



**Ekidor v Republic (Miscellaneous Criminal Appeal E101 of 2023)  
[2023] KEHC 27648 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27648 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
MISCELLANEOUS CRIMINAL APPEAL E101 OF 2023  
RN NYAKUNDI, J  
OCTOBER 16, 2023**

**BETWEEN**

**MIKE ATIKONY EKIDOR ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was convicted with the offence of attempted rape contrary to section 4 of the [Sexual Offences Act](#) No. 3 of July 2006 and was sentenced to 5 years imprisonment on 17.08.2022.
2. The particulars of the charge were that on the 27<sup>th</sup> day of November, 2020 at [Particulars Withheld] village in Turkana West sub county within Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of AK without her consent.
3. The applicant sought review of the sentence pursuant to Section 332 of the [Criminal Procedure code](#) and article 50(2) (p) of [the constitution](#) of Kenya. I take note that the applicant has not challenged neither the conviction nor the sentence meted but seeks the court to apply 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. The applicant urged the court to consider the case of *Vincent Sila Jona & 87 Others vs Kenya Prison Service & 2 Others* [2021] eKLR which I fully associate myself with. The Court held as follows;

A declaration that Trial Courts are enjoined by Section 333(2) of the *Criminal Procedure Code*, in imposing sentences, other than sentence of death to take into account of the period spent in custody. A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences. A declaration that Section 333(2) CPC applies to the original sentence as well as sentence imposed during resentencing...

7. Additionally, in *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.”

8. The Applicant was convicted on 17<sup>th</sup> August 2022 when judgment was read out and after mitigation, he was sentenced to serve 5 years imprisonment. The court in sentencing the accused person highlighted that the period spent in custody by the accused person was considered. However, I share the same thoughts as the court in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR that the trial court should have directed the applicant’s sentence of imprisonment to run from the date of arrest on 27<sup>th</sup> November, 2020.

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 27<sup>th</sup> November 2020 and sentenced on 17<sup>th</sup> August 2022. The 5 years sentence ought to start running from November 2020 when he was placed in custody to August 2022 when he was sentenced to serve 5 years imprisonment.
11. The sentencing process and its outcome are within the mandate of the trial court. However, since circumstances vary from a case to another, this court shall intervene in exercise of revision pursuant to article 165(3) CoK where mandatory provisions of the law have not been complied with.
12. In conformity to Section 333(2) *Criminal Procedure Code*, and considering the period he has been in custody. The 5 years imprisonment sentence shall be computed to include the period running from November 2020-August 2022 when he was sentenced to serve 5 years imprisonment. The International covenant on civil and political rights, Article 9.3 states this principle clearly. “It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise for execution of the judgment. The two most important aspects of the situation of remand prisoners are that they must be presumed innocent, until and if they are convicted, and that they have special need and right relating to their legal status and access to their lawyers. The regime of remand prisoners should differ from those of other prisoners in certain respects, with fewer obligations and more rights with regard to the practical aspects of prison life. This issue was extensively discussed in *Rwabugande Moses vs Uganda* (2017) UGSC 8 where the supreme court held that a sentence arrived at without taking into consideration the period spent on remand is illegal for the failure to comply with a mandatory constitutional provision. In our case it is the purposive interpretation of section 333 (2) of the *criminal procedure code* which imposes obligation upon the trial court to take into account the period spent in remand custody: “ What is material in that decision is tht the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This court used the words to deduct and in arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from *the constitution*. Where a sentencing court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing judge or justice used different words in their judgement or missed to state that they deducted the period spent on remand. It is the essential function of the re-sentencing court to determine whether an error has been established by the applicant in one way or another on the aspects of Section 333(2) of the penal code. It is also necessary to view it in the perspective of a fair and proportionate sentence for the offence provided within the architecture of the law legislated against that offence by parliament. What trial courts can and must do is to strive to properly respond to this provision without compromising the balancing act of sentencing from time to time in individual cases. It is significant to take judicial notice of Section 333(2) of the code when it comes to sentences of imprisonment. The safeguard is to ensure a fair trial of the convict and the protection of his or her guaranteed rights.
13. In light of the above the Applicant’s Miscellaneous Application is allowed as follows;
  - a. That Section 333(2) CPC mandates the 5 years imprisonment sentence granted by the Trial Court to be computed with effect from 27<sup>th</sup> November, 2020 being the period spent in remand custody before conclusion of the trial and final judgement of the case. The committal warrant shall therefore be amended in compliance with this order to give effect to the provisions of the code. It is so ordered.

**DATED AND SIGNED AT ELDORET THIS 16<sup>TH</sup> DAY OF OCTOBER, 2023.**

**In the Presence**



**Appellant**

**Mr. Yusuf for the State**

**R. NYAKUNDI**

**JUDGE**

