



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lopekan v Republic (Miscellaneous Criminal Appeal E028 of 2023)  
[2023] KEHC 23631 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23631 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
MISCELLANEOUS CRIMINAL APPEAL E028 OF 2023  
RN NYAKUNDI, J  
OCTOBER 17, 2023**

**BETWEEN**

**EDUPUR LOPEKAN ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was charged in the lower court with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *sexual offences Act* no 3 of 2006. The said court had an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *sexual offences Act* no 3 of 2006. The applicant was convicted of the said charge and a sentence of 10 years was imposed.
2. The applicant sought 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 *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. The punishment prescribed by the law for the offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. I therefore find the sentence meted to be reasonable and lenient.
7. The Applicant was convicted on 18<sup>th</sup> June, 2021 when judgment was read out and after mitigation, he was sentenced to serve 10 years imprisonment. The court in sentencing the accused person was not clear on when the sentence would start running. 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 20<sup>th</sup> September, 2020.
8. 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.
9. The Accused was placed in custody on 20<sup>th</sup> September, 2020 and sentenced on 18<sup>th</sup> June, 2021. The 10 years ought to start running from September 2020 when he was placed in custody to June 2021 when he was sentenced to serve 10 years imprisonment.
10. 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.
11. 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 September 2020-June 2021 when he was sentenced to serve 10 years imprisonment.
12. The Applicant’s Miscellaneous Application is allowed as follows;



- a. Section 333(2) *CPC* mandates the 10 years imprisonment sentence granted by the Trial Court on 18<sup>th</sup> June, 2021 served by the Applicant shall be computed to include the period the Applicant was in custody before sentence, to commence from 22/9/2020

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

In the presence of

Mr. Yusuf for the State

Appellant

.....

**R. NYAKUNDI**

**JUDGE**

