



**Lole v Republic (Miscellaneous Criminal Application E053 of 2023)  
[2024] KEHC 12514 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12514 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CRIMINAL APPLICATION E053 OF 2023**

**MW MUIGAI, J  
OCTOBER 15, 2024**

**BETWEEN**

**BEN WAMBUA LOLE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Notice of Motion**

1. *Vide* an undated Application filed in Court on 14/08/2023 the Applicant sought the following orders;
  - i. Review of the sentence pursuant to Section 333(2) of the *Criminal Procedure Code*.
  - ii. That he be present during the hearing of the said application.
2. The Application is supported by the affidavit of the Applicant stating that: he is currently serving a 10-year imprisonment term for the offence of indecent Act Contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006; the Trial Magistrate erred in law and fact by not considering the period the Applicant spent in remand custody as per Section 333(2) of the *Criminal Procedure Code* before his conviction on 14<sup>th</sup> July, 2023; the Applicant had been in remand custody for 29 months and 8 days a period this Court should factor in in his sentence.
3. The Application is canvassed by way of written submissions.



## Written Submissions

### Applicant's Submissions Dated 22/02/2024

4. The Applicant has been in custody from the date of his arrest on 19<sup>th</sup> June, 2012. By dint of Section 333(2) of the *Criminal Procedure Code*, the Court was obliged to take into account the period that the Applicant had spent in custody before being sentenced.
5. In the instant case the Applicant was arrested on 6/02/2021 and was in remand custody up and until his conviction on 14/07/2023. Cumulatively he had spent 29 months and 8 days in remand custody period which this Court should consider to prevent the Applicant serve a longer sentence than envisioned.
6. Reliance is made in the Criminal Appeal case of *Abmad Abolfathi Mohammed & Anor -vs- Republic* [2018] eKLR.
7. Also see the case of *Musyeki Lemoya -vs- Republic* [2014] eKLR where the Court of Appeal contended itself thus;

“the conviction by the Trial Court was for the main and more serious offence and the sentence of 14 years was commensurate to the gravity of that offence as spelt out under the proviso to the section.

In meting out the sentence the Trial Court did not consider the extenuating circumstances that the Appellant had already spent three (3) years in custody during his trial. This was a requirement of the proviso to Section 333(2) of the *Criminal Procedure Code*.

### Respondent's Submissions – Dated 25/04/2024

8. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs-Republic* [2002] eKLR restated that;

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”
9. Also, the Court of Appeal in the case of *Abmad Abolfathi Mohammed & Anor -vs- Republic* held that:

“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 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 CPC 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. Section 11(1) of the *Sexual offences Act* provides for any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and liable upon conviction to imprisonment for a term of not less than Ten years.
11. In the instant the Trial Court did not factor the period the Applicant spent in custody but the Trial Court's sentence of 10 years was appropriate in the circumstances being in mind that the victim was 3 years old.
12. The Respondents pray that this Application be dismissed in its entirety.

### **Determination**

13. The matter before Court is for re sentencing in light of Section 333(2) *CPC* only by review to factor in computation of the sentence by the Trial Court for period the Accused person was in custody during trial upto sentencing.
14. Kiarie Waweru Kiarie J. in the case of *Joseph Maburu alias Ayub vs. Republic* [2019] eKLR stated;  
  
“Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. The *Black's Law Dictionary* Tenth (10th) Edition describes defines sentence as:

The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.

Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”

### **Section 333(2) Of The Criminal Procedure Code**

15. In the reliefs sought by the Applicant, this court is urged to apply the provisions of Section 333(2) of the *CPC* and the time he had served in remand be factored in.
16. The *Judiciary Sentencing Policy Guidelines* at paragraph 7.10 and 7.11 is to the effect that 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.
17. Resentencing is the adjustment of a criminal sentence due to a problem or error with the original punishment it is not a re hearing. When conducting resentencing The Court is considering the sentence meted out at trial if it is in compliance with the provisions of Section 333(2) of the *Criminal Procedure Code*.
18. The Court notes that the Applicant does not state whether the Trial Court took or did not take into account the period he spent in custody. A copy of the judgment from the Trial Court has been included.
19. This Court perused the Trial Court file and the Judgment of the Court of 14/7/2023 the Accused was found guilty as charged under Section 215 CPC of the offence of committing an indecent act with a child c/s 11(1) of the *Sexual Offences Act* No 3 of 2006.



20. The Court notes that the Applicant does not state whether the Trial Court or this court took or did not take into account the period he spent in custody. A copy of the judgment is availed and read through.
21. During Pre-Sentencing proceedings, the Applicant was treated as 1<sup>st</sup> offender in mitigation he said the charges are fabricated and the Trial Court sentenced him to 10 years imprisonment with 14 days to appeal.
22. The sentence meted out did not include the process of computation that sentence to begin from date of plea and include the period he was in custody for trial until sentence.

### **Disposition**

1. The Court finds the Applicant was in custody for 2 years 5 months and 8 days. Therefore, this period shall be taken into account while computing the 10 year sentence.
2. Appeal/Application allowed/granted.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS HIGH COURT ON 15<sup>TH</sup> OCTOBER 2024 (VIRTUALLY/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

