



REPUBLIC OF KENYA



**KENYA LAW**  
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**Koome v Republic (Petition 3 of 2020) [2022] KEHC 10895 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10895 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**PETITION 3 OF 2020**

**PJO OTIENO, J**

**MAY 31, 2022**

**IN THE MATTER OF THE ENFORCEMENT OF BILL OF RIGHTS  
UNDER ARTICLES 22(1), 23(1), 25(D), 50(1) AND 51(2) OF THE  
CONSTITUTION AND SECTION 333(2) OF THE CRIMINAL  
PROCEDURE CODE**

**AND**

**IN THE MATTER OF ARTICLES 20(1) (2) (4), 48, 258(1) OF THE  
CONSTITUTION**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 25(C), 27(1)(2), 47, 48, 50(2)(P),  
51(1), 23(1) AND 165(3) OF THE CONSTITUTION**

**AND**

**IN THE MATTER ARISING FROM SECTION 333(2) OF THE CRIMINAL  
PROCEDURE CODE**

**BETWEEN**

**ERICK MAINGI KOOME ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**



## JUDGMENT

1. The petitioner herein was charged with and convicted of Gang rape contrary to Section 10 of the *Sexual Offences Act* No.3 of 2006, in Meru Criminal Case No. 146/2011 and sentenced him to fifteen (15) years' imprisonment.
2. He was aggrieved by the decision and lodged Meru High Court Criminal Appeal No. 182/16 against both conviction and sentence which was dismissed on 19/12/16.
3. He has now moved the court through a petition filed on 29/1/2020 seeking that the period he spent in custody be deducted from his 15 years' sentence by contending that the failure to comply with Section 333(2) of the *Criminal Procedure Code* amounts to unfair trial and a contravention of his rights under Articles 25(c), 27(1)(2) and 50(2)(p) of *the Constitution*. He urges the court to order his sentence to commence from the date of arrest in conformity with *Abdul Aziz Oduor & another v Republic* [2019] eKLR.
4. In his written submissions, the petitioner reiterates that the failure by the trial court to consider the time he spent in custody violated section 333(2) of the Criminal Procedure and amounted to discrimination of the law in computation of the imposed sentence, and urged the court to allow the petition so that his rights to equal benefit of the law as guaranteed under Articles 27(1)(2), 50(2)(p) and 51(1) of *the Constitution* may be vindicated. He relied on *James Muriithi Marete & Anor v Republic* (2019) eKLR and *Henry Mugendi Igoki v R* (2020) eKLR to support the prayer sought in his petition.
5. In opposition to the petition, the prosecution orally submitted that Section 333(2) of the Criminal Procedure Code ought to be considered on a case to case basis. It submitted that the trial court had taken into account the period the petitioner had been in custody as shown in the lenient sentence meted out to the petitioner.
6. The respondent underscored the fact that the petitioner was charged with gang raping a victim left unconscious for 6 hours and also infected her with a Sexually Transmitted Disease and made a conclusion that the issue raised herein ought to have been raised during appeal, and urged the court to dismiss the petition.
7. The question that must be posed and answered before hand is whether the petitioner has established a right to be considered for resentencing following the supreme court decision in *Francis Muruatetu vs Republic* (2017) eKLR and the directions of the court given to courts in the same matter in 2021. It is not the law that one would wake up one day remember that there could have been a violation or error in a decision by the court which could have been a basis of appeal but was never made such basis and just walk before the High Court and seek to be resentenced. One must fit within the law which I appreciate to be that he has exhausted his journey on appeal and was denied an aspect of fair hearing.
8. Here, even though the provisions of section 333(2) are imperative, that was a matter that was due for challenge on appeal but was not taken up. It is not a reason that the petitioner chose not to challenge the sentence on appeal then now seek to challenge it by this petition. A party must be prepared to handle its dispute wholesomely and not to split it into minute instalment. To allow this kind of petitions would be to allow parties to seek a revision of a decision by the High Court by the same court.
9. I find that not tenable and therefore this petition is wholly misconceived and it is dismissed.



10. However, even if one was to consider the merits, the trial court in its judgment stated: -

“I have considered the mitigation done on behalf of the accused and in particular that he is a first offender. Section 10 of the *Sexual Offences Act* No.3 of 2003 provides a minimum sentence. The hands of court are tied and a non-custodial sentence is inapplicable. I have however considered the mitigation and the fact that the accused has been in custody since 2011. I will sentence him to serve the minimum period provided. The accused to serve 15 years’ imprisonment.”

11. From that rendition, it is irrefutable that the trial court acknowledging and appreciated that the petitioner had been in custody since 2011 in handing upon him the sentence. I find that the period taken in custody was duly taken into account and even if the matter was properly before the court I would still not accede to the invitation to interfere with the sentence.

12. The upshot is that the petition is dismissed.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 31<sup>ST</sup> DAY OF MAY 2022.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Petitioner in person

Ms. Mwaniki for the Respondent/ODPP

Court Assistant: Mwenda

