

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT MISCELLANEOUS CRIMINAL APPLICATION NO.

E036 OF 2025

JOHN NDIRANGU MBOGO.....

APPLICANT

-VERSUS-

REPUBLIC.....

.....RESPONDENT

RULING

1. The Applicant **JOHN NDIRANGU MBOGO** has filed this undated application seeking to have the period which he spent in remand factored into his sentence.
2. The Appellant had been charged at the Nyeri Magistrates Court vide

CMCR C NO. E034/2023 with the offence of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(4) OF THE SEXUAL OFFENCES ACT 2006.**

3. The particulars of the offence were that

“Between 17th day of September 2023 and 19th September 2023 at NGANGARITHI area in Nyeri Central Sub-county within Nyeri County you intentionally and unlawfully caused your penis to penetrate the vagina of E.W.M a child aged 16 years.”

4. The Applicant faced an alternative charge of **INDECENT ACTS WITH**

A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT.

5. The Applicant pleaded **‘Not Guilty’** to both charges. The matter went

to trial which was conducted in the lower court. Vide the Judgment delivered on **21st February 2025 HON. ANASTASIA NDUNGU Principal Magistrate** convicted the Applicant on the main charge of Defilement.

6. Following his conviction the Applicant was granted an opportunity to

mitigate. The court also called for a pre-sentence report. Thereafter the Applicant was sentenced to serve **ten (10) years** imprisonment without the option of a fine.

7. The Applicant does not wish to challenge his conviction or sentence.

However he prays that the period of time which he spent in remand prison during the pendency of his trial be deducted from the sentence.

8. The court is empowered by **Article 165(6)** of the **Constitution of**

Kenya 2010 to review a decision by a subordinate court. **Article 165(6)** provides:-

“The High Court has supervisory jurisdiction over the subordinate courts over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.”

9. **Section 333(2)** of the **Penal Code Cap 63** Laws of Kenya provides as follows;-

“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 sub-section (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.” [Own emphasis]

It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

10. The provisions of **section 333(2)** of the Criminal Procedure Code were considered in this case of **AHAMAD ABOLFADHI MOHAMMED & Another vs REPUBLIC [2018] eKLR** where the **Court of Appeal** held as follows:-

**“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 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 332 (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 appellant's sentence of imprisonment to run from the date of their arrest on 19th June 2012." [Own emphasis]

11. The ***Judiciary Sentencing Policy Guidelines clauses 7:10 and***

7:11 state that:-

"The proviso to section 332(2) of the Criminal Procedure Code obligates the court to take into account the time already spent in custody if the convicted person had been in custody during the trial. Failure to do so impacts overall period of detention which may result in an excessive punishment that is not proportional to the

offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

12. I have carefully perused the record of the proceedings in the Lower Court. I note that in imposing sentence the trial magistrate did take into account the fact that the Applicant had been in remand since **21st September 2023**. However the court did not direct that the sentence be reduced proportionally.
13. The judgment was read on **February 2025**, thus Applicant had spent a period of **sixteen (16) months** in remand. I therefore direct that the **ten (10) year** sentence imposed by the trial court will commence from the date of arrest being **21st September 2023**. It is so ordered.

Dated in Nyeri this 28th day of November 2025.

.....
MAUREEN A. ODERO
JUDGE

ORIGINAL