



REPUBLIC OF KENYA



**Baraza v Republic (Criminal Petition 70 of 2020)
[2024] KEHC 1656 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 70 OF 2020
RN NYAKUNDI, J
FEBRUARY 22, 2024**

**IN THE MATTER ENFORCEMENT OF THE BILL OF RIGHTS AS
UNDER ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF SENTENCE REVIEW UNDER SECTION 39(2) OF THE
SEXUAL OFFENCES ACT OF 2006 IN RELIANCE TO ARTICLE (1), (2) (4), 19(3),
23(1), 25(C), 165(3) (A, B & D AND 258(1) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER FUNDAMENTAL RIGHTS AND FREEDOM AS UNDER
ARTICLE 27,28,29,48,50(1)(2) AND 25C OF THE CONSTITUTION OF KENYA**

BETWEEN

GEOFFREY WANJALA BARAZA PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The petitioner was charged, tried, convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* number 3 of 2006. The particulars of the offence are that on the 18/6/2011 at [particulars withheld] Location in Eldoret West District within Rift Valley Province intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (anus) of AOO a boy aged 12 years. Aggrieved with the sentence the petitioner filed the notice of motion with a corresponding affidavit invoking the jurisdiction of this court on the following grounds;
 - i. That I know of my own knowledge that I was convicted and sentence to serve 20 years imprisonment for the offence of defilement contrary to section 8(1) of the *Sexual Offence Act* No.3 of 2006.
 - ii. That I have been in prison for a period of 9 years including time spend in remand custody.



- iii. That I am repentant, remorseful and reformed because I have learned the incarceration.
- iv. That this court has unlimited original jurisdiction powers and discretion as contemplated in art. 22(1), 23, 159(2) a, b & d, (6) (7) and 258 (1) of the [Constitution of Kenya](#) 2010 to handle matter of this nature.
- v. That the sentence meted upon me is too harsh considering the fact that I am a first offender.
- vi. That I beg leave to rely on [Francis Muruatetu and another v Republic](#) petition no. 15 of 2015 among other enabling laws.

Grounds sought

- i. That I am seeking orders for review of sentence under section 39(2) of [Sexual Offences Act](#) no. 3 of 2006 and be admitted on non-custodial basis or/and such order the honourable court may deem fit.
- ii. That may this honourable court be pleased to consider the sentencing policy by the Kenya Judiciary and invoke the provisions of art. 159(2) a, b & d, 165(3) (a)(b) (d) and 258 (1) of the [Constitution](#) of Kenya 2010 and reduce my sentence to non-custodial community service order or/and other orders as it will deem fit.
- iii. That, this honourable court be pleased to invoke the [Muratetu case](#) (*supra*) among other enabling laws and grant me leniency in accordance to the same.

Determination

- 2. 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.
- 3. 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.
- 4. In the case of [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.

5. The petition examines the interface between basic concepts of fundamental rights and freedoms as enshrined in the bill of rights in art. 25(a), 26, 28 & 29 of the Constitution . It is also pertinent to take cognizance of Art. 27 of the Constitution which reads as follows;
 1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 2. equality included the full and equal enjoyment of all rights and fundamental freedoms.
6. The central question being asked is how much discretion if any does a judge who is calculating an offender remand credit has to factor in the statutory release and earned remission that would have been earned at the offender been serving a sentence rather than being held in pre-trial detention. The position superior courts have taken in this jurisdiction is that a sentencing judge may consider credit for early release that could have been earned had the offender been in custody as a result of serving a sentence rather than being on remand. My view is that under section 333(2) of the CPC the pre-trial detention credit is considered enhanced remand credit. The flashpoint of this petition is the interpretation of section 333 (2) of the CPC in determining the sentence to be imposed on a person convicted of an offence a court may take into account any time spent in custody by the person as a result of the offence. Although, the wording of the section appears to me to be discretionary and not mandatory but given the constitutional imperatives in the bill of rights a sentencing judge should ordinarily give credit for pre-trial custody. Again, as per the text of the law a judge should not deny credit without justification or good reasons. To do so offence one's sense of fairness and justice. Incarceration at any stage of the criminal trial or process is a denial of an accused's dignity, security and liberty all those rights guaranteed by the Constitution . In practical terms this means that the petitioner is eligible for pre-trial remand credit period of 10 months before his case was heard and determined on the 30/4/2012. According to the record he was arraigned in court on 26/6/2011. This being an important consideration and focus in the legislation balancing the historical contexts the warrant of committal to prison be amended to reflect the 10 months in remand custody.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF FEBRUARY 2024

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R. NYAKUNDI

JUDGE

Mr. Mugun for State

