



**Nyakha v Republic (Miscellaneous Criminal Application  
E040 of 2022) [2023] KEHC 3637 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CRIMINAL APPLICATION E040 OF 2022**

**JN KAMAU, J**

**APRIL 24, 2023**

**BETWEEN**

**SHADRACK NYAKHA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Applicant herein was tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to twenty (20) years imprisonment.
2. Being dissatisfied with the said decision, he lodged an Appeal at the High Court being HCCRA No 53 of 2019, which appeal was dismissed in its entirety. He did not appeal to the Court of Appeal due to what he termed as lack of points of law (sic).
3. He filed the present application for review of sentence on 8<sup>th</sup> April 2022. His application was premised on Section 333(2) of the *Criminal Procedure Code*.
4. In his Written Submissions that were filed on 23<sup>rd</sup> November 2022, he urged the court to consider the period he spent in custody from the date of his arrest on 3<sup>rd</sup> December 2014 as provided in Section 333(2) of the *Criminal Procedure Code*. He also cited the powers of the court that have been vested in Sections 354 and 364 of the *Criminal Procedure Code*.
5. In that respect, he placed reliance on the case of *Paul Omondi Odipo & 4 Others vs Republic* Miscellaneous Application No E049 of 2021(eKLR citation not given) where it was held that while applying the provisions of Section 333(2) of the *Criminal Procedure Code*, the sentence of imprisonment ought to run from the date of arrest.



6. The Respondent opposed his prayer. In its Written Submissions that were filed on 13<sup>th</sup> December 2022, it contended that the period he spent in custody was considered by the Trial Court before sentencing.

### Legal Analysis

7. Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides as follows:-

“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. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Abamad Abolfathi Mohammed & Another vs Republic* (Supra).
9. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy 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.”

10. A reading of the Judgment herein showed that the Trial Court considered the provisions of Section 332 (2) of the *Criminal Procedure Code* at the time of meting out the sentence upon the Applicant herein. It rendered itself as follows:-

“Mitigation considered. I note the sentence provided under S. 8(3) of the Act is a minimum sentence. The accused has been in custody since 5/12/2014. Accused sentenced to serve 20 years imprisonment. The period in custody shall be taken into account. R/A within 14 days (emphasis court).”

11. As the appellate court upheld this decision, this court’s hands were tied as it could not grant orders which were already in force. However, in view of the fact that the Prisons may not know the period an applicant has been in custody as they only receive committal warrants with the date of conviction only, it is good practise for courts to indicate this period or to indicate the time to be deducted to avoid any ambiguity.

### Disposition

12. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s application for review of sentence that was lodged on 8<sup>th</sup> April 2022 was not merited and the same be and is hereby dismissed.
13. However, for the avoidance of doubt, the period of two (2) years seven (7) months and fifteen (15) days that the Applicant spent in custody between 5<sup>th</sup> December 2014 and 20<sup>th</sup> July 2017 being the date of his arrest and the date he was convicted and sentenced respectively be taken into account when



computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

14. It is so ordered.

**DATED AND SIGNED AT KISUMU THIS 20<sup>TH</sup> DAY OF APRIL 2023**

**J. KAMAU**

**JUDGE**

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF APRIL 2023**

**M. S. SHARIFF**

**JUDGE**

