



**Loyongorot v Republic (Miscellaneous Criminal Appeal E058 of 2023)
[2023] KEHC 23638 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E058 OF 2023
RN NYAKUNDI, J
OCTOBER 17, 2023**

BETWEEN

JAMES LOYONGOROT APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant was charged in the lower court with two counts of the offence of attempted defilement contrary to section 9(1) (2) of the [sexual offences Act](#) No 3 of 2006. In Count II, the applicant was charged with attempted murder contrary to section 220 of the penal code. The applicant was convicted of the said charges and a sentence of 20 years was imposed on each count.
2. The applicant sought review of the sentence pursuant to Section 332 of the [Criminal Procedure code](#). The applicant prays that the court applies 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 attempted defilement is a minimum of ten years imprisonment and a maximum of life imprisonment whereas the offence of attempted murder attracts life imprisonment. I therefore find the sentence meted to be commensurate to the charges.
7. The Applicant was convicted on November 9, 2020 when judgment was read out and after mitigation, he was sentenced to serve 20 years imprisonment for each count. The court in sentencing the accused person considered that he was a first-time offender but did not consider the period that he was in custody. I share the same thoughts as the court in *Ahamad 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 August 10, 2017.
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 August 10, 2017 and sentenced on November 9, 2020. The 20 years for each count ought to start running from August 2017 when he was placed in custody to November 2020 when he was sentenced to serve 20 years imprisonment on each count for the two counts.
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 August 2017- November 2020 when he was sentenced to serve 40 years imprisonment.
12. The Applicant's Miscellaneous Application is allowed as follows;
 - a. Section 333(2) CPC mandates the 40 years imprisonment sentence granted by the Trial Court on November 9, 2020, served by the
 - b. Applicant shall be computed to include the period the Applicant was in custody before sentence, to commence from August 14, 2017

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

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R. NYAKUNDI

JUDGE

