



REPUBLIC OF KENYA



**KENYA LAW**  
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**Odhiambo v Republic (Criminal Petition E103 of 2023)  
[2024] KEHC 14844 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14844 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E103 OF 2023  
E OMINDE, J  
NOVEMBER 28, 2024**

**BETWEEN**

**EDWIN OKOTH ODHIAMBO ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Petitioner was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual offences Act* 2006. The particulars of the offence were that between 1<sup>st</sup> October and 13<sup>th</sup> November 2010 at [particulars withheld] in Wareng District within Rift valley province, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of MK, a girl aged 12 years.
2. The Petitioner pleaded not guilty and the matter proceeded to full hearing. The prosecution called 4 witnesses to prove its case and after the court found that he had a case to answer, the Petitioner was placed on his defence. He gave sworn evidence and did not call any witness. Upon considering the evidence and the testimonies, the trial court convicted him of the main charge and sentenced him to 30 years' imprisonment.
3. Being aggrieved by the sentence and conviction, the petitioner appealed the same vide Eldoret High Court Criminal Appeal No. 140 of 2012. The appeal partially succeeded as the High Court reduced the sentence from 30 years imprisonment to 20 years imprisonment vide a judgement delivered on 24/09/2015.
4. The Petitioner then approached this court vide a Petition filed on 04/12/2023 seeking that the court compute the time spent in remand to the current sentence. It is premised on the grounds that he spent one year and eight months in remand which was not accounted for. He cited Section 333(2) of the Criminal Procedure Code and urged the court to consider the time he had spent in prison.



### **Petitioners' submissions**

5. The Petitioner filed submissions on 29/02/2024 and another set on 11/10/2024 in support of the petition. He urged that the Application is pursuant to the provisions of Section 333(2) of the Criminal Procedure Code. He stated that he spent 1 year and 8 months in remand before he was sentenced.
6. Further, that he had been out on bond and partly in remand during the pendency of the trial. He submitted that he was a first-time offender and has served two thirds of his sentence. Additionally, that he is a reformed person and has attained various skills while in prison. He urged that the court allow his application.

### **Respondents' submissions**

7. Learned counsel for the state S.G. Thuo, filed submissions dated 22/10/2024. He urged that the Petitioner was charged and rightfully convicted. He was sentenced to 20 years' imprisonment for the offence of Defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act*. He urged that the sentence was lawful as the law dictates the minimum sentence for the same to be imprisonment to a jail term of not less than 20 years. He cited the decision of the Supreme Court of Kenya in SC Petition No. E018 of 2023 – Republic vs Joshua Gichuki Mwangi and urged the court to uphold the same.
8. From the onset, let it be noted that the Applicant is not seeking that his sentence be invalidated. Rather, his Application seeks that the Court computes the period that he spent in remand within the 20 year sentence that the High Court reduced his sentence to. It follows therefore that the above decision cited by the Counsel for the State which is in respect of the constitutionality or otherwise of the sentences provided for under Section 8 of the *Sexual Offences Act* is not relevant to this Application which is brought under Section 333(2) of the Criminal Procedure Code.

### **Analysis & Determination**

Statutory provisions

Section 333(2) of the Criminal Procedure Code 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.

9. The Court takes cognisance of the fact that this provision under Section 333(2) is a mandatory requirement. Further, The Judiciary Sentencing Policy Guidelines & Directions at Clause 7.10 provides;

The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.



## Case Law

10. In *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR 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.”

11. Hon. G. V. Odunga J (as he then was) in *Vincent Sila Jona & 87 Others vs Kenya Prison Service & 2 Others* [2021] eKLR pronounced himself on the application of Section 333(2) of the Criminal Procedure Code as follows;

A person on whom a sentence had been imposed which did not comply with section 333(2) of the Criminal Procedure Code had recourse to the court since he would by that fact have been subjected to serve a sentence that did not comply with the law. Such a person risked serving a sentence that was in excess of the one lawfully prescribed thus being deprived of his liberty contrary to the law. Imposing a sentence without adhering to the law hence subjecting the convict to serve a sentence that was over and above what was provided for, was depriving him of his freedom without a just cause.

12. The Hon Judge then proceeded to make the following orders;

- i. A declaration that Trial Courts are enjoined by Section 333(2) of the Criminal Procedure Code, in imposing sentences, other than sentence of death to take into account of the period spent in custody.
- ii. A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.
- iii. A declaration that Section 333(2) CPC applies to the original sentence as well as sentence imposed during resentencing.....

13. I have perused the Lower Court proceeding and on the issue of the time spent in custody, the record shows that the plea was taken on 6<sup>th</sup> December 2010 and the Appellant was able to post bail on 7<sup>th</sup> January 2011. He therefore spent a period of one (1) month in remand custody. The above notwithstanding, I note that the Appellant has submitted that because he was partly in remand and



partly out on bond, the Court should compute the entire period of the trial as the period he was in remand.

14. I have further perused the sentence. There is no indication that the period spent in remand was computed. On the Appellant's submission, there is no need to belabour the point of this submission because the provisions of Section 333(2) is very clear and unambiguous. The period to be computed into the sentence meted out is the period spent in remand custody during the trial and that is the period the Court shall proceed to compute. That period is one month.
15. In this regard, the Court finds merit in the Applicant's Applicant and allows the same. The period of one moth that the Applicant spent in remand custody is to be competed into his sentence of 20 years imprisonment. The Appellant's right to appeal within 14 days of this Ruling is explained.

**READ DATED AND SIGNED AT ELDORET ON 28<sup>TH</sup> NOVEMBER 2024**

**E. OMINDE**

**JUDGE**

