



REPUBLIC OF KENYA



KENYA LAW
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**Ogonda v Republic (Criminal Petition E035 of 2022)
[2023] KEHC 3982 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL PETITION E035 OF 2022**

JN KAMAU, J

APRIL 25, 2023

BETWEEN

DAVID OCHIENG OGONDA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein was tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to fifteen (15) years imprisonment.
2. Being dissatisfied with the said decision, he lodged an Appeal at the High Court being HCCRA No 37 of 2019, which appeal was dismissed in its entirety. He did not appeal to the Court of Appeal due to what he termed as lack of points of law (sic).
3. On October 26, 2022, he filed this Petition for review of the sentence. In his Affidavit in support thereof, he urged this court to consider the period he had already served in custody as per Section 333(2) of the *Criminal Procedure Code*.
4. In his Written Submissions that were filed on December 15, 2022, he placed reliance on the cases of Criminal Petition No 97 of 2021, No 90 of 2021, No 57 of 2021 vide *Edwin Wachira & 9 Others* (sic) and *Philip Mueke & Another vs Republic* (eKLR citation not given) where the common thread was that mandatory minimum sentences were discriminatory in nature because they gave differential treatment to a convict distinct from the kind of treatment accorded to convicts under offences which did not impose mandatory sentence. It was his contention that mandatory minimum sentences violated an accused's right under Article 27 of the *Constitution*.



5. He pleaded with this court to consider that he was arrested at the age of twenty five (25) years and was currently twenty eight (28) years old, having spent three (3) years in custody. He asserted that he was a young man with a promising future whose dreams were shattered by the long incarceration as he had completed his O level and had been employed as a support staff at Kapkerer Primary School. He added that his parents who were disabled were overwhelmed with the burden of responsibilities of taking care of him and his siblings. He urged the court to grant him a second chance in life to shape his future given that his family was ready to facilitate his rehabilitation and resettlement.
6. He contended that he was a first offender and remorseful for having engaged in a criminal activity. He pointed out that he had been disciplined and had been rated the best. He asserted that he had trained in various courses such as Theology, Health Education, Bible Studies amongst other ongoing courses. He believed that the skills he had acquired would enable him integrate well back to society and live a crime free life.
7. The Respondent was not opposed to the Petition herein. In its Written Submissions that were dated and filed on 16th January 2023, it asserted that there was overwhelming evidence against the Petitioner which led to his conviction and that the sentence that was meted upon him was lenient and sufficient considering the circumstances of the case.
8. It, however, pointed out that the Petitioner was in custody for eleven (11) days as he was arrested on January 12, 2018, released on bond on January 23, 2018 and sentenced on July 4, 2019. It urged this court to consider the period spent in custody by the Petitioner.

Legal Analysis

9. Notably, Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides that:-

“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” (Emphasis court).
10. The requirement under with Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Abamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
11. Further, Clauses 7.10 and 7.11 of the Judiciary *Sentencing Policy Guidelines* provide that: -

“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.”



12. Although the Trial Court’s judgment was upheld, a reading of the said decision showed that the Trial Court did not indicate if it considered the provisions of Section 332 (2) of the Criminal Procedure Code at the time of meting out the sentence upon the Petitioner herein. It rendered itself as follows:-

“The court has considered the mitigation of the accused person. The accused person herein is sentenced to imprisonment for a period of 15 years.”

13. As was correctly pointed out by the Respondent herein, a perusal of the Charge Sheet showed that the Petitioner was arrested on January 12, 2018. He was released on bond on January 23, 2018 and was sentenced on July 4, 2019. He therefore stayed in custody for eleven (11) days before he was convicted, a period it conceded ought to be taken into account at the time of computing his sentence.

Disposition

14. For the foregoing reasons, the upshot of this court’s decision was that the Petitioner’s Petition for review of sentence that was lodged on October 26, 2022 was merited and the same be and is hereby allowed.

15. It is hereby ordered and directed that the period of eleven (11) days that the Petitioner spent in custody between January 12, 2018 and January 23, 2018, being the date of his arrest and the date he was released on bond respectively be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

16. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU
JUDGE

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL 2023

M. S. SHARIFF
JUDGE

