



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ntongai v Republic (Criminal Appeal E032 of 2025)
[2025] KEHC 16455 (KLR) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E032 OF 2025
HM NYAGA, J
NOVEMBER 13, 2025**

BETWEEN

FRANCIS NTONGAI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged before Tigania Principal Magistrate's Court with the offence of defilement, contrary to Section 8(1) and (3) of the *akn ke act 2006 3 Sexual Offences Act*. The particulars of the offence are that on the 13th day of December 2016 at Kirukire Village, Kianjai Sub-Location, Kianjai Location, Tigania West Sub- County, within Meru County, he intentionally caused his penis to penetrate the vagina of M.K. a child aged 13 years.
2. He also faced an alternative count of indecent act with a child, contrary to Section 11(1) of the said Act. The particulars herein being that on the same date and place, he intentionally touched the vagina of M.K. a child aged 13 years with his penis.
3. At the end of the trial, the applicant was convicted on the principal charge and was sentenced to 20 years imprisonment. When meting out the sentence, the trial court did not state when the sentence would be deemed to have commenced.
4. Aggrieved by the sentence only, the applicant then moved this court vide an undated petition of appeal.
5. The appellant's appeal is essentially based on the application of section 333(2) of the Criminal Procedure Code. He prayed that his sentence be deemed to have commenced from the time he was remanded in custody awaiting trial.
6. The Prosecution opposed the appeal, on the wrong impression that the appellant was appealing against the conviction and sentence as a whole.



7. In his submissions the appellant reiterated his plea. He relied on the findings in *Ahamad Abolfathi Mohammed & Another vs Republic* (2018)eKLR and *Bethwel Wilson Kibor vs Republic* (2009) eKLR.

8. Section 333(2) of the Criminal Procedure Code states as follows: -

33(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.

9. It is thus imperative that the court convicting and sentencing an accused person takes account of the time that occurred has been in custody. Taking account may be done in different ways.

10. In the case of *Bukenya vs Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013) it was held that;

“Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement.”

11. From this authority, it is clear that the court was against the application of a mathematical formula of arriving at a sentence, if the convicted person was in custody. The court was of the view that the mere consideration of that fact was sufficient.

12. On the other hand, there are authorities that state that the said section ought to have a purposeful meaning.

13. For instance, in *Ahamad Abolfathi Mohammed & Another vs Republic* (supra) 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 19th June 2012.”

15. The same court in *Bethwel Wilson Kibor vs Republic* (supra) expressed itself as follows: -

“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

16. It is apparent that the superior courts have settled on the principles set out in *Ahamad Abolfathi Mohammed & Another vs Republic* (supra) and *Bethwel Wilson Kibor vs Republic* (supra).

17. The application of the said principles means that the convicted person's time in custody takes a more purposeful meaning, as intended by the Act.

18. In the instant case, the trial court was silent on the application of Section 333(2) of the Criminal Procedure Code (CPC, meaning that the sentence commenced on the date the same was decreed.

19. A perusal of the trial court record confirms that the applicant was in remand custody throughout the trial.

20. In the light of the above, I allow the appeal only to the extent that the twenty (20) year sentence imposed by the trial court will be deemed to have commenced on 15th December, 2016, when the appellant was first remanded in custody.

21. It is so ordered.

SIGNED, DATED AND DELIVERED AT MERU THIS 13TH DAY OF NOVEMBER, 2025

H. M. NYAGA

JUDGE

