



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 278 OF 2010**

*(An Appeal arising out of the conviction and sentence of Hon. T. Murigi - PM delivered on 3<sup>rd</sup> May 2010 in Makadara CMC. CR. Case No.807 of 2007)*

**JAMES KIHARA WAMBOGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, James Kihara Wambogo was charged with the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 5<sup>th</sup> February 2007 at [Particulars Withheld]Estate in Nairobi County, the Appellant intentionally and unlawfully did an act which caused penetration of his male genital organ to the female genital organ of CN, a child aged 13 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve twenty (20) years imprisonment.

Although the Appellant filed an appeal challenging both his conviction and sentence, during the hearing of the appeal, he told the court that he was abandoning his appeal against conviction. However, he pleaded with the court to take into consideration the period of three (3) years and three (3) months that he was in remand custody prior to his conviction. The Appellant urged the court to take into consideration the provisions of **Section 333(2)** of the **Criminal Procedure Code** that mandates the court to take into account the period that a convict has been in remand custody prior to sentencing him to serve a custodial sentence. Mr. Momanyi for the State was not opposed to this plea by the Appellant for the period that he was in remand custody to be taken into consideration.

This court has carefully considered the submission made by the parties to this application. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016** (unreported) held thus at Page 28:

*“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.”*

In the present appeal, it was clear to this court that although the Appellant made the trial court aware that he had been in remand custody for a period of three (3) years and three (3) months, the trial court did not take that period into account when sentencing the Appellant to serve the custodial sentence. It was apparent to the court that the trial court sentenced the Appellant to serve the sentence mandate under **Section 8(3)** of the **Sexual Offences Act**. The trial court ought to have taken into account the period that the Appellant was in remand custody. That being the case, this court finds merit with the Appellant's plea for reduction of sentence on the basis of the period that the Appellant was in remand custody prior to his conviction.

In the premises therefore, the custodial sentence of twenty (20) years imprisonment imposed on the Appellant by the trial magistrate shall be reduced by a period of three (3) years and three (3) months that the Appellant was in remand custody prior to his conviction. That means that the custodial sentence that the Appellant shall serve is sixteen (16) years and nine (9) months with effect from 3<sup>rd</sup> May 2010 when he was convicted by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2019**

**L. KIMARU**

**JUDGE**