



**Amusibwa v Republic (Miscellaneous Application E027 of 2022)
[2024] KEHC 3331 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION E027 OF 2022
SC CHIRCHIR, J
MARCH 20, 2024**

BETWEEN

PROTUS AMUSIBWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By way of a Notice of Motion dated 7th June 2022, the Applicant seeks for the following orders:
 - a. That the honourable court grant him leave to appear before it physically or virtually for mitigation of the application
 - b. That the two years and six months spent in remand by the applicant be taken into consideration and the directives be made that the imposed sentence to run from the date of the arrest which was 14th June 2019.
 - c. That the effect of the 8 years imprisonment be achieved with lesser non-custodial sentence.
2. His grounds for review was that;
 - a. His sentence was set to expire on 21st April 2026
 - b. That he has no civil or criminal case pending that he did not appeal against the lower court decision in the high court
 - c. That the trial court did not direct that the 8 years imposed as sentence to run from the date that the accused was in custody.



- d. That he has learnt his lesson the hard way and that he has been reformed and that he has been rehabilitated
 - e. He was a first time offender.
 - f. That the court be pleased to exercise its discretion as per the ruling in the Machakos petition no 17/2 Philip Mueke and others.
3. In his supporting affidavit, the applicant avers that he was convicted and sentenced for 8 years imprisonment for the offence of rape contrary to section 10 of the [Sexual Offences Act](#) of 2006
 4. He further stated that he was arrested on 14th June 2019 , convicted and sentence on 21st December 2021 by the Trial court.
 5. He avers that he is a first offender, and is remorseful, and has been in remand since the time he was arrested until the time he had been convicted .
 6. He asserts that the trial magistrate failed to direct that the imposed 8 year imprisonment to take effect from the time of his arrest.
 7. He prays that this court exercise its discretion according to the ruling in the Machakos High court petition no 17/21 Philip Mueke and others.
 8. The applicant proceeded by way of oral submission on 14th December 2023.
 9. In his submission, the applicant prayed for leniency claiming that he has children he was taking care of and prayed that the time 2 years which he has spent in custody prior to conviction be considered.
 10. In response, Ms. Osoro for the Respondent submitted that the court had already considered the time that he had served as he was sentenced to 8 years as opposed to the 10 years provided under the [Sexual Offences Act](#).
 11. She finally submitted that the victim was 90 years old and prayed and urged the court not to disturb the sentence.

Determination

12. The main issue for determination is whether the applicant is entitled to review of sentence under Section 333(2) of the [Criminal Procedure Code](#).
13. 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.”

14. The proviso to section 333(2) of the [Criminal Procedure Code](#) was the subject of the decision in [Abamad Abolfathi Mobammed & 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 19th June 2012.”

15. The applicant was arrested and arraigned in court on 17/6/2019 and convicted on 22/12/2021.
16. Upon perusal of the court record the court while sentencing the accused stated as follows: “ Court considers mitigation and time he has been in custody ...”
17. It is evident therefore that the court had factored in the time that the Applicant had spent in custody when sentencing the accused.
18. The Application is unmerited and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF MARCH 2024.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin- Court Assistant

