



**Duncan v Republic (Miscellaneous Application E078 of 2022)
[2024] KEHC 14633 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E078 OF 2022
MW MUIGAI, J
NOVEMBER 18, 2024**

BETWEEN

JAMES LETAPAN DUNCAN APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with Defilement contrary to Section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#).
2. In the alternative, the Applicant was charged with committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No.3 of 2006.
3. The Trial Magistrate convicted and sentenced the Appellant to serve ten (10) years imprisonment.

Notice of Motion

4. Vide an application filed on 23.11.2022, the Applicant seeks review of his sentence pursuant to Section 333(2) of the [Criminal Procedure Code](#).
5. The Application is supported by an affidavit sworn by the Applicant in which he contends that he is serving a sentence 10 years imprisonment for the offence of Defilement contrary to section 8 (2) (4) of the [Sexual Offences Act](#). He stated that he was arrested on 18.01.2018 and had been in remand for 13 months up to the date of his conviction on 10.02.2020 which time was not accounted for in the sentence by stating that the sentence was to commence from 10.02.2020. He also stated that his mitigation was not conclusively considered by the Trial Court.
6. The application was disposed of by way of written submissions.



Applicant's Submissions Filed on 15.11.2023

7. The Applicant reiterated the contents of his supporting affidavit and placed reliance on the case of *Abamad Albofathi Mohammed & Another vs Republic* [2018] e KLR. He urged the court to consider the 13 months spent in custody as provided for under section 333(2) of the *Criminal Procedure Code*.

Respondent Submissions Dated 27.04.2023

8. Martin Mwongera, State Counsel submitted that the applicant was presented in Kangundo law courts on 18.01.2018 and was released on a surety bond on 8.03.2018 and had spent 45 days in custody. That he attended court diligently until 11.02.2019 when a warrant was issued by the trial court and the Applicant was arrested and brought to court by the surety who withdrew her security and the Applicant was remanded from 17.04.2019 till the date of judgment on 10.02.2020. he thus spent 299 days bringing the total number of days to 348 days. It was submitted that the trial court took the time spent in custody into consideration and the application should be dismissed in its entirety. Reliance was placed on the case of *Benard Kimani Gacheru vs Republic* [2002] eKLR and *Abamad Albofathi Mohammed & Another* (supra).

Determination

9. I have considered the application and written submissions filed on behalf of the respective parties.
10. Section 362 of the *Criminal Procedure Code*(CPC) is clear on the scope of revision in criminal trial as follows:-
- “The High Court may call for and examine the record of any Criminal proceedings before any Subordinate Court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate Court.”
11. Section 364 of the CPC provides that:-
- “(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –
- (b) in the case of any other order other than an order of acquittal, alter or reverse the order.”
12. As was stated by the High Court of Malaysia in *Public Prosecutor vs. Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735:
- “.....The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...”
13. Section 333(2) of the *Criminal Procedure Code* stipulates that the time spent in custody must be taken into account. It was emphasized in the cases of *Abamad Abolfathi Mohammed & Another vs. Republic*



[2018] eKLR and in *Bethwel Wilson Kibor vs. Republic*, CA at Eldoret Cri. Appeal No. 78 of 2009 that the period must be taken into account before sentencing.

14. From the Trial Court record, the Applicant was presented at Kangundo Senior Principal Magistrate's court on 18.01.2018 and was admitted to a bond of Kshs 200,000 with one surety of the like sum. The bond was satisfied on 8.03.2018 when the surety took to the stand and the bond was approved. The period between arraignment and bond approval is 45 days in custody.
15. The Applicant attended Court diligently until 11.02.2019 when a warrant was issued by the Trial Court and the Applicant was arrested and brought to Court on 17.04.2019 and the surety withdrew her security. The Applicant was remanded from 17.04.2019 till the date of judgment on 10.02.2020. From the Trial Court Record, I agree with the Respondent that the Applicant spent 299 days bringing the total number of days to 348 days.
16. From the record, the Trial Court stated as follows after Applicant's mitigated;

"Mitigation well noted. Noted also is the fact that accused is remorseful and a young man. I will use my discretion and sentence accused to served ten (10) years in jail. Right of Appeal 14 days."
17. Based on the above extract from the Trial Court Judgment, it is noted that the Trial Magistrate did not indicate when the sentence was to commence as required under Section 333(2) of the CPC.
18. Section 333(2) of the *Criminal Procedure Code* provides that:

“(2) Subject to the provisions of section 38 of the Penal Code 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.”

Disposition

1. The review for sentencing is denied/dismissed. The accused person was out on bond from 8/04/2018 and had been in custody for 45 days. He jumped bail and was brought by surety under warrant of Arrest and withdrew the security. He cannot benefit from his misconduct. Only the 45 days will be computed in the reduction of sentence. The Trial Court took this period into account.

It is so ordered.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 18/11/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

