



REPUBLIC OF KENYA



**Machuki v Republic (Revision Case E078 of 2024)  
[2024] KEHC 13906 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13906 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
REVISION CASE E078 OF 2024  
WA OKWANY, J  
OCTOBER 24, 2024**

**BETWEEN**

**CHARLES NYAKUNDI MACHUKI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being a Revision against the Sentence at the Chief Magistrate's Court  
in Nyamira in the CMCCR No. 68 of 2018 by Hon. M.C. Nyigei,  
Principal Magistrate delivered on the 30th day of September, 2021)*

**RULING**

**Introduction**

1. The Applicant herein, Charles Nyakundi Machuki, filed an Application dated 13<sup>th</sup> March 2024 seeking the Revision of sentence under Section 333 (2) of the Criminal Procedure Code citing the following grounds: -
  1. That he was charged and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 in Criminal Case No. 68 of 2018 at Nyamira Magistrate Court and sentenced to serve 25 years imprisonment.
  2. That he has no pending matter in court hence this Application.
  3. That the Honourable Court be pleased to invoke the provision of Section 333 (2) i.e. the period spent in remand from the year 26<sup>th</sup> December 2018 to 30<sup>th</sup> September 2021 be factored in the sentence to be awarded.
  4. That this Honourable Court is seized of competent jurisdiction under Article 165 (3) (b) of *the Constitution* of Kenya 2010 to hear and determine the matter.



2. Counsel for the Respondent did not oppose the Application.
3. The main issue for determination is whether the Application is merited.
4. Article 165 of *the Constitution* vests supervisory jurisdiction on the High Court over subordinate courts as follows: -
  - (6) 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.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
5. Sections 362 and 364 of the Criminal Procedure Code, also provide for revisionary powers of the Court as follows: -
  362. Power of High Court to call for records
 

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
  364. Powers of High Court on revision
    - (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
      - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
      - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
    - (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:
 

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
6. I am cognizant of the circumstances under which an appellate court may interfere with the sentence passed by the trial court as was stated by the East African Court of Appeal in *R vs. Mohamedali Jamal* (1948) 15 E A C A 126 where it was held thus: -
 

“It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.”
7. Section 333 (2) of the Criminal Procedure Code which forms the crux of this Application states as follows: -



333. Warrant in case of sentence of imprisonment

- (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. This Court is also guided by The Judiciary Sentencing Policy Guidelines (2016) which state: -
10. 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.
11. 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.
9. The principles stipulated by Section 333 (2) of the Criminal Procedure Code were further enunciated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR, thus: -

“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.”

10. A perusal of the court record reveals that the Applicant was arrested on 26<sup>th</sup> December 2018. He took plea before the trial court on 28<sup>th</sup> December 2018 when he denied the charges and was granted bond in the sum of Kshs. 100,000/= with one surety of a similar amount. The Applicant was however not able to fulfil the bond terms and therefore remained in remand custody for the entire period of his trial. The trial ended on 30<sup>th</sup> September 2021 when he was convicted and sentenced.
11. I note that the trial court did not consider the period that the Applicant spent in remand custody during sentencing as required by Sections 333 (2) of the Criminal Procedure Code.



12. Consequently, I find that the instant application is merited and I therefore allow it and direct that the period that the Applicant spent in remand custody be considered in computing the Applicant's sentence in accordance with Section 333 (2) of the Criminal Procedure Code.
13. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**W. A. OKWANY**  
**JUDGE**

