



**Kibet v ODPP (Criminal Miscellaneous Application
E003 of 2024) [2024] KEHC 2187 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL MISCELLANEOUS APPLICATION E003 OF 2024**

AK NDUNG’U, J

MARCH 1, 2024

BETWEEN

SILAS NGETICH KIBET APPLICANT

AND

ODPP RESPONDENT

RULING

1. The Applicant, Silas Ngetich Kibet, moved this court vide a notice of motion dated 21st December, 2023, seeking the following orders;
 - i. That this honourable court be pleased to determine his application in the matter of Section 333.
 - ii. That it is within the rule of law for the same to be considered.
2. The background to the application is that the applicant was charged in Nyahururu CM’S SOA 80 of 2018 with the offence of Attempted Defilement contrary to Section 9(1) as read with 9(2) of the [Sexual Offences act](#) No. 3 of 2006 and also faced an alternative charge of Committing an Indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. He was tried, convicted and sentenced to a term of 10 years.
3. The application is supported by an affidavit by the Applicant dated 28th December, 2023 in which he depones that he was charged with an offence of Attempted Defilement contrary to Section 9(1) as read with 9(2) of the [Sexual Offences act](#) No. 3 of 2006 and also faced an alternative charge of Committing an Indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to serve 10 years on 26th July, 2019.
4. He mitigates out of time (sic) to the honourable court, pursuant to Rule Number 4 and Part iii (Section 58-73) of [Court of Appeal rules](#) on the basis that my application may be determined.



5. That he is a poor man and has no money for filing process and thus, prays that such charges be exempted from payment of requisite fee ordinarily payable, including fees for preparation of the record of mitigation.
6. Ms. Kariuki appearing for the ODPP did not oppose the application.
7. On perusal of the application and the submissions, the main issue for determination herein is whether the applicant is entitled to review of sentence under Section 333(2) of the [Criminal Procedure Code](#).

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.”

8. The law thus obligates the court to take into account the period the convict spent in custody. Addressing this issue in [Abamad Abolfathi Mohammed & Another v Republic](#) [2018] eKLR the Court of Appeal held that:-

“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.”

9. The issue was subject to discussion by the Court of Appeal in [Bethwel Wilson Kibor v Republic](#) [2009] eKLR where the court stated:

“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.”

10. 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.”

11. I have considered the record of the trial court. The trial court did not indicate that it had considered the period in which the Applicant was in remand. There is no evidence on record of such taking into account of the period spent in custody during trial. The sentence is thus contrary to the dictates of the law and good ground is laid to invoke this court’s jurisdiction to interfere with the discretion and the sentence meted out by the trial court.

12. With the result that the sentence by the trial court is set aside and substituted thereof with a sentence of 9 years from 17th July, 2018 being the date of arrest.

DATED SIGNED AND DELIVERED IN OPEN COURT THIS 1ST DAY OF MARCH, 2024.

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A.K. NDUNG’U

JUDGE

