



**Ibrahim v Republic (Criminal Revision E002 of 2024)
[2024] KEHC 2566 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL REVISION E002 OF 2024
JN ONYIEGO, J
MARCH 8, 2024**

BETWEEN

ALI ABDIWAHAB IBRAHIM APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein was charged and found guilty of the offence of defilement contrary to section 8(1)(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 14th and 15th of June, 2018 at [Particulars withheld] Guest House within Garissa Town in Garissa County, intentionally and unlawfully caused his penis to penetrate the vagina of MAS, a child aged 16 years.
2. He was tried, convicted and thereafter sentenced to serve eighteen (18) years' imprisonment.
3. Vide a petition of appeal filed in court on 09.02.2022, he challenged the decision of the trial magistrate and vide its judgment delivered on 29.09.2023, this court substituted the Eighteen-year sentence with a Seven-year imprisonment to run from the time when sentence was imposed.
4. The applicant has since approached this court once more vide the application dated 23.11.2023 seeking review of his sentence to consider the time already spent in remand custody. He argued that despite this court stating that his sentence was to run from the time of arrest, the same was not considered for he stood to serve an extra period of one year fourteen days in prison. He sought that this Court be guided by section 333(2) of *Criminal Procedure Code* to ensure that he does not remain in prison beyond the stipulated time of his sentence.
5. During the hearing of the application, the applicant urged this court to allow his prayer for consideration of time already spent in custody. On the other hand, Mr. Kihara, counsel for the respondent opposed the said application arguing that this court had previously reduced the applicant's



sentence from Eighteen years to Seven years and therefore, a further prayer for consideration of time already spent in custody is not tenable. He urged this court to dismiss the application herein in its entirety.

6. I have considered the application and the oral submissions by both parties. The main issue for determination is whether this Honourable Court has jurisdiction to determine the application herein and to issue the orders sought.
7. It is not in dispute that having been aggrieved by the judgement of the trial court the applicant appealed to this court and the appeal was heard and determined.
8. The applicant in seeking for consideration of time already spent in custody argued that if this court does not intervene, then he stood to serve an extra period of one year fourteen days.
9. Section 333(2) of the *Criminal Procedure Code* provides: -

“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.”

10. It is clear from the above proviso that the law requires courts while sentencing to take into account the period the accused spent in custody.
11. The same was held in the case of *Bethwel Wilson Kibor vs Republic* [2009] eKLR expressed itself as follows: -

“By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

12. According to The Judiciary Sentencing Policy Guidelines:

“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.”

13. It is important to note that the applicant appealed to the High court against conviction and sentence as he has stated in his application. In determining the appeal, the High Court considered the propriety of



the sentence and reduced the Eighteen-year imprisonment to Seven years. This means that the alleged time considered in custody has already been reviewed by the High Court. The question whether this court has jurisdiction to review sentence already reviewed by the same court as this one, namely the High Court thereby comes into consideration.

14. Article 50(2) of *the Constitution* gives the right to every accused person of a fair trial which includes: -
 - a. “If convicted, to appeal to, or to apply for review by, a higher court as prescribed by law.”
15. In *John Kamau Gachuba v Republic* [2019] eKLR the Court held as follows;

“... The applicant merely seeks the imposition of a more lenient sentence. This court has no revision jurisdiction over an appeal it has concluded. The applicant’s only option is to appeal in the Court of Appeal...”
16. It is thus clear that this Court having dealt with the issue of sentence review on appeal it is functus officio.
17. Consequently, I am of the considered view this court lacks jurisdiction to entertain this application and thereby dismisses it for want of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF MARCH, 2024.

J. N. ONYIEGO

JUDGE

