



REPUBLIC OF KENYA



**Gathogo v Republic (Criminal Petition 14 of 2023)
[2024] KEHC 263 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 14 OF 2023
RN NYAKUNDI, J
JANUARY 24, 2024**

BETWEEN

JOEL KAMWARA GATHOGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Application for Re-Sentencing in CR. Case No. 97 Of 2016)

RULING

1. The applicant approached this court vide an application filed on 9th may 2023 seeking a resentencing. The applicant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* in Eldoret Chief Magistrate’s Court case no. 3 of 2006 and sentenced to serve 20 years’ imprisonment. He appealed the sentence vide Eldoret High Court Criminal Appeal No. 93 of 2019 which appeal was dismissed in its entirety. He seeks to have this court exercise powers granted under section 333(2) of the *Criminal Procedure Code* and allow his sentence to commence as mitigated. He wished to rely on the decision on Machakos High Court Petition No. 15 of 2020.
2. It follows that the only issue for determination is as follows;

Whether the court should interfere with the sentence
3. It is trite law that a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law and it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Further, a court cannot expand its jurisdiction through judicial craft. (See *Samuel Kamau Macharia & Another v KCB & 2 Others* App. No. 2/2011).
4. Article 165(3) of *the Constitution* provides for the jurisdiction of the court and includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; and any other jurisdiction, original or appellate, conferred on



it by legislation. The High court further has supervisory jurisdiction over subordinate courts donated by Article 165(6) of *the Constitution*. This jurisdiction is expounded under sections 362 and 364 of the *Criminal Procedure Code*. The only time this court can review its own decision or that of a court of concurrent jurisdiction is in exercise of the resentencing jurisdiction pursuant to *Francis Karioko Muruatetu & another v Republic* [2017] eKLR and only where the court did not exercise discretion during sentencing.

5. The applicant appealed against the decision of the trial court vide appeal no. 93 of 2019 which was heard and determined on 15th February 2023. In his appeal, the court considered the decision that his petition is grounded upon being Machakos High Court Petition E017 of 2021 - *Maingi & 5 Others v Director of Public Prosecutions & Another*. The court considered his mitigation and found no reason to review the decision.
6. Notwithstanding that position there is need for a further interrogation on the application of section 333 (2) of the *Criminal Procedure Code*.
7. This 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.
8. 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.
9. 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.
10. 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.”

11. It is implicit from Arts. 24,25,27,28,29 & 49 of *the constitution* that the use of pre-trial detention is only an exceptional measure in pre-trial and fair trial rights. The reason being that detention of an individual is such a serious measure that it can only be justified where other less stringent measures have been considered by a trial court and found to be insufficient to safeguard the attendance of an accused to



- attend the criminal proceedings or that the public interest might require the person concerned to be detained. That is the basis where pre-trial detention must be subject to regular judicial review.
12. The cornerstone of section 333 (2) of the *CPC* is tailored upon the principles that depriving a person of liberty in connection with an alleged offence when the person has not been convicted and the evidence has not yet been examined or tested represents a potential infringement of several key rights. Let us take the example of the right to freedom and security of the person in Art.29 of *the Constitution*, pre-trial detention may contravene the right to liberty which incorporates a right not to be detained arbitrarily.
 13. It is worthy noting that pre-trial detention in Kenya can be needlessly long, sometimes lasting for years because of overloaded case dockets. Viewing the fair trial rights and presumption of innocence pre-trial detention conflicts with the right of an accused person to be presumed innocent until the contrary is proved.
 14. Indeed, a key feature of the petition and on a place of the record shows the petitioner was arraigned in court on 27th April, 2016 to plead to the charge of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. His trial commenced in earnest and finally concluded on 8th May, 2019. That is when the trial magistrate found him guilty, convicted and imposed a sentence of 20 years imprisonment. Being aggrieved with conviction and sentence he appealed to the High Court which also dismissed the appeal in its entirety.
 15. There is no formal order that section 333 (2) of the *CPC* was adhered to on the aspects of giving credit to the period spent in pre-trial detention.
 16. The upshot of the foregoing discussion is to find merit in the petition by having the custodial sentence factor in the period spent in remand custody.
 17. As a consequence, the comital warrants be reviewed for the commencement date to read the 26th April, 2016.
 18. Ordered accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 24th DAY OF JANUARY 2024

R. NYAKUNDI

JUDGE

