



**Tola v Republic (Criminal Petition E010 of 2023)
[2024] KEHC 2034 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL PETITION E010 OF 2023**

M THANDE, J

MARCH 1, 2024

BETWEEN

DAY TOLA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By an application filed on 7.11.23, the Applicant seeks that the period of 1 year 2 months and 9 days from 22.9.21 to 1.12.22 spent in remand custody be considered as part of his 10 year sentence that was imposed upon him, in Garsen Criminal Case No. E023 of 2021. The Applicant states that he was charged with the offence of defilement contrary to section 9 of the *Penal Code*.
2. It is the Applicant’s case that the period spent in custody was not taken into account in the sentence imposed upon him. He further contended that Article 50(2) of the *Constitution* provides that an accused person should have the benefit of the least severe of the prescribed punishments for an offence. The Applicant cited the case of *Jona & 87 others v Kenya Prison Service & 2 others* (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) (Judgment), where the Court held that Section 333(2) applied to an original sentence as well as a resentence. Further that pursuant to Article 165(3)(b) of the *Constitution*, this Court has jurisdiction to entertain the Application
3. The Respondent did not oppose the Application and confirmed to the Court that after looking at the record, the period spent in custody was not considered.
4. The lower court record shows that the Applicant was charged with attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*. The record further shows that the Applicant was arrested on 22.9.21 and remained in custody throughout the trial, until 1.12.22 when he was convicted and sentenced.



5. The Applicant's complaint is that the trial court failed to take into account the period of 1 year 2 months and 9 days he spent in custody during trial.
6. The law requires that the period spent in custody pending trial be taken into account when imposing sentence. Section 333(2) of the [Criminal Procedure Code](#) provides as follows:

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.

7. The proviso to Section 333(2) of the [Criminal Procedure Code](#) obligates the court to take into account the period an accused spent in custody pending trial.
8. In the case of [Abamad Abolfathi Mohammed & another v Republic](#) [2018] eKLR, the Court of Appeal addressed its mind to the proviso to Section 333(2) of the [Criminal Procedure Code](#) and stated:

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](#). That provision provides as follows:

“

“333(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.”

The appellants have been in custody from the date of their arrest on 19th June 2012. 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(s) 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. Flowing from the above authority, a trial court must take into account in a meaningful way, the period spent by an accused person in custody, pending trial. As such, the imposed sentence is to be reduced proportionately by the period already spent in custody. The Court of Appeal went on to state that the proviso to Section 333(2) was introduced in 2007 to give the court power while sentencing a person convicted of an offence, to include the period already spent in custody.
10. The only way to ascertain that the period spent in custody during trial was taken into account when imposing sentence, is by looking at the record. From the record it can be seen that during sentencing of the Applicant, the trial court did consider the period the Applicant remained in custody during trial. After considering the Applicant's mitigation, the trial court stated:

I have heard (*sic*) an opportunity to listen to the accused mitigation. I empathise with his social conditions he finds himself in. However, the Sexual Offences Act prescribes one sentence only. I hereby sentence the accused to serve 10 years in jail starting from 22/9/21.
Right of Appeal within 14 days.
11. The trial court clearly cognizant of the provisions of the proviso to Section 333(2) of the Act indicated that the sentence imposed would run from 22.9.21, which was the date of the Applicant's arrest. Accordingly, contrary to the Applicant's allegation, the period spent in custody pending trial was taken into account by the trial court.
12. In the end, I find that the Application filed on 7.11.23 is unmerited and the same is hereby dismissed.

DATED AND DELIVERED IN GARSEN THIS 1ST DAY OF MARCH 2024

M. THANDE

JUDGE

