



**Musya v Republic (Criminal Revision Application 033 of 2022)  
[2023] KEHC 2094 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2094 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL REVISION APPLICATION 033 OF 2022  
F WANGARI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**MAKAU MUSYA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The applicant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*<sup>1</sup>. He was also charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. He pleaded not guilty to both counts and the matter proceeded for full hearing. The applicant was subsequently convicted of the main charge and sentenced to 20 years imprisonment.
2. Aggrieved by the sentence, the applicant filed an appeal before the High Court, against the conviction and the sentence. Having found no merit in the appeal, Kariuki J dismissed the appeal, and confirmed the conviction and the sentence.
3. The appellant has now moved this court via an application filed on March 14, 2022, seeking to have the computation of the period spent in custody under section 333 (2) of the *Criminal Procedure Code*. The application was not opposed.
4. Section 333 (2) of the Criminal Procedure Code states;  
‘Subject to the provisions of section 38 of the *Penal Code* (Cap 63) every sentence shall be deemed to commence from, and to include of the day of, the date on which it was pronounced except where otherwise provided in this Code

<sup>1</sup> Act No 3 of 2006



Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take into account of the period spent in custody'

5. In his application, the appellant states that he does not seek to interfere with his conviction or sentence but the application of section 333 (2) of CPC. From the provision of the above section, it is mandatory for the court while sentencing, to consider the time spent in custody during trial. This is also amplified by The Judiciary Sentencing Policy Guidelines and Directions, where the courts are obligated to consider time already served in custody if the convicted person was in custody during trial.<sup>2</sup>
6. In *Ahamad Abolfathi Mohammed & Another v Republic*<sup>3</sup>, the Court of Appeal faulted the High Court for misdirecting itself by ordering that the appellants substituted sentence to run from the date of conviction instead of the date of the arrest. In this case, both the trial court and the appellate court did not state that the time spent in custody was factored. This means that the period was not taken into consideration.

### **Determination**

7. From the above discussion, the courts ought to have considered the time spent in custody. I find that the application by the appellant has merits and is allowed as prayed. The sentence shall start to run from May 11, 2015 when the appellant was first presented in court.

**DATED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

**Pauline Mwaniki for State**

**Appellant present**

**Court Assistant - Guyo**

<sup>2</sup> The Judiciary Sentencing Policy Guidelines and Directions, Clause 7.10

<sup>3</sup> [\*Abamad Abolfathi Mohammed & Another v Republic \[2018\] eKLR\*](#)

