



**Elimlim v Republic (Miscellaneous Criminal Appeal E038 of 2023)
[2023] KEHC 23617 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E038 OF 2023
RN NYAKUNDI, J
OCTOBER 17, 2023**

BETWEEN

JOHN LOTILAN ELIMLIM APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant was charged and convicted with the offence of defilement contrary to section 8(3) of the *sexual offences Act* No. 3 of 2006. The applicant was thereafter sentenced to serve 15 years imprisonment. Being aggrieved, the appellant preferred an appeal to this court which was allowed and the conviction for the offence of defilement was quashed and the sentenced of 15 years set aside. The accused was sentenced to serve 12 years.
2. The court directed that the same would run from the date of sentencing in the lower court i.e., 9th September, 2020.
3. The applicant now seeks review of the sentence pursuant to section 332 of the *Criminal Procedure code*. The applicant prays that the court considers the provisions of section 333(2) of the CPC and take into account the time he has been in custody.

Analysis And Determination

4. I have considered the application and the court's mandate is to determine the application of section 333(2) of the *Criminal procedure code*. The section provides as follows:
 - (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.

5. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.
6. In the case of *Abamad Abolfathi Mobammed & another v Republic* [2018] eKLR where the Court of Appeal held that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. 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.”

7. It follows then that the court should state in its decision that it indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.
8. The punishment prescribed by the law for the offence of an indecent act with a child is imprisonment for a term of not less than 10 years upon conviction.
9. The applicant was convicted on September 9, 2021 when judgment was read out and after mitigation, he was sentenced to serve 15 years imprisonment. This court in allowing the appeal, reduced the sentenced to 12 years and directed that the same would run from the date of sentence by the trial court. In my view, the court ought to have directed the applicant’s sentence of imprisonment to run from the date of arrest on 18th February, 2020.
10. Therefore, in compliance with section 333(2) *Criminal Procedure Code*; computation of the sentence ought to include the period the Accused person was in custody during hearing and determination of the case before sentence was meted out.
11. The Accused was placed in custody on 18th February, 2020 and sentenced on September 9, 2021. The sentence was reviewed by this court on November 22, 2022. The 12 years ought to start running from February 2020 when he was placed in custody to November 2022 when he was sentenced to serve 12 years imprisonment.



12. In conformity with section 333(2) *Criminal Procedure Code*, and considering the period he has been in custody. The sentence shall be computed to include the period running from February 2020-November 2022 when he was sentenced to serve 12 years imprisonment.

The applicant's Miscellaneous Application is allowed as follows;

13.

a. Section 333(2) CPC mandates the 12 years imprisonment sentence granted by this court on November 22, 2022 served by the applicant shall be computed to include the period the applicant was in custody before sentence, to commence from 18/2/2020

DATED AND SIGNED AT LODWAR THIS 17TH DAY OF OCTOBER, 2023

In the presence of

Mr. Yusuf for the State

Appellant

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R. NYAKUNDI

JUDGE

