



**Njuguna v Republic (Criminal Revision E016 of 2024)  
[2024] KEHC 5387 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5387 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL REVISION E016 OF 2024  
FN MUCHEMI, J  
MAY 16, 2024**

**BETWEEN**

**JAMES MAINA NJUGUNA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This application is undated and was filed on 5<sup>th</sup> January 2024 in which the applicant seeks orders for review of sentence under Section 333(2) of the [Criminal Procedure Code](#).
2. The applicant was convicted by Ruiru Senior Principal Magistrate, in Criminal Case (S.O.) No. E058 of 2021 of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 and was sentenced to serve ten (10) years imprisonment.
3. The applicant herein seeks for review of sentence and urges the court to invoke section 333(2) of the [Criminal Procedure Code](#) and consider the period he served in remand custody pending the trial to be considered as part of his sentence. He states that he was arrested on 19<sup>th</sup> October 2021 and convicted on 24<sup>th</sup> October 2022 and that the period of one (1) year ought to have been taken into consideration.
4. The respondent states that the applicant was sentenced to ten (10) years imprisonment on 24/10/2023 and that he spent one year in custody from 19<sup>th</sup> October 2021 to 24<sup>th</sup> October 2022. As such, the respondent concedes that the period of one year ought to have been taken into consideration. For that reason, this application was unopposed.

**The Applicant's Submissions**

5. The applicant relies on the cases of [Abamad Abolfathi Mohammed & Another vs Republic](#) Criminal Appeal No. 135 of 2016 and [Joseph Mwaura Macharia & Others vs Republic](#) Cr. Case No. 488 of 2012 and submits that he has been in custody from 21/10/2021 to 24/10/2022, which period was not



factored during the sentencing exercise and urges the court to take into account the period such period that he spent in custody.

6. The applicant submits that he is 67 years old and he is experiencing undue and unjustifiable hardship in prison and that further submits that his advanced age is a burden on other offenders and prison officers as they have to take care of him. The applicant relies on the case of *S vs Muchunu & Another* (AR 24/11/2012) ZAKZPHC 6 Icon Zulu Natal High Court and submits that the sentence meted against him is excessive considering his advanced age. He therefore urges the court to substitute the sentence imposed to a lesser one which he can manage to serve and get out of prison alive.
7. The applicant further submits that he is a first offender, is remorseful and humbly seeks the court's leniency.

### **The Law**

8. 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.”

9. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.
10. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Ahamad Abolfatbi Mohammed & Another vs Republic* [2018]eKLR where 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 19<sup>th</sup> June 2012.”



11. 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.”

12. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

13. The applicant was arrested on 19<sup>th</sup> October 2021 and convicted on 24<sup>th</sup> October 2022. The accused was granted bail pending trial following taking of plea. He was not able to raise a surety and therefore remained in custody throughout the trial period. Section 333(2) of the *Criminal Procedure Code* provides that the period spent in custody pending trial shall be taken into account during sentencing. It is important to note that this application was unopposed.

14. have perused the court record and noted that during sentencing, the trial court took into account the mitigation of the applicant and then sentenced the applicant to ten (10) years imprisonment according to the provisions of Section 8(3) of the *Sexual Offences Act*. It is however evident that the trial court was silent on the issue of the duration the applicant spent in remand pending trial. It is therefore correct that the one (1) year in custody was not taken into account during sentencing as required by the law.

15. It is my finding that this application has merit and it is hereby allowed. The sentence of ten (10) years imprisonment imposed on the applicant shall commence from 19<sup>th</sup> October 2021, being the date of arrest.

16. It is hereby so ordered.

**RULING DELIVERED AT THIKA, DATED AND SIGNED THIS 16<sup>TH</sup> DAY OF MAY 2024.**

**F. MUCHEMI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

