Gitahi v Republic (Miscellaneous Criminal Application E039 of 2025)
[2025] KEHC 18153 (KLR) (5 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18153 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

MISCELLANEOUS CRIMINAL APPLICATION E039 OF 2025

MA ODERO, J

DECEMBER 5, 2025

BETWEEN

SAMUEL WAWERU GITAHI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant Samuel Waweru Gitahi has filed this application dated 24th April 2025 seeking to have the period which he spent in remand during the pendency of the trial deducted from his sentence.

2. The Applicant was arraigned before the Magistrates Court in Nyeri vide CMCR No. 48 of 2018 on a charge of Defilment Contrary To Section 8(1) as read with Section 8(2) Of The *Sexual Offences Act*, 2006. The particulars of the charge were that

> "On the 20th day of November 2018 at Labure Sub-Location in Kieni Sub-County within Nyeri County intentionally and unlawfully caused his organ namely penis to penetrate the genital organ namely vagina of Mary Wairimu a child aged 10 years."

3. The Applicant faced an alternative charge of Indecent Act With A Child Contrary To Section 11(1) Of The *Sexual Offences Act* 2006.

4. The Applicant entered a plea of 'Not Guilty' to both charges and his trial was conducted in the Lower Court. On 23rd September 2020. Hon. J. Macharia, Principal Magistrate delivered a judgment in which she convicted the Applicant on the main charge of Defilement.

5. Following his conviction the Applicant was allowed an opportunity to mitigate. The trial court then sentenced the Applicant to serve fifteen (15) years imprisonment with no option of a fine.

6. 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 and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court."

7. 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 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]
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> It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

8. The provisions of section 333(2) of the Criminal Procedure Code were considered in this case of Ahamad Abolfadhi Mohammed & Another v 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.
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> .....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.
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> "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 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]

9. 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 served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the 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."

10. I have carefully perused the proceedings in the Lower Court. I note that the trial court did not mention at all much less take into account the period of time which the Applicant had spent in remand.

11. The Applicant was arraigned in court on 10th December 2018 and was sentenced on **23rd September 2020.** Accordingly I direct that the **fifteen (15) year** sentence imposed upon the Applicant will run from **10th December 2018**. It is so ordered.

DATED IN NYERI THIS 5TH DAY OF DECEMBER 2025.

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MAUREEN A. ODERO

JUDGE