



**Neondo v Director of Public Prosecution (Miscellaneous Criminal Application E188 of 2024) [2025] KEHC 9003 (KLR) (24 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9003 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CRIMINAL APPLICATION E188 OF 2024**

**S MBUNGI, J**

**JUNE 24, 2025**

**BETWEEN**

**MOSES NEONDO ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion seeking an order for consideration of a non-custodial sentence in respect of the remaining one [1] year of his sentence.
2. The application is supported by the affidavit of the applicant sworn on 24<sup>th</sup> October 2024, wherein he deponed that he was convicted and sentenced to twelve [12] years imprisonment for the offence of defilement contrary to Section 8[1] as read with Section 8[4] of the *Sexual Offences Act*.
3. He averred that he has been in custody since the date of arrest, is remorseful, and has since undergone rehabilitation. He prayed to be placed under probation or community service for the unserved portion of his sentence.
4. The applicant further stated that he does not intend to appeal against the conviction or sentence but seeks the indulgence of the court to vary the mode of sentence. He prayed that a probation report be availed to assist the court in consideration of the application.
5. When the matter came up for hearing interpartes on 26<sup>th</sup> May, 2025, the application was opposed by prosecution counsel, Ms. Osoro, who submitted that the applicant can benefit from remission. She urged the court not to interfere with the sentence. The applicant prayed that the court orders for his sentence to start from the date of his arrest.



## Analysis and Determination.

6. I have considered the application, the supporting affidavit, the trial court record and oral submissions by the parties.
7. From the record, the applicant was charged with the offence of defilement contrary to section 8[1] as read with section 8[4] of the *Sexual Offences Act* No. 3 of 2006. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 [1] of the *Sexual Offences Act* No. 3 of 2006. He was also charged with a second count, assault causing actual bodily harm contrary to section 251 of the *Penal Code*. The case proceeded to full trial and the court meted out a sentence of 20 years on the first count, and 2 years on the second count, to run concurrently.
8. He then appealed against both conviction and sentence to the High Court vide HCCRA 135 of 2027, wherein the court substituted the trial court sentence with a 12-year sentence.
9. The applicant’s application for a non-custodial sentence was opposed by the DPP, who submitted that the applicant may benefit from remission of up to one-third of the sentence under Section 46 of the *Prisons Act*. The applicant prayed that in the alternative, the court directs that his sentence starts from the date of arrest.
10. I do note that in the court’s pronouncement, the trial court magistrate did not address the time spent by the accused person in custody during trial. Neither was the issue addressed in the Appeal.
11. According to The Judiciary Sentencing Policy Guidelines 2023:

“Section 333 [2] of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served [see GATS at Part V]. This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders– for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.”

12. Section 333[2] of the *Criminal Procedure Code* 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 shall take account of the period spent in custody.”

13. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be considered in meting out the sentence where it is not hindered by other provisions of the law.



14. According to the charge sheet, the applicant was arrested on 09.10.2016. The applicant remained in remand throughout the trial until the date of sentencing by the trial court on 07.11.2017.

**Disposition.**

15. The court finds that the application has merit to the extent that the sentence imposed did not take into account the period the applicant had spent in lawful custody prior to sentencing.
16. The sentence of 12 years' imprisonment to commence from the date of arrest, being 09.10.2016 pursuant to section 333[2] of the CPC.
17. File closed.
18. Right of appeal 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JUNE 2025**

**S.N MBUNGI**

**JUDGE**

In the presence of:

Court Assistant – Elizabeth Angong'a

Accused person present online.

Court Prosecutor- Ms Osoro.

