



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimathi v Republic (Petition E010 of 2022)  
[2023] KEHC 881 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 881 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
PETITION E010 OF 2022  
LW GITARI, J  
JANUARY 19, 2023**

**BETWEEN**

**DAVID MUTHURI KIMATHI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner herein, vide an undated notice of motion application that was filed before this court on October 24, 2022 sought for the following orders:
  - i. That, this honourable court be pleased to allow the Petitioner’s petition under section 333(2) of the *Criminal Procedure Code* (CPC),
  - ii. That, this honourable Court be pleased to admit and give any other orders that it deems just in the circumstances of this Petition.
  - iii. Spent.
2. The application is based on the grounds that:
  - i. The Petitioner was charged at Marimanti Law Court in Criminal Case No. 15 of 2018 for the offence of rape contrary to section 3(1) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to serve 10 years imprisonment on January 3, 2020. He appealed to this Court vide Chuka High Court Criminal Appeal No. 7 of 2020 and the appeal was heard but dismissed.
  - ii. The Petitioner’s contention herein is that the period he spent in custody was not considered by the trial court during sentencing.
  - iii. The Petitioner prayer is for petition for the appeal to be allowed and the period spent in custody be deducted from the sentence of 10 years meted against him by the trial court according to



section 333(2) of the Criminal Procedure Code (CPC) and articles 27(1)(4) and (5) of the Constitution on the right to equal protection and equal benefit of the law and freedom from discrimination.

- iv. The Petitioner is poor and unable to pay for the costs of this Petition.
  - v. This honourable court does issue and give such further directions and;/or reliefs as it may deem fair and just.
3. The application is not opposed.
  4. The application is expressed to have been brought under the provisions of section 333(2) of the Criminal Procedure Code (CPC) and articles 19, 20, 22, 23, 25, 27, 28, 29, 50, 51, 51, 159 and 165 of the Constitution.
  5. Section 333(2) of the Criminal Procedure Code provides as follows:

“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.”

6. This position is also contained under Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines which state:

“7.10 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.

7.11 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.”

This means that for the court to be seen to have taken into account the period spent in custody awaiting trial, it must be shown that the sentence imposed is reduced by the period spent in remand. The section has been dealt by this court and the Court of Appeal.

7. The Court of Appeal in the case of Abamad Abolfathi Mohammed & another v Republic [2018] eKLR held as follows in this regard:

“The appellants have been in custody from the date of their arrest on 19th June 2012. 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."

8. The question is therefore whether the petitioner had served time in remand during trial and whether the trial court took "into account" the time petitioner had spent in custody at the time of sentencing. This calls upon this court to consider the record of the lower court. According to the trial court's record, the Petitioner was arrested on and July 28, 2018. On 30<sup>th</sup> July, 2018, the trial Court directed that he could be released on a bond of Kshs. 200,000/= with a surety of the same amount. The Petitioner applied for a review of the bond terms on 14<sup>th</sup> August 2018 and his application was allowed by the trial Court. The Petitioner's bond terms were reviewed to Kshs. 100,000/= with a surety of the same amount. On August 27, 2018 one Caroline Karimi Mauro of Identification Number 30700760, an aunty to the Petitioner, applied to stand surety for the Petitioner. Her application was approved and the Petitioner was released on 27/8/2018 as per release order dated 27/8/2018. He was in custody for one month only.
9. Consequently, the trial commenced and four witnesses in the support of the prosecution's case testified on 6/11/2018 the surety applied to be discharged. The court charged the surety and ordered the petitioner to be remanded in custody. He remained in custody upto 20/7/2019, a period of eight (8) months and four (4) days, see a release order dated 10/7/2019. Thereafter he was remanded in custody on 30/7/2019 upto 3/1/2020 when he was sentenced. The total period spent in custody (cumulatively) is fourteen (14) months and eight days.
10. The Petitioner therefore remained in custody until December 18, 2019, when the trial court delivered its judgment in the matter. On 3<sup>rd</sup> January, 2020, the matter came up for sentencing and a sentence of ten (10) years was meted out against the Petitioner. Based on this background, it means that the Petitioner spent time in custody from the date of his arrest and throughout his trial. It follows that he spent a total of one (1) year five (5) months in custody while undergoing his trial. At the time of passing the sentence, the trial magistrate did not indicate that he had taken into account the time the petitioner had spent in remand awaiting trial. It follows that the time petitioner had petitioner had spent in prison custody awaiting trial was not considered as mandatorily required under section 333(2) (supra). It ought to have been taken into account so as to proportionately reduce the sentence imposed by that period already spent in custody. Since this was not done, it follows that this petition is properly before this court. The court of Appeal in the case of *Bethwel Wilson Kibor-v- Republic* (2009) eKLR, where the court failed to take into account the period the accused had spent in custody, held that the court ought to have taken into account the period spent in custody in assessing the sentence. The court took into account the period of ten years the accused had spent in custody awaiting trial and held that he had been sufficiently punished then set him at liberty. The court of Appeal further observed that the trial Judge had not specifically stated that he had taken into account the period spent in custody. It is therefore clear that it is mandatory that the period which an accused person spends in custody awaiting trial must be taken into account.

The petitioner had filed Criminal Appeal No.7/2020. The appeal which was subsequently dismissed was on conviction. This being a petition based on denial of the right of the petitioner, this court has jurisdiction under article 165(6) of *the Constitution*.



## **Conclusion**

11. For the reasons stated, I opine that the period of one (1) year five (5) months that the Petitioner spent under custody while undergoing trial should have been taken into account by the trial court to reduce the sentence. In the circumstances I find that the 10 (ten) years sentence meted against the Petitioner should be reduced by one year (1) and five (5) months.

I therefore order that the sentence of ten (10) years shall run from 28<sup>th</sup> July 2018 the date the appellant was arrested and placed in custody to await the trial.

The Deputy Registrar to issue an amended committal warrant and serve it on the officer in charge Prison where the applicant is serving the sentence.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 19<sup>TH</sup> DAY OF JANUARY 2023.**

**L.W. GITARI**

**JUDGE**

