



REPUBLIC OF KENYA



**Ndaro v Republic (Petition 242 of 2019) [2023] KEHC 20666 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20666 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA**

**PETITION 242 OF 2019**

**OA SEWE, J**

**JULY 20, 2023**

**BETWEEN**

**KASSIM HAMISI NDARO ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner, Kassim Hamisi Ndaro, filed the instant Petition on November 5, 2019 seeking that the period spent by him in pre-trial detention be taken into account as required by Section 333(2) of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya. He explained, in his Supporting Affidavit dated November 5, 2019, that he was charged, tried and convicted of the offence of attempted defilement and sentenced to 15 years' imprisonment and now seeks reconsideration pursuant to Section 333(2) of the *Criminal Procedure Code*.
2. The Court called for the original record of the proceedings of the lower court. The same was thereafter availed together with the original record of the High Court in High Court Criminal Appeal No 63 of 2017: *Kassim Hamisi Ndaro v Republic*. The records show that the petitioner was charged before the lower court in Shanzu SPM's Criminal Case No 167 of 2015 with the offence of attempted defilement contrary to Section 9(1) as read with Subsection (2) of the *Sexual Offences Act*, No 3 of 2006. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The offences were alleged to have been committed by the petitioner on the February 14, 2015 at Mtopanga Area of Bamburi Location within Mombasa County in respect of a 7-year-old victim.
3. As the petitioner denied the charges, the matter went to trial and upon hearing the entire evidence including the petitioner's defence, the learned trial magistrate, Hon. A. Ndung'u, RM, found the petitioner guilty of the substantive charge of Attempted Defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*. He was accordingly convicted thereof and sentenced to serve 20 years' imprisonment. His appeal to the High Court was heard and determined by Hon. Njoki



Mwangi, J. on January 30, 2019. The appeal against conviction was dismissed, but the sentence was reduced to 12 years' imprisonment.

4. The petitioner thereafter filed this Petition seeking that the pre-trial detention period be taken into account pursuant to Section 333(2) of the *Criminal Procedure Code*, which provision states:

(2) Subject to the provisions of section 38 of the Penal Code 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.

(5) In the same vein, The Judiciary Sentencing Policy Guidelines provide thus at Paragraph 7.10:

“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.”

5. In *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR the Court of appeal had occasion to consider the import of Section 333(2) of the Criminal Procedure Code. Here is what the Court had to say, particularly in connection with the phrase “take account of”:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012.”

6. A perusal of the record of the lower court shows that the petitioner was arrested on February 14, 2015 and arraigned before the lower court on February 16, 2015. Although an order was made for his release on bond of Kshs. 200,000/=, the petitioner was unable to comply with the terms of his release. Thus, the lower court proceedings show, at page 31 of the Record of Appeal, that by May 20, 2016, the petitioner was still in custody when the case was listed for hearing of the last prosecution witness. He



remained in custody until the judgment of the lower court was pronounced on March 20, 2017 as shown on pages 41 and 52 of the Record of Appeal. His prayer for release on free bond was accordingly declined.

7. Accordingly, it was imperative that the pre-conviction period be taken into account. Neither the lower court nor the appellate court did so. I have no doubt therefore that the petitioner is entitled to the credit of the period spent in custody prior to his conviction. In this regard, I am persuaded by the position taken by Hon. Odunga, J. (as he then was) in *Jona & 87 others v Kenya Prison Service & 2 others* (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) that:

“...Where the appellate court considered the appeal and disallowed the same without interfering with the sentence, it is clear that the decision on sentencing remains that of the trial court and if that sentence was imposed in contravention of the provisions of section 333(2) of the Criminal Procedure Code, nothing bars this court in the exercise of its constitutional mandate pursuant to article 165 of *the Constitution* from redressing the situation. Accordingly, notwithstanding a dismissal of an appeal, a person sentenced in disregard of section 333(2) aforesaid is not thereby disentitled from invoking this court’s supervisory jurisdiction to consider whether or not the sentence imposed was lawful. While it may be argued that in so doing this court would be interfering with the decision of the appellate court which in effect affirmed the decision of the trial court, in my respectful view that would not be the position where an appeal is simply dismissed without the sentence being reviewed...”

8. In the result, I find merit in the petitioner’s petition filed herein on September 7, 2020. The same is hereby allowed and orders granted as hereunder:
- (a) That the period of pre-conviction detention between the date of the petitioner’s arrest on February 14, 2015 and the date of his conviction on March 20, 2017 be taken into account for purposes of Section 333(2) of the *Criminal Procedure Code*.
  - (b) In reckoning the applicant’s imprisonment term of 12 years, the period aforementioned be included accordingly.

9. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20<sup>TH</sup> DAY OF JULY 2023**

**OLGA SEWE**

**JUDGE**

