



**Oyemba v Republic (Miscellaneous Criminal Application  
E127 of 2024) [2024] KEHC 15709 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15709 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CRIMINAL APPLICATION E127 OF 2024**

**AC BETT, J**

**DECEMBER 6, 2024**

**BETWEEN**

**ELPHAS MUSUNDI OYEMBA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant, Elphas Musundi was convicted of the offence of defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act* and sentenced to imprisonment of 20 years.
2. Being dissatisfied with the conviction and sentence, the Applicant filed an appeal which proceeded to hearing. The appellate court came to the conclusion that the conviction was safe and therefore dismissed the appeal on conviction. However, the court declared the appeal against sentence partially successful and set aside the twenty (20) year sentence and in lieu thereof, sentenced the Applicant to fifteen (15) years imprisonment with effect from 6<sup>th</sup> October 2017, when he was first sentenced.
3. By an undated application filed herein, the Applicant once more knocks at the door of justice. The Applicant's application is predicated on Section 333(2) of the *Criminal Procedure Code*.
4. The Applicant avers that he was arrested on 8<sup>th</sup> October 2016 and convicted on 9<sup>th</sup> September 2014. Clearly, the dates given are in error and I have on perusal of the original record, confirmed that the Applicant was arrested on 8<sup>th</sup> October 2016. I have further confirmed that the Applicant was in custody from his date of arrest until his date of conviction and sentence which was from 8<sup>th</sup> October 2016 to 6<sup>th</sup> October 2017 which translates to twelve (12) months.
5. Section 333(2) of the *Criminal Procedure Code* enjoins the courts to take into account the time an accused person has spent in custody while imposing its sentence.



6. I have perused the Judgement by the court in Kakamega HCCR.A. No 128 of 2017. I have established that the appellate court did not take the period spent by the Applicant in remand into consideration. In the case of *Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others* [2021] eKLR, Odunga J, as he then was, held as follows:-

- “ 1. 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 account of the period spent in custody.
- 2) 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.
- 3) A declaration that section 333(2) applies to the original sentence as well as the sentence imposed during resentencing...”

7. It is trite that the court is under obligation to comply with Section 333(2) of the *Criminal Procedure Code* which is couched in mandatory terms. This means that the court cannot turn a blind eye to the time already spent in custody. In *Abamad Abolfathi Mobammed & another v Republic* [2018] eKLR, the Court of Appeal rendered itself thus:-

“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...”

8. Flowing from the aforesaid decisions, I find and hold that the failure to credit the Applicant with the twelve (12) months that he spent in custody pending trial is a violation of his right to a fair trial as envisaged by the *Constitution*. Article 49(1) (h) guarantees an accused person the right to be released on bond pending trial. Since the Applicant herein was not released on bond during the entire proceedings, then the period he spent in custody should be taken into account in his sentence so that the Applicant can enjoy his fundamental rights as envisioned in Articles 20, 22, 24, 25, 27, 28, 29, 47, 48, 40 of the *Constitution*.

9. The upshot is that the Applicant succeeds in his application for review of sentence. The Applicant’s sentence is adjusted so that the fifteen (15) year sentence shall run from 16<sup>th</sup> October 2016 when the



Applicant was arrested and placed in custody in compliance with Section 333(2) of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6<sup>TH</sup> DAY OF DECEMBER 2024.**

**A. C. BETT**

**JUDGE**

In the presence of:

The Applicant in person

Ms. Chala for the Respondent

Court Assistant: Polycap

