



**Odera v Republic (Criminal Appeal E253 of 2022)  
[2023] KEHC 20876 (KLR) (Crim) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20876 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E253 OF 2022  
LN MUTENDE, J  
JULY 19, 2023**

**BETWEEN**

**FRANCIS ODERA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Francis Odera, the applicant, was arraigned for the offence of defilement contrary to Section 8(1)(4) of the *Sexual Offences Act*.
2. Having denied the charge he was taken through full trial, convicted and sentenced to serve fifteen (15) years imprisonment.
3. Through an undated application, filed herein on September 20, 2022, he seeks inter alia a determination giving breath to life Section 364(1) (b) and 333(2) of the *Criminal Procedure Code* (CPC).
4. The application was canvassed through written submissions where the applicant urges that the trial court did not take into consideration time spent in custody as required by Section 333(2) of the CPC.
5. The respondent conceded the application.
6. Section 333(2) of the CPC provides thus:

"...(2) 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. The Judiciary Sentencing Policy Guidelines 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."

8. In the case of *Abamad Abolfathi Mohammed & Another vs. Republic* (2018 )eKLR the Court of Appeal delivered itself thus:

"...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..."

9. The trial court delivered itself thus:

"It is my finding therefore that the Prosecution has proved all the ingredients of the offence of defilement and thus proved its case beyond reasonable doubt. The accused is found guilty of the offence of defilement contrary to Section 8(1)(4) of the *Sexual Offences Act* No. 3 of 2006 and convicted under Section 215 of CPC."

10. Apparently the trial court failed to comply with the law. This was an error that must be corrected. The applicant was arrested on October 28, 2018. The sentence meted out on February 6, 2020 shall be effective from October 28, 2018.

11. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 19<sup>TH</sup> DAY OF JULY 2023.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF**

Applicant

Mr. Kiragu for ODPP

Court Assistant - Mutai

