



REPUBLIC OF KENYA



KENYA LAW
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**Atsango v Republic (Criminal Revision E080 of 2023)
[2025] KEHC 5321 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E080 OF 2023**

RN NYAKUNDI, J

APRIL 29, 2025

**IN THE MATTER OF ARTICLE 25, 27(1), 48, 50(1)
(2) AND 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF APPLICATION AND ENFORCEMENT OF SECTION
333(2) OF THE CRIMINAL PROCEDURE CODE IN RELATION TO THE
SENTENCES THAT HAVE NOT FACTORED THE TIME SPENT IN CUSTODY**

BETWEEN

KENNEDY ATSANGO PETITIONER

AND

REPUBLIC RESPONDENT

RULING

Representation:

MS Kirenge for the State

1. What is pending before me for determination is an undated Notice of Motion Application where the Petitioner/Applicant is seeking the following orders:
 - a. Spent
 - b. That the Applicant is seeking revision of the sentence pursuant to the provisions of section 333(2) of the *Criminal Procedure Code*.
 - c. The individual rights under Article 23(1) in reliance to Article 165 is mandated upon this Honourable Court.
 - d. That any other relief that this Honourable Court shall deem fit to grant.



2. The Application is based on the grounds in which the Applicant states as follows:
 - a. That the Applicant is not interfering with the conviction but on sentence only.
 - b. That Article 165(6) and (7) of the *Constitution* of Kenya and section 362 as read together with section 364 of the *Criminal Procedure Code* gives the Honourable Court powers to handle matters of this nature.
 - c. That may this Honourable Court be pleased to be persuaded by ruling of Justice Odunga in Petition No 15/2020 at Machakos High Court.
3. The Application is supported by the annexed affidavit dated 2nd February 2023, in which the Applicant avers as follows:
 - a. That I was convicted and sentenced to serve 5 years' imprisonment for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No 3 of 2006 vide SOA Case No E012/2020 by CM'S Court at Eldoret.
 - b. That the Applicant herein has spent (1) year (6) months in remand custody which the Honourable court should consider as part of the 5-year sentence.
 - c. That, the trial Magistrate recognized the accused spent in remand custody since the arrest but did not commute the sentence from the date of arrest as provided in section 333(2) of the *CPC*.
 - d. That being dissatisfied with the trial magistrate judgement, I beseech this Honourable Court to consider the time I spent in custody remand as I would like to be one of the beneficiaries of Article23(1), 165 of the *Constitution* of Kenya 2010.
 - e. The Applicant has learnt to be a law abiding citizen.
 - f. That I wish to rely on Petition No 15 of 2020 at Machakos High Court by Justice Odunga.
 - g. That I am remorseful, repentant and reformed hence qualified to be re-integrated back to the society.

Analysis and Determination

4. On perusal of the application, the main issue for determination herein is whether the applicant is entitled to review of sentence under Section 333(2) of the *Criminal Procedure Code*.
5. Section 333(2) of the *Criminal Procedure Code* 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 provision that the law requires courts to take into account the period the convict spent in custody. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR where 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.

7. According to The Judiciary Sentencing Policy Guidelines:

“The provision to section 333(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.”

8. This court is empowered by Article 165(6) of the Constitution of Kenya 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.

9. The applicant was arrested on 24th September 2020 and convicted on 28th September 2022. Notably, the Applicant has not contested the sentence, he only seeks to have the duration he spent in custody be taken into account which is his legal entitlement in my considered view.

10. I have considered the application and all the information available. It is thus crystal clear that the learned trial Magistrate did not take into consideration the provisions of section 333(2) of the Criminal Procedure Code while sentencing the Applicant herein. Consequently, the committal warrant to prison be amended with a commencement being the date of arrest 24th September 2020.

11. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 29TH APRIL 2025

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R. NYAKUNDI

JUDGE

