



**Ekai v Republic (Miscellaneous Criminal Appeal E036 of 2023)  
[2024] KEHC 3688 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
MISCELLANEOUS CRIMINAL APPEAL E036 OF 2023  
RN NYAKUNDI, J  
APRIL 17, 2024**

**BETWEEN**

**EITON EKAI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was charged in the trial court with the offence of attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 21<sup>st</sup> day of May, 2020 at (Particulars withheld) location, Turkana East Sub-County attempted to cause his penis to penetrate the vagina of LN a child aged 9 years.
2. The applicant was convicted of the said charge and a ten years sentence was imposed. The applicant has now filed the instant application seeking to benefit from the provisions of Section 333(2) of the CPC.

**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. In the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR as cited by the Applicant, 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 June 19, 2012.”

6. It follows then that the court should state in its decision that it indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.
7. The punishment prescribed by the law for the offence of attempted defilement is 10 years imprisonment. I take note that the applicant was found guilty of the offence of attempted defilement. The trial court in its sentencing decision stated that the mitigating factors were considered. The court did not clearly state whether section 333(2) was considered.
8. From the foregoing, it is my considered view that the applicant ought to benefit from the provisions of section 333(2) of the *CPC*.
9. In conformity with Section 333(2) *Criminal Procedure Code*, and considering the period he was in custody, the sentence shall be computed to include the period running from 25<sup>th</sup> May, 2020 to 21<sup>st</sup> April, 2022 when he was sentenced to serve 10 years imprisonment.

**DATED AND SIGNED AT ELDORET THIS 17<sup>TH</sup> DAY OF APRIL, 2024**

In the Presence of

Mr. Onkoba for the State

Accused

**R. NYAKUNDI**

**JUDGE**

