



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Republic (Criminal Petition 16 of 2023)
[2024] KEHC 256 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 256 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 16 OF 2023
RN NYAKUNDI, J
JANUARY 24, 2024**

BETWEEN

STANLEY KAMAU PETITIONER

AND

REPUBLIC RESPONDENT

(Being an Application for Re-Sentencing in the Cr. Case No 16 of 2017)

RULING

1. The applicant was charged in the lower court with the charge of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 23rd day of January 2017 at (Particulars withheld) area within Uasin Gishu County the accused intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (penis) to penetrate the genital organ (vagina) of M.S, a girl aged 13 years. Thereafter after a full trial the applicant was found guilty convicted of the offence and sentenced to 20 years imprisonment in Criminal Case No. 16 of 2017. He has now approached this court under certificate of urgency supported by a Notice of Motion seeking the following orders:
 1. That may the honorable court allow my sentence to start from 20th January 2017 from the date I was first admitted into prison instead of 1st June 2017.
 2. That any fee payable towards this application be waived as I am held in custody.
 3. That, the petition is seeking enforcement of section 333(2) of the *criminal procedure code* in relation to sentence that have not factored the time spent in custody.
2. In support of the application is an affidavit dated on April 17, 2020 in which the applicant on oath deposed as follows:



1. That I am a Kenyan citizen adult of sound mind hence competent to swear this affidavit
 2. That I was charged for the offence of defilement c/s 8(1) (3) of the SOA No.3 of 2006, convicted and sentenced to 20 years imprisonment at CM’s Eldoret.
 3. That I appealed against the above decision and it was dismissed
 4. That I am remorseful, repentant, reformed and rehabilitated as I have learned hard lessons while in custody and now beg for leniency.
 5. That I am praying for non-custodial /community based sentence.
 6. That, may this honorable court exercise section 333(2) of the CPC and allow my sentence to commence as mitigated.
 7. That what I have deponed there-in is true and correct to the best of my knowledge, belief and understanding, source of my information.
3. The applicant sought review of the sentence pursuant to Section 332 of the Criminal Procedure code, and in the matter of alleged contravention of rights or fundamental freedoms under Article 19, 20,22, 25, 27, 28, 29, 50, 51, 159 and 165 of the Constitution of Kenya and all other enabling powers and provisions of the law and In the matter of The applicant prays that the court applies the provisions of section 333(2) of the CPC and take into account the time he has been in custody. The million-dollar question is whether the Applicant is entitled to the relief under Section 333(2) of the Criminal Procedure Code.

Analysis And Determination

4. I have considered the application and the court’s mandate is to determine the application of section 333(2) of the Criminal procedure code. The section provides as follows:
 - (2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
5. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.
6. 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. 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 *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 appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012."

7. The punishment imposed by the trial court for the offence is that of 20 years imprisonment. In my considered view it is trite as stated in the Case of *Benard Kimani Gacheru vs Republic* (2002) eKLR that it is now the position in law that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle, Even if the Appellate court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states in shown to exist." There is no evidence in this application for this court to interfere with the sentence passed by the trial court going by the guidelines in the above case.
8. The Applicant however was convicted on 1st day of August 2017 when judgment was read out and after mitigation, he was sentenced to serve 20 years imprisonment for the offence of defilement. The court in sentencing the accused person considered that he was a first-time offender but did not consider the period that he spent in remand custody. I share the same thoughts as the court in *Abamad Abolfathi Mobammed & another v Republic* [2018] eKLR that the trial court should have directed the applicant's sentence of imprisonment to run from the date of judgement of on 1st August 2017 instead of 1st June 2017.
9. Therefore, in compliance with Section 333(2) *Criminal Procedure Code*; computation of the sentence ought to include the period the applicant was in custody pending the hearing and determination of the case before sentence was meted out.
10. The sentencing process and its outcome are within the mandate of the trial court. However, since circumstances vary from a case to another, this court shall intervene in exercise of revision pursuant to Article 165(3) *CoK* where mandatory provisions of the law have not been complied with.
11. In conformity with Section 333(2) *Criminal Procedure Code*, and considering the period he has been in custody. The sentence shall be computed to include the period running from 1st June 2017 and not the 1st day of August 2017 when he was sentenced to serve 20 years imprisonment.
12. The upshot of it is that the Notice of Motion succeeds to the extent that the committal warrant shall be amended to factor in the period spent in remand custody for the sentence to be effected from the date of arrest.
13. It is so ordered
14 days right of appeal.

DATED AND SIGNED AT LODWAR THIS 24TH DAY OF JANUARY 2024

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R. NYAKUNDI

JUDGE

In the presence of;

Petitioner present

Mr. Mugun for State

