



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Shikweyi v Republic (Petition 5 of 2021)
[2023] KEHC 25940 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
PETITION 5 OF 2021
JN KAMAU, J
NOVEMBER 28, 2023**

BETWEEN

EUGENE LUMUMBA SHIKWEYI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11 (a) of the [Sexual Offences Act](#). He was convicted on the main charge and sentenced to life imprisonment.
2. On 12th April 2021, he filed a Notice of Motion application seeking to have the period he that he stayed in custody while the trial was ongoing be taken into account pursuant to Section 333(2) of the [Criminal Procedure Code](#) and be deemed to be part of sentence that he had already served. He also asked this court to grant him a probation sentence for those offenders who were serving a sentence of three (3) years and below which was in tandem with Article 50(2) of [the Constitution](#). He pointed out that his sentence will expire on 20th October 2025.
3. He did not file Written Submissions to support his prayer. The Respondent was not opposed to the said application and did not therefore file any Written Submissions.



Legal Analysis

4. As seen hereinabove, part of the Petitioner’s application was based on Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya). The said Section 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](#)).
5. This duty is also contained in the [Judiciary Sentencing Policy Guidelines](#) (under clauses 7.10 and 7.11) where it is provided 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.”
6. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the [Criminal Procedure Code](#) was restated by the Court of Appeal in the case of Ahamad [Abolfathi Mohammed & Another v Republic](#) (*Supra*).
7. This court could not ascertain when the Petitioner herein was arrested. However, he was first arraigned in court on 18th October 2010. There was no indication if he was granted bond/bail. It was, however, evident from the proceedings of the lower court that he stayed in custody while his trial was ongoing. He was convicted and sentenced on 20th June 2012.
8. In the warrant, it was indicated that the sentence was reduced to twenty (20) years imprisonment. However, this court did not find any records of the decision of the High Court in that regard in the Kenya Law Reports. This made it difficult for this court to ascertain if the appellate court took into account the period the Petitioner had spent in custody while the trial was going on.
9. As it was not clear whether the court that reduced the sentence from life imprisonment to twenty (20) years pronounced itself on the said period, the only remedy that was open to the Petitioner herein was to seek appropriate redress from the Court of Appeal if the records could not be traced at all.
10. Going further, this court could not set aside the sentence that the said court meted upon him and place him on probation. Indeed, recommendations for revision of sentences for offenders who have sentences that are three (3) years and below are initiated by the prisons where the offenders are incarcerated and are dependent on the good conduct and rehabilitation of the offenders. The Sentence Review Reports filed by the Probation Office pursuant to such recommendations assist the High Court to ascertain whether such offenders can be released from custody to serve the remainder of their sentences either under Community Service Orders and Probation under the [Community Service Orders Act](#) No 10 of 1998 and [Probation of Offenders Act](#) Cap 64 (Laws of Kenya) or not.



11. Until such recommendation is given by prisons and favourable Sentence Review Reports are filed by the Probation Office, courts have no mandate to review custodial sentences and replace the same with non-custodial sentences on their own motion.

Disposition

12. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was filed on 12th April 2021 was not merited and the same be and is hereby dismissed.
13. The Prison where the Petitioner is incarcerated is at liberty to recommend his release whereupon the Probation Office will be required to file a Sentence Review Report to guide the court on the appropriate sentence to mete upon him, if at all as there was currently a continuous revision exercise to decongest prisons.
14. This court did not grant the Petitioner the period that he spent in custody while his trial was ongoing as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) as it was not clear whether the court which was of equal and competent jurisdiction such as this one took into account the said period when it reduced his sentence from life imprisonment to twenty (20) years imprisonment as no records could be traced. Indeed, this court as cautious not to give conflicting decisions.
15. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF NOVEMBER 2023

J. KAMAU

JUDGE

