



REPUBLIC OF KENYA



**Gioya v Republic (Criminal Appeal 61 of 2020)
[2025] KECA 1282 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1282 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 61 OF 2020
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
JULY 11, 2025**

BETWEEN

STEPHEN ONYANGO GIOYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Siaya (Aburili, J.) dated 7th October 2019 in HCCRA 41 of 2018)

JUDGMENT

1. Stephen Onyango Gioya, the appellant was charged, tried and convicted in the lower court of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The appellant was then sentenced to serve a mandatory minimum sentence of 15 years imprisonment. The appellant then appealed to the High Court on both conviction and sentence. The High Court upon considering the appeal found it to be without merit and dismissed it in its entirety. Undeterred the appellant filed this second appeal on various grounds. However, on the day of hearing, he withdrew his appeal against conviction and urged the court consider computation of his sentence; the main ground of appeal being that the learned Judge of the High Court erred in failing to consider the time that he had spent in custody pending trial.
2. In support of the appeal, the appellant filed written submissions in which he argues that under section 333(2) of the *Criminal Procedure Code* (CPC), the period spent in custody during the trial ought to be considered when sentencing. In support, the appellant relied on the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR where this Court differently constituted reduced the sentence to the period that the appellant had already served in custody.



3. In their written submissions, the respondent concedes to the appeal, accepting that section 333(2) of the [CPC](#) requires that the period spent in remand during the trial, be included in the computation of the sentence.
4. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, this Court is mindful of its duty as a second appellate court, that a second appeal must only be confined to points of law and this court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See [Karingo & 2 Others v Republic](#) [1982] eKLR.
5. The appeal relates to sentencing on the basis of section 333(2) of the [CPC](#) and the State does not object to the same. Section 333(2) of the [CPC](#) provides:

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 shall take account of the period spent in custody.

6. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. The provision of section 333(2) of the [CPC](#) was the subject of the decision in [Abamad Abolfathi Mohammed & Another v Republic](#) [2018] eKLR where this Court 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 [CPC](#). By dint of section 333(2) of the [CPC](#), 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 [CPC](#) 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.”

Similar sentiments were expressed in [Bethwel Wilson Kibor v Republic](#) [2009] eKLR.

7. According to The [Judiciary Sentencing Policy Guidelines](#):

The proviso to section 333(2) of the [CPC](#) 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.

8. In the instant appeal, the appellant had been in custody from the date of his arraignment in court for plea taking on 11th September, 2017. By dint of section 333(2) of the CPC, the trial court was obliged to take into account the period that he had spent in custody before he was sentenced. When sentencing the appellant, the trial court stated as follows:

“Mitigation noted. Accused sentenced to [15] years in prison. 14 days Right of appeal.”

9. There is no evidence that the court took into account the period already spent by the appellant in custody. From the record, the appellant was first presented before the court for plea taking on 11th September, 2017 and was, thereafter, convicted and sentenced on 22nd August, 2018 to serve 15 years imprisonment. He is asking this Court to determine that the time of his sentence should start to run from 11th September 2017 when he was arraigned in Court.
10. Since the trial court did not take into account the period that the appellant was held in custody, we find that there is merit in this appeal to the extent that the sentence imposed of 15 years should run from the date the appellant was arraigned in court, being 11th September, 2017.

The upshot of this is that the appellant’s appeal on sentence is allowed that extent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

