



**Arusei v Republic (Criminal Petition E072 of 2023)  
[2024] KEHC 14293 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14293 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E072 OF 2023  
RN NYAKUNDI, J  
NOVEMBER 15, 2024**

**BETWEEN**

**SILAS KIPRONO ARUSEI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006. The applicant underwent trial and the trial court found him guilty hence imposing a sentence of 7 years' imprisonment.
2. Vide an application dated 18<sup>th</sup> September, 2023 the applicant seeks sentence review pursuant to the provisions of Section 333(2) of the *Criminal Procedure Code*, to incorporate the period of 1 year and 6 months spent under remand custody.
3. In support of the application, the applicant filed written submissions filed on 10<sup>th</sup> November, 2023. He essentially argued that his sentence be reviewed to capture the period spent in custody.

**Analysis and Determination**

4. The main issue for determination is whether the applicant is entitled to have his sentence reviewed under Section 333(2) of the *Criminal Procedure Code* to take into account the period spent in remand custody. 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 applicant urged the court to consider the case of *Vincent Sila Jona & 87 Others v 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...”

6. Additionally, in *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. The *Judiciary Sentencing Policy Guidelines* emphasize that failure to take into account time served in custody may result in excessive punishment that is not proportional to the offence committed.
8. The applicant was in custody for a period of 1 year and 6 months before his conviction. This duration ought to have been considered during sentencing as per Section 333(2) of the *Criminal Procedure Code*. While the offence of defilement is undoubtedly serious, the legal requirement to account for pre-sentence custody time is mandatory and separate from considerations of the gravity of the offence.
9. In the end, I find that this application under Section 333(2) has merit and it is hereby allowed. In conformity to the said provision, the applicant will serve seven (7) years imprisonment with effect from the date he was taken into custody.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024.**

**R. NYAKUNDI**

**JUDGE**



Representation:

Mr. Mark Mugun for the State

