



**Wamwere v Republic (Miscellaneous Criminal Application  
E061 of 2022) [2023] KEHC 1658 (KLR) (7 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1658 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
MISCELLANEOUS CRIMINAL APPLICATION E061 OF 2022**

**GL NZIOKA, J**

**MARCH 7, 2023**

**BETWEEN**

**DAVID KIMANI WAMWERE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant has filed the subject application herein seeking that, the court reviews the sentence of ten (10) years meted out against him vide Engineer Chief Magistrate's Court, Sexual Offence Case No 48 of 2017 at Naivasha. The review is based on the ground that the period he was in custody was not considered when the sentence was pronounced.
2. He relies on the affidavit he has sworn in support of the application and deposes that, he was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 of 2006 and sentenced to serve ten (10) years imprisonment. That he did not appeal against the decision.
3. However, he was in remand from November 28, 2017 to March 31, 2021 but that period was not considered, hence the prayer that, the court invokes the provision of section 333 (2) of the *Criminal Procedure Code* and reviews the sentence.
4. He also relies on the case of *Vincent Sila Jona and 87 Others Vs Republic Machakos Petition No 15 of 2020* and avers that, the court has jurisdiction under Article 165 (3) (b) of the *Constitution* of Kenya to hear and determine the application.
5. The application was served for a response but none was filed despite the Respondent being given fourteen (14) days for the same. I have considered the application and the affidavit in support. Be that, as it were, this is a simple application in that the court simply needs to consider whether the period the applicant was in custody was considered or not.



6. In that regards, section 333(2) of the Criminal Procedure Code states 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.'

7. In the instant matter, the applicant was arraigned in court on, November 3, 2017. He took a plea of not guilty and was released on bond of Kshs 500,000 with one surety of like amount or a cash bail of Kshs 100,000. On December 20, 2017, the surety was approved and he was released. The judgment was delivered on March 10, 2021 and he was remanded at Naivasha GK Prison. He was sentenced on March 31, 2021 and surety released on April 14, 2021.

8. In that case he was in custody for a period of two (2) months seven (7) days and not for the period he alleges he was in custody for a period of three (3) years plus. He was therefore lying to the court and more so on oath, thus constituting perjury. He who goes to equity must go with clean hands. Even then the period he was in custody of two (2) months is negligible.

9. I find no basis to interfere with sentence and dismiss the application for want of merit.

10. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 7<sup>TH</sup> MARCH 2023**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of:**

Appellant present in person, in court virtually

Mr Atika for the Respondent

Ms Ogutu: Court Assistant

