



**Nyangares v Republic (Criminal Revision E263 of 2022)
[2023] KEHC 2505 (KLR) (Crim) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E263 OF 2022
JM BWONWONG'A, J
FEBRUARY 2, 2023**

BETWEEN

MOSES NYANGARES APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for revision of the sentence of 10 years imprisonment delivered by Hon. A. Kithinji, S.P.M, on 15th May 2019 in Makadara Chief Magistrates Court in Criminal Case No. 3338 of 2013 Republic vs Moses Nyangares)

RULING

1. The applicant was convicted and sentenced to serve 10 years imprisonment for the offence of defilement contrary to section 8 (1) as read with 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006.
2. He has now filed the present application seeking the revision of his sentence.
3. The grounds raised in his application and the sworn affidavit in support are that the trial court failed to consider the 5 years and 11 months spent in pre-trial remand custody. He is remorseful for and he has reformed.
4. He has urged the court to consider his application and reduce his sentence.

The applicant's written submissions

5. The applicant submitted that the provisions of section 333 (2) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya, were not taken into consideration. He has cited the decision of [Abamad Abolfathi Mohammed & Another vs. Republic](#) [2018] e-KLR, and has urged the court to consider the time spent in the pre-trial remand custody.



The respondent's written submissions

6. The respondent did not file any submissions.

Issues for determination

7. After considering the application, the oral submissions and the applicable law, I find that the issue for determination is whether the applicant has made out a case for the grant of the orders sought.

Analysis and determination

8. The instant application is premised on sections 362 and 364 of the *Criminal Procedure Code*. Section 362 gives the High Court the jurisdiction to call for and examine the record of any criminal proceeding before any subordinate court to satisfy 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. On the other hand, section 364 provides for the powers of the High Court on revision.
9. However, the prayer sought by the applicant is basically that the time he spent in custody be considered and subtracted from the sentence meted against him. 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.”
10. The powers of the court under section 333 (2) of the *Criminal Procedure Code* and the proviso thereto were explained in the Court of Appeal case of *Abamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR. The court while applying this provision, held that by dint of section 333 (2) of the *Criminal Procedure Code*, the courts during sentencing ought to take into account the period that the accused have spent in custody before they were sentenced.
11. The *Judiciary Sentencing Policy Guidelines* further buttresses this legal position as it provides 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.”
12. However, I have perused the trial court record. I note that upon being convicted and upon the applicant having put forward his mitigation, the trial court considered the mitigation and sentenced him. His right of appeal was also explained.
13. From the record, the applicant was arrested on July 18, 2013. He was charged in court on July 19, 2013 and was in custody for the entire period during his trial until his conviction and sentence on May 15, 2019. He therefore spent 5 years 9 months and 27 days in pre-trial remand custody.



14. From the record, it is clear that the period was not considered during sentencing. I find that the trial court erred in law in failing to take into account that period. I am therefore entitled to interfere with the sentencing discretion of the trial court.
15. I find that the application has succeeded. I therefore order that the sentence of 10 years imprisonment imposed on the applicant be and is hereby reduced by 5 years 9 months and 27 days.
16. The sentence will commence from the date of conviction being May 15, 2019.

RULING SIGNED DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

The applicant in person

Ms Oduor for the Republic

