



REPUBLIC OF KENYA



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

**Otieno v Republic (Criminal Appeal 141 of 2019)
[2025] KECA 413 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 413 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 141 OF 2019
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
FEBRUARY 28, 2025**

BETWEEN

FREDRICK ONYANGO OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Siaya (Cherere, J.) dated and delivered on 19th April 2019 by (J. A. Makau, J.) in HCCRA No. 134 of 2016)

JUDGMENT

1. The appellant, Fredrick Onyango Otieno, has lodged this second appeal limited to contesting the sentence imposed by the trial court that was then confirmed by the first appellate court being the High Court of Kenya at Siaya. The High Court had dismissed the appellant's initial challenge which was against both the conviction and sentence imposed by the trial court. The appellant now seeks to overturn only the sentence imposed, arguing that the sentence imposed was excessive and that he had undergone significant rehabilitation during his time in custody. He contends that the remaining portion of his sentence of three years should either be converted to a non-custodial sentence or that he should be released on account of time already served. The appellant hinges this argument on the interpretation and application of section 333 (2) of the *Criminal Procedure Code* ("CPC"), which provides that the period spent in custody by an accused prior to conviction must be considered in sentencing him.
2. The background to this appeal is that the appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on the night of 16th January 2016 at Madungu Sub-location in Ugunja Sub-county within Siaya County, he intentionally caused his penis to penetrate the vagina of YAO, a child aged 14 years.



3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#). The particulars of the offence being that on the same day and place, he intentionally and unlawfully touched the vagina of YAO, a child aged 14 years with his penis.
4. On arraignment before the trial court, the appellant pleaded not guilty to the offences and to prove its case, the prosecution called a total of four (4) witnesses. The trial court after the prosecution had laid out its case against the appellant placed him on his defence. In a sworn statement of defence, the appellant denied committing the offence. The trial court, in a judgment delivered on 28th September 2016, found the appellant guilty, convicted him, and sentenced him to 20 years imprisonment.
5. The appellant, thereafter, preferred an appeal in the High Court at Siaya. Upon re-evaluating the evidence, the learned Judge dismissed the appeal and upheld both the conviction and sentence in a judgment delivered on 19th April 2018. That decision galvanized the filing of the present appeal.
6. As already stated, the appellant does not contest the conviction but only appeals on sentence. The grounds in support thereof are that the High Court: did not take into consideration the fact that the appellant was remorseful and sought forgiveness and reconciliation; was a first offender and that he had undertaken rehabilitative programs while in prison. He further seeks that his sentence be determined to run from the date when he was arrested, pursuant to section 333 (2) of the [CPC](#), and that the nine (9) months he spent in remand custody pending trial and sentence be factored in.
7. When the appeal was heard on 9th October 2024, the appellant, who appeared in person reiterated and expounded on the above grounds in his written submissions. Suffice to add that he did not impugn the sentence imposed as it was lawful. However, he seeks to be released on account of time already served or that the remaining sentence be converted to a non-custodial one, stating that he only had 3 years remaining on his sentence. He opined that this Court ought to interfere with the sentence by allowing him to be released from jail since he had already been rehabilitated. Relying on the cases of Michael Kalewa vs. Republic is [Michael Kalewa v. Republic](#) [2018] eKLR.; [Julius Kitsao vs. Republic](#), Criminal Appeal No. 12 of 2021; [Abamad Abolfathi Mohamed](#) in Criminal Appeal No. 135 of 2016 and [Benjamin Kabindi Changawa & Another vs. Republic](#) [2020] eKLR, the appellant pointed out that the appellants in all these cases though handed mandatory and minimum sentences by the trial courts, were however, in the spirit of rehabilitation and reintegration of offenders, the sentences were reduced to less custodial sentences.
8. The respondent through Mr. Okango, learned Senior Principal Prosecution Counsel submitted that the appellant was properly convicted and lawfully sentenced. While relying on the case of [Republic vs. Mwangi; Initiative for Strategic Litigation in Africa \(ISI-A\) & 3 Others \(Amicus Curiae\)](#) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), counsel submitted that the twenty years imprisonment meted out on the appellant was lawful, valid and should not be interfered with. It was further submitted that this being the second appeal where the Court determines pure matters of law, the sentence is not a matter of law but fact. Similarly, the reduction of sentence is not a matter of law, but of fact. Turning on the plea that the time that the appellant spent in remand custody pending trial be taken into account in computing sentence in terms of section 333 (2) of the [CPC](#), the respondent submitted that it is a legal requirement and they were prepared to concede the appeal limited to that aspect only. That it was common ground that, the appellant was arrested on 17th January 2016. While he was granted bond upon being arraigned in court on 19th January 2016, he was, however, unable to meet the terms and therefore remained in remand custody throughout the trial. He therefore was in custody from 17th January 2016, until 28th September 2016 when he was convicted and sentenced. Consequently, the respondent conceded that the twenty years imprisonment be computed



to start from 17th January 2016 when the appellant was arrested. Counsel, otherwise prayed that the appeal on reduction of sentence be dismissed.

9. We have independently reviewed the record and considered it in light of the impugned judgment and the rival submissions presented on sentence. The only issue for consideration is whether the sentence imposed by the trial court and affirmed by the High Court calls for intervention by this Court. In the case of *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISI-A) & 3 Others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024), the Supreme Court of Kenya stated that”

“... section 361(1) of CPC explicitly bars the court of appeal from hearing issues relating to matters of fact, in cases of appeals from the subordinate courts. Section 361 (1) also elaborated that severity of a sentence was a matter of fact and not law and the Court of Appeal was barred from determining questions relating to sentences meted out, except where such sentence had been enhanced by the High Court..... Consequently, the respondent’s appeal on grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal....”

10. In the circumstance of this case, we are expressly barred from entertaining grounds of appeal that question the harshness, excessiveness, and legality of the sentence, as that is a matter of fact. We have nonetheless jurisdiction to entertain the appeal on sentence if it was arrived at in breach of statutory provisions.
11. Section 333 (2) of *CPC* requires that the period spent in custody be considered in sentencing. Indeed, in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISI-A) & 3 Others* (*supra*), the Supreme Court reiterated and affirmed that the period spent in remand custody whilst undergoing trial must be factored in sentencing, in accordance with section 333 (2) of the *CPC*.
12. This position was echoed by this Court in *Momanyi vs. Republic* [2022] KEHC 16302 (KLR), when it stated that the trial court is obligated to deduct the period spent in custody from the total sentence. The Court emphasized that this requirement is not merely a procedural formality but a substantive right of the accused, ensuring that the punishment is fair and just. The Court opined that failure to consider the time spent in custody could result in an unjustly prolonged period of incarceration and that the trial courts must adhere to this legal requirement to uphold the principles of justice and fairness in sentencing.
13. Turning to the appeal before us, it is common ground that in sentencing the appellant, the trial court did not factor in the period that the appellant had been in remand custody. Similarly, on the first appeal, the High Court did not interrogate this aspect of the sentence. Before us, the respondent readily admitted that this was a serious omission on the part of the two courts below that we should address. As this was a legal requirement and based on the foregoing authorities, we allow the appeal on sentence to the limit that the sentence imposed shall run from 17th January 2016, being the date of the appellant's arrest.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL



H. A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

