



**Enawa v Republic (Miscellaneous Criminal Appeal E096 of 2023)  
[2023] KEHC 23618 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23618 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
MISCELLANEOUS CRIMINAL APPEAL E096 OF 2023  
RN NYAKUNDI, J  
OCTOBER 17, 2023**

**BETWEEN**

**LOKIRU EKAI ENAWA ..... 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 30 years imprisonment. The applicant thereafter made an application for review of the sentence to this court which was declined.
2. The applicant this time 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**

3. 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.



4. 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.
5. In the case of *Abamad Abolfathi Mohammed & 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.”

6. 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 been taken into consideration.
7. The punishment prescribed by the law for the offence of defilement of a child less 11 years attracts life imprisonment.
8. The Applicant was convicted on 30<sup>th</sup> March, 2011 when judgment was read out and after mitigation, he was sentenced to serve 30 years imprisonment. Pursuant to the provisions of section 332(2) the trial court ought to have directed the applicant’s sentence to run from the date of arrest on 19<sup>th</sup> December, 2008.
9. 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.
10. The Accused was placed in custody on 19<sup>th</sup> December, 2008 and sentenced on 30<sup>th</sup> March, 2011. The 30 years ought to start running from December 2008 when he was placed in custody to March 2011 when he was sentenced to serve 30 years imprisonment.
11. In conformity with Section 333(2) *Criminal Procedure Code*, and considering the period he was in custody. The sentence shall be computed to include the period running from December 2008-March 2011 when he was sentenced to serve 30 years imprisonment.



The Applicant's Miscellaneous Application is allowed as follows;

Section 333(2) *CPC* mandates the 30 years imprisonment sentence granted by this court on 30<sup>th</sup> March, 2011 served by the Applicant shall be computed to include the period the Applicant was in custody before sentence, to commence from 6/1/2009.

**DATED AND SIGNED AT LODWAR THIS 17<sup>TH</sup> DAY OF OCTOBER, 2023**

.....

**R. NYAKUNDI**

**JUDGE**

