023 to conviction on 24.7.2023 was not considered.



6. The Respondent submitted that the sentence of 15 years was lenient in the circumstances and should be upheld.

Analysis

7. The powers of the High Court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code. Section 362 of the Act provides as follows:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.

8. What the High Court can do under its revision jurisdiction is stated under Section 364 of the Criminal Procedure Code, which states as follows:

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –

(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

(b) In the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.(5)When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

9. On the time spent in custody, Section 333(2) of the Criminal Procedure Code provides that;

“Subject to the provisions of Section 38 of the penal code, 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 sub section (1) has prior, to such sentence shall take into account of the period spent in custody”

10. The court herein granted the minimum sentence of 15 years. In the circumstances, the applicant has not demonstrated before this court that the sentence rendered by the trial court of 15 years was illegal or that it was arrived at by a wrong exercise of jurisdiction. The application fails.

11. The next issue is time spent in custody. The trial court noted that it was considering inter alia, the duration spent in custody since 1.2.2023. The law under Section 333(2) of the Criminal Procedure Code provides as doth:

“Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”

12. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR stated as follows as regards time spent in custody:

“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. 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.”

13. I am also guided by the Judiciary Sentencing Policy Guidelines, 2023 as follows:

“The proviso to Section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”



14. The revisionary power of this court also serves the supervisory role and the court is empowered by Article 165(6) of *the Constitution* of Kenya to review a decision by a subordinate court. Article 165(6), the relevant provision is as doth:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

15. The trial court though stated, did not indeed apply the time spent in custody by subtracting it from the expected prison term. The common position of the parties is that the Applicant was arrested on 1.2.2023 and convicted on 24.7.2023. The Applicant remained in custody after taking plea. He was not able to raise a surety for the bond of Ksh. 100,000/=. He remained in custody throughout the trial period. Section 333(2) of the Criminal Procedure Code provides that the period spent in custody pending trial shall be taken into account during sentencing. It is important to note that this application was unopposed.

16. The Applicant had stayed in custody for 5 months and 23 days which ought to have been netted from any period the Applicant was to serve in prison. In the case of the trial court, it was to be considered in computing the sentence of 15 years imprisonment. It is clear that the time spent in custody was not considered. The period spent in custody must mean something, so that the imposed sentence is reduced proportionately by the period already spent in custody. This was not done and this court will interfere to that extend.

Determination

17. In the upshot, I make the following orders: -

- a. The application is not merited and is dismissed.
- b. The sentence of 15 years imprisonment is upheld.
- c. The term of 15 years imprisonment shall run from 1.2.2023 when the Applicant was arrested.
- d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF SEPTEMBER, 2025.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the State

Applicant present

PC Kimani of Kamiti Medium GK Prison – present

Court Assistant – Michael

M. D. KIZITO, J.

