



REPUBLIC OF KENYA



**Kilong'I v Republic (Criminal Petition E008 of 2021)
[2022] KEHC 366 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL PETITION E008 OF 2021
FA OCHIENG, J
APRIL 28, 2022**

BETWEEN

WILSON SASAKA KILONG'I PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

Before me is a petition seeking the reduction of sentence.

1. The Petitioner, Wilson Sasaka Kilong'i, feels that the sentence of 35 Years imprisonment was excessive in the circumstances of his case. Therefore, he urged this Court to grant him a re-hearing;
“..... on resentencing purposely for sentence reduction”
2. Secondly, the Petitioner asked that the sentence be reduced, in consideration of Section 333 (2) of the *Criminal Procedure Code*.
3. When canvassing the petition, the Petitioner told the Court that he was currently 28 years old. He described himself as very young and energetic. He therefore believes that he ought to be given an opportunity to utilize his strength to build up his family and also to help the nation develop.
4. The Petitioner said that he was a first offender. He regretted having committed the offence of defilement, and was very remorseful.
5. During the time he had spent in jail, the Petitioner had undertaken training in Biblical Studies. As a result, the Petitioner feels that he had been rehabilitated, and now had the necessary good morals and skills which could enable him earn his livelihood appropriately.



6. Meanwhile, the wife of the Petitioner is said to have run away immediately after he had been incarcerated. She left behind their children, who were now being looked after by the Petitioner's parents.
7. According to the Petitioner, his parents were very old, weak and economically poor. He therefore hoped for an opportunity to fend for his children.
8. When the Petitioner was canvassing the petition, he informed this Court that on 25th November 2020, Riechi J. dismissed the appeal which he had lodged at the High Court.
9. Notwithstanding the said decision, the Petitioner was of the view that this Court had jurisdiction to intervene, and to remit the case to the trial court so that that court would consider his mitigation.
10. In determining the petition, I note that the Petitioner does not appear to be sure of the reliefs he was seeking. I say so because he asked the Court to grant him a re-hearing on resentencing, but simultaneously asked the Court to remit the case to the trial court.
11. In practical terms, the High Court has had occasion to conduct the process of resentencing even in cases which had originally been heard before the Magistrate's courts. Indeed, the Petitioner has cited a number of such cases.
12. Therefore, if the Petitioner were to satisfy the Court that he was entitled to resentencing, this Court would not need to refer the matter back to the trial court for the purposes of resentencing.
13. When the Petitioner urged the Court to reduce the sentence, pursuant to the provisions of Section 333 (2) of the *Criminal Procedure Code*, I deem that to be a misnomer. I so find because when the court orders the prison authorities to take into account the period which the convict had spent in custody during his trial, the court would not be ordering for a reduction in the sentence which had been handed down by the trial court. As an example, a sentence of 10 Years imprisonment would still remain as one for the said 10 Years. The application of Section 333 (2) would only impact on the actual duration which the convict would serve in jail, when the sentence of 10 Years was being effected.
14. Thus, if the convict spent 3 months in remand custody, during his trial, the computation of the actual period to be served in jail, would presume that he had already served the 3 months as a part of the 10 Years imprisonment.
15. In my understanding, the court does not have a discretion in the application of Section 333 (2) of the *Criminal Procedure Code*.
16. Therefore, in a strict sense, the court does not have to make an express order before the prison authorities can give effect to the said statutory provision. If the period that was spent in remand custody was verifiable from the record of the proceedings, the convict ought to be given the benefit thereof.

Excessive Sentence

17. The question as to whether or not the sentence of 35 Years imprisonment was or was not excessive in the circumstances of the case, ought to have been taken up on appeal.
18. Following the dismissal of the Petitioner's appeal, it would be wrong for this Court to delve into a matter which formed part of the decision that was made by a Judge of concurrent jurisdiction.
19. If I were to find that the sentence was excessive, yet my learned brother had dismissed the Petitioner's appeal, I would be deemed to have sat on an appeal over the decision of a Judge of concurrent jurisdiction. I have no such authority.



Mitigation

20. The record of the proceedings reveals that the Petitioner was given an opportunity for mitigation.
21. Thereafter, the learned trial magistrate gave due consideration to the mitigation.
22. In my opinion, the trial court also took into account all other relevant factors that could assist it in determining the appropriate sentence. This is what the court said;

“I have considered the accused’s mitigation. However, I find that the aggravating factors in the circumstances of the offence are overwhelming. Having considered the circumstances of the offence, I note that the accused threatened the victim in this case, with a knife, before defiling her. After defiling her, the accused again threw the victim into a river, which was clear intention of the accused to kill the said victim.

No doubt, the accused was callous and brutal in committing the offence. He showed no compassion to his victim. If at all he had any human decency, he would have stopped after defiling the victim. But what did he do?

He decided to throw her into a river to kill her.

The court is aware that in some cases, justice is meted out by mercy. However, this is not one such case, because of the accused’s heinous and brutal act to the victim.

Just like he showed no mercy to his victim, he deserves none from the court. In the premises, I sentence the accused to thirty-five years imprisonment.

Right of appeal explained.”

23. I have verified from the proceedings that the observations made by the trial court are borne out from the evidence adduced.
24. The victim was 10 years old! The accused was married to the eldest sister of the victim; in effect, the accused defiled and then tried to kill his own sister-in-law.
25. Notwithstanding the regrets and remorse about which the Petitioner has told this court, I share the views of the learned trial magistrate.
26. I well appreciate why the learned Judge dismissed the Petitioner’s appeal.
27. And I hold the view, that the least I could do, for the sake of the victim; and in the interests of justice, is to dismiss the Petition herein, as I hereby do.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL 2022

FRED A. OCHIENG

JUDGE

