



REPUBLIC OF KENYA



**MTA v Republic (Criminal Appeal E088 of 2022)  
[2024] KEHC 4261 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4261 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E088 OF 2022  
RN NYAKUNDI, J  
APRIL 11, 2024**

**BETWEEN**

**MTA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. O.  
Mogire in Eldoret Law courts Cr. S.O No. 135 of 2020)*

**RULING**

1. The Appellant was charged with the offence of Defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on diverse dates between 1st March, 2020 and 25th June 2020 within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organs to penetrate the genital organs of FJ a child aged 15 years.
2. Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the [sexual offences Act](#). The particulars of the offences were more less the same.
3. The Appellant was found guilty as charged, convicted and sentenced to serve 15 years imprisonment. The appellant is before this court seeking to benefit from the provisions of section 333(2) of the [Criminal Procedure code](#).
4. The appeal on sentence is based on grounds that:
  - i. He is a first offender and thus begs for leniency
  - ii. That section 333(2) of the [CPC](#) be considered in light of the high court petition No. E017 of 2021 at Machakos among other enabling provisions of the law.

The appellant filed written submission in support of his grounds of appeal



## Appellants written submissions

5. It was submitted by the appellant that he has already withdrawn his appeal at the high court as he is no longer interested. He stated that the period one has spent in custody must be reflected in the sentence and it is not enough for the court to state the same has been considered and yet it is not factored in when sentencing. The appellant relied on numerous decision to support review on sentence. (See the case of *Abamad Abolfabi Mohammed & Another v Republic* (2018) eKLR, *Vincent Sila Jona and 87 Others v Republic* (2021) eKLR, Constitutional and Human Rights Petition No 15 of 2020, the *Hon Justice George Odunga, Dahir Hussein v Republic* Criminal Appeal No 1 of 2015 (2015) eKLR
6. In making his prayers, the appellant sought to be considered for a non-custodial sentence.

## Analysis And Determination

7. I have considered the petition of appeal 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, 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.”



10. It follows then that the court should state in its decision that 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.
11. The punishment prescribed by the law for the offence of defilement of a child aged 15 years is a term of not less than 20 years. I take note that the applicant was found guilty of the offence of defilement. The trial court in its sentencing decision did not come out clear as to whether the mitigating factors were considered. The court did not clearly state whether section 333(2) was considered.
12. The appellant has equally sought for a non-custodial sentence. In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
  - a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanour.
  - b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
  - c) Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
  - d) Protection of the community: - where the offender is likely to pose a threat to the community.
  - e) Offender's responsibility to third parties: - where there are people depending on the offender.
  - f) Children in conflict with the law: - non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.
13. In order to decide whether such a sentence is appropriate, the Court has to consider the seriousness of the offence. The offence in question is that of defilement and from the testimony of the complainant, the accused defiled her in three different occasions. It is my considered view that the appellant cannot have the benefit of a non-custodial sentence. He can only benefit from the provisions of section 333(2) of the [CPC](#).
14. From the foregoing, and 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 28<sup>th</sup> May, 2020 to 31<sup>st</sup> August, 2022 when he was sentenced to serve 15 years imprisonment

**DATED AND SIGNED AT ELDORET THIS 11<sup>TH</sup> DAY OF APRIL, 2024**

.....

**R. NYAKUNDI**

**JUDGE**

