



**Lokiru v Republic (Miscellaneous Criminal Application  
E093 of 2023) [2024] KEHC 3725 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3725 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
MISCELLANEOUS CRIMINAL APPLICATION E093 OF 2023**

**RN NYAKUNDI, J**

**APRIL 4, 2024**

**BETWEEN**

**NAKWAWI LOKIRU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The undated application received in court on 10<sup>th</sup> July, 2023 is seeking sentence review. The applicant was charged with incest contrary to section 209(1) of the *Sexual Offences Act* No 3 of 2006. At the end of the trial, the applicant was convicted and sentenced to 20 years' imprisonment. Aggrieved by the conviction, the applicant lodged an appeal before this court, which was dismissed by Justice J.K. Serгон.
2. The applicant is now approaching this court vide the instant application and he seeks review of the sentence of 20 years that he is currently serving on grounds that the court ought to be lenient and that his rights were not observed.

**Analysis and Determination**

3. I have considered the application and the grounds relied upon by the applicant. It is my considered opinion that the issue which I need to decide on is whether the same is merited.
4. This court heard the applicant's appeal and it was held that the same lacked merit and that the conviction was proper. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves. The only time that this court can review a sentence imposed upon by a court is where such sentence was imposed by a subordinate court (as per section 362 of the *Criminal Procedure Code*).



5. In *Samuel Kamau Macharia & another v KCB & 2 others* App. No 2/2011, the Supreme Court of Kenya made it clear that a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law and cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. And as it is trite, a court of law ought to down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
6. In the circumstances of this case, the applicant is clearly engaging in abuse of the court process. Consequently, the Applicant cannot approach the High Court again for a review of the sentence. His only recourse is to file an appeal to the Court of Appeal on any such grounds touching on the subject matter as to conviction and sentence.
7. The only saving provision for the applicant is within the scope of section 333(2) of the Criminal Procedure Code. In this regard the sentence so imposed has to take into account the period spent in pre-trial detention. That credit period is within the purview of the constitutional imperatives under the bill of rights. 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.
8. 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.
9. In the case of *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR where the Court of Appeal held that:
  7. "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"
10. The first question is whether the applicant has demonstrated by discharging an evidential burden to justify the application of section 333(2) of the Criminal Procedure Code on account of credit period



having been spent in remand custody. The second question is whether the sentence for the crime so imposed did not take into account the appropriate credit in the circumstances of the case. My reading of the record is uncontroversial that the applicant was detained in pre-trial custody pending hearing and determination of his case. He is therefore entitled to credit for the period between arrest and final sentence committing to prison to serve sentence for the offence.

11. Given that background the committal warrant to prison shall therefore be amended in compliance with the letter and spirit of section 333(2) of the CPC. That means the sentence so imposed commencement date be effective from 30<sup>th</sup> June, 2020. The other grounds raised on this application lack merit for any remedy in favour of the applicant to be granted under Art.50 (6) (a) and (b) of the Constitution.
12. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT LODWAR THIS 4<sup>TH</sup> DAY OF APRIL, 2024**

**R. NYAKUNDI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

In the presence of;

Mr. Onkoba for the state

Applicant present in person

