



**Mutiso v Republic (Criminal Appeal E091 of 2022)
[2023] KEHC 1054 (KLR) (Crim) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E091 OF 2022
JM BWONWONG'A, J
FEBRUARY 15, 2023**

BETWEEN

MUTHUI MWONGELA MUTISO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. E. Kanyiri, S.R.M, on 5th February 2019 in Milimani Chief Magistrate's Court Sexual Offences Case No. 39 of 2016 Republic vs Muthui Mwangela Mutiso)

JUDGMENT

1. The appellant appealed against his conviction and sentence of 10 years imprisonment in respect of the offence of attempted defilement contrary to section 9 (1) (2) of the *Sexual Offences Act*, No. 3 of 2006.
2. Being dissatisfied with the conviction and the sentence of the court, the appellant filed the present appeal.
In his petition of appeal the appellant raised four (4) grounds.
3. When the appeal came up for hearing, the appellant abandoned his appeal against conviction and proceeded to argue his appeal against sentence only. In this regard, the appellant faulted the trial court in failing to consider the time he spent in the pre-trial remand custody. The appellant submitted that the trial court failed to consider the period spent in pre-trial remand custody pursuant to the provisions of section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.
4. In response, Ms. Akunja learned prosecution counsel urged the court to consider the record of the trial court. She submitted that the trial court considered the time spent in the pre-trial remand custody.



Analysis and determination

5. Section 333 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides that: -

“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.”

6. The powers of the court under Section 333 (2) of the *Criminal Procedure Code* and the proviso thereto were explained by the Court of Appeal in the case of *Abamad Abolfathi Mobammed & Another v Republic* [2018] e-KLR. That court while applying this provision, held that by dint of Section 333 (2) of the *Criminal Procedure Code*, the court during sentencing ought to take into account the period that the appellant had spent in pre-trial remand custody, before he is sentenced. The Judiciary Sentencing Policy Guidelines further buttresses this legal position. Those guidelines provide 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. 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.”

7. I have perused the trial court record and the sentencing notes of the trial court. I note that upon being convicted and upon the appellant having put forward his mitigation, the trial court considered the offence, the penalty provided in law, and the time spent in the pre-trial remand custody, which was 2 years and 9 months.

8. The learned trial magistrate stated that she had considered all these and proceeded to sentence the appellant to 10 years imprisonment.

His right of appeal was also explained.

9. I find that the trial court considered the time spent in pre-trial remand custody by the appellant, before sentencing him to serve 10 years imprisonment.

Consequently, I find no merit in this appeal.

10. The appellant’s appeal fails with the result that it is hereby dismissed.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF FEBRUARY 2023.

J M BWONWONG’A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

The appellant in person



Ms Akunja for the Respondent

