



REPUBLIC OF KENYA



**Wanjiru v Republic (Criminal Petition E015 of 2022)
[2022] KEHC 16891 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E015 OF 2022
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

GEORGE NJAHI WANJIRU PETITIONER

AND

REPUBLIC RESPONDENT

(Emanating from Eldoret Chief Magistrates' Criminal Case no. 6271 of 2014)

RULING

1. The petitioner approached this court under section 333(2) of the [Criminal Procedure code](#) seeking a sentence review. The review is sought in consideration of the time spent in custody at the time of conviction and sentencing.
2. The petitioner was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) in Eldoret Chief Magistrates' Criminal Case no 6271 of 2014. Upon considering the testimony of the witnesses and the evidence on record the trial court sentenced him to life imprisonment. The petitioner appealed to the court of appeal which appeal partially succeeded and consequently his sentence was reduced to 20 years.
3. The petitioner cited section 333(2) of the [Sexual Offences Act](#) and contended that the court did not take into account the time spent in custody before his conviction. He also cited the case of [Vincent Sila Jonah and 87 others vs Kenya Prison Service and 2 others](#); Petition No 15 of 2020, KEHC 457 (KLR) in support of his submissions.
4. The petitioner had been in custody for 1 year and 4 months at the time of his sentencing and contended that the trial magistrate did not take into account the time served when sentencing him to life imprisonment. The petitioner submitted that this was a violation of his rights under article 45 of the [constitution](#) as he was discriminated against.



5. The petitioner submitted that he has expressed his remorse and given a second chance he will be an upright, productive and law-abiding citizen which is reflected in the skills he learned in prison. Further, he is a first offender and having served 9 years in prison he has served a third of his sentence. He cited Petition E017 of 2021 and stated that the court now has regained its discretionary powers to review the matter at hand.
6. The petitioner asked the court to review his sentence and substitute the same with a lesser term.

Issues For Determination

7. Whether the court considered the time served in custody during sentencing
8. The initial sentence meted out on the petitioner was one of life imprisonment. If the court was to factor in the time spent in custody, the petitioner would have still served life in prison. Further, I note that the petitioner has relied on the most recent decision in Petition E017 of 2021 where the court declared mandatory minimum sentences unconstitutional.
9. Section 333(2) of the Criminal Procedure Code states 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 (emphasis mine).”
10. 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.”
11. Article 50 of the Constitution of Kenya states as follows
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
10. I have perused the court record and the judgment of the Court of Appeal where the sentence of the petitioner was reduced to 20 years imprisonment. I note that there is no indication that the time the petitioner spent in custody was factored into his sentence. It is also not clear the time he spent in remand. The provisions of section 333(2) of the Criminal Procedure Code are clear and need no



restatement. It therefore follows that the petition succeeds to the extent that the petitioner is sentenced to 20 years' imprisonment to run from December 11, 2015.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL ELDORET THIS 23TH DAY OF DECEMBER, 2022

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R. NYAKUNDI

JUDGE

