



**Kigen v Republic (Civil Appeal E016 of 2021)
[2024] KEHC 1224 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E016 OF 2021
RN NYAKUNDI, J
FEBRUARY 15, 2024**

BETWEEN

BENEARD KIPKEMBOI KIGEN APPELLANT

AND

REPUBLIC RESPONDENT

(Being a review on sentence in Cr. 172 of 2019 before Hon. Wewa (SPM))

RULING

1. The applicant was charged in the lower court with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the sexual offences Act No. 3 of 2006. The brief fact were that on the 21st day of July 2019 at Soy sub county within Uasin Gishu county, intentionally and unlawfully picked and carried V.N a child aged 15 years with mental disability into the maize plantation with intent to defile her. The applicant was tried, convicted of the said charge and a sentence of 10 years imprisonment. The applicant being aggrieved preferred an application challenging the impugned judgment on sentence on the basis of section 333(2) of the Criminal Procedure Code.
2. The applicant now seeks review of the sentence pursuant to Section 333(2) of the Criminal Procedure code. The applicant prays that the court considers the said provision and take into account the time spent in custody before determination of his case.

ANALYSIS AND DETERMINATION

3. I have considered the application and the court’s mandate is to determine the application of section 333(2) of the Criminal procedure code. The section provides as follows:

- (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.

4. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.
5. This Court associates itself with the decision of the High Court by Hon. G. V. Odunga J in *Vincent Sila Jona & 87 Others vs Kenya Prison Service & 2 Others* [2021] eKLR where a joint petition was filed by 51 Petitioners whose sentences had not taken into account the time spent in remand and in order to enhance fundamental rights and freedoms of Petitioners while upholding the intention of the sentencing Court sought declaration on compliance with Section 333(2) *CPC*. The Court held as follows;

A declaration that Trial Courts are enjoined by Section 333(2) of the *Criminal Procedure Code*, in imposing sentences, other than sentence of death to take into account of the period spent in custody.

A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.

A declaration that Section 333(2) *CPC* applies to the original sentence as well as sentence imposed during resentencing.....

6. The requirement to comply with Section 333(2) *CPC* is mandatory in computation of the sentence to be served by the Convict upon establishing the nature of the sentence to be imposed. The requirement is also amplified by the Judiciary Sentencing Policy and thus an integral part of sentencing process to avoid excessive punishment that is not proportional to the offence committed. In *The Rwabugande Moses v Uganda* (2017) UGSC 8 the Supreme Court of Uganda profoundly held as follows on a constitutional provision with similar provisions with our section 333(2) of the *CPC* as follows:
 15. What is material in that decision is that 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*
 20. Where a sentencing court has clearly demonstrated that it has 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 justice used different words in the judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which 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*
7. The punishment prescribed by the law for the offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than ten years. I



am alive to the fact that it is in the trial court’s discretion to mete a reasonable sentence considering the circumstances of each case. As an appellate court I am guided by the principles in the court of Appeal case of *Bernard Kimani Gacheru vs Republic* (2002) eKLR where it was stated as follows: “ It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

8. It is common to describe the principles enunciated in *Bernad Case* (supra) as connoting various factors of error if established by an appeal’s court does vitiate the exercise of discretion by the trial court. I can classify them as express errors which include error of principle, an error of law, or an error of fact or failing to take into account relevant matters. The other category of error is commonly referred to as “implied” error because even though an express error is not evident from a review of the process or the observation made at the time of sentence, the sentence imposed is “unreasonable or plainly unjust” with the consequence that error can be implied from the outcome.
9. The Applicant was convicted on 1/3/2021 when judgment on sentence was read out and after mitigation, he was sentenced to serve 10 years imprisonment. The court in sentencing the accused person was not clear on when the sentence would start running. I share the same thoughts as the court in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR that the trial court should have directed the applicant’s sentence of imprisonment to run from the date of arrest on 7th December, 2020.
10. Therefore, in consonance with Section 333(2) *Criminal Procedure Code*; computation of the sentence ought to include the period the Applicant person was in custody during hearing and determination of the case before sentence was meted out.
11. The sentencing process and its outcomes are within the mandate of the trial court. However, since circumstances vary from a case to another, this court shall intervene in exercise of revisionary jurisdiction pursuant to Articles 165(6) & (7), 50 (6) (a) & (b) of *the Constitution* as read with Section 362 & 364 of the CPC. The question for this court is to ensure that an accused person tried, convicted, and sentenced to a custodial sentence he or she ought to be accorded a fair trial and the sentence so imposed to capture the spirit of the law under section 333(2) of the *CPC*. I don’t think it will be an overreach for this court to state that the custodial sentence passed against a convict who has been in pre-trial remand without incorporating the above provisions may be considered illegal. What is material to the decision are the principles in *Rwabugande* case (supra).
12. From the above discussion there is certainly evidence to show that Section 333(2) of the *CPC* was not complied with by the trial court. In this respect, the committal warrant to prison be amended to give credit to the applicant for the period spent in remand custody. As a consequence, the sentence is deemed to commence on 21/7/2019. Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF FEBRUARY, 2024.

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R. NYAKUNDI

JUDGE

