



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. E002 OF 2020

IN THE MATTER OF ARTICLE 22(1)

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 27(1), 28, 47(1), 48, 51, & 259(1) OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF ARTICLES 23(1)(3), 24, 50(2)(Q), 50(7), 159(1), 165(3) OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF PRISONS ACT 2016 SECTION 46, & CRIMINAL PROCEDURE CODE SECTION 333(2).

AND

IN THE MATTER OF CRIMINAL CASE NO. 939 OF 2011 AT MAKINDU

AND

HIGH COURT CRIMINAL APPEAL. NO. 183 OF 2012 AT MACHAKOS

BETWEEN

NICODEMUS MUSYOKI KILONZO.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE KENYA PRISON SERVICES.....2ND RESPONDENT

RULING

1. In this criminal matter, Nicodemus Musyoki Kilonzo has come to this court through a petition dated 9/11/2020 in which he prays for the following orders –

- i. That this court has jurisdiction to hear the petition under Article 22, 50(7) 159, 160(1), 165(2) (b) (d) of the Constitution.*
- ii. The 1st and 2nd respondents apply section 46(2) of the Prison Act and section 333(2) of the Criminal Procedure Code to the letter in relation to the time spent in remand being accounted in the sentence of the petitioner.*
- iii. A declaration that the conduct of the 1st and 2nd respondents of not taking into account the time spent in remand violated the petitioner’s constitutional rights.*

iv. An order that the honourable Attorney General, the Commissioner General of Prisons, the Officer in charge of Makueni Main Prison or where the petitioner is held compute the petitioner's sentence putting into account the time spent in remand.

v. Any other order that the court deems just under Article 23 of the Constitution or any other enabling laws bearing in mind the circumstances of the cases.

2. The petitioner also filed a Notice of Motion to beef up the petition, which in my view was superfluous.

3. In response, the Director of Public Prosecutions filed a replying affidavit sworn on 22nd January 2021 by James K. Kihara a Prosecuting Counsel, in which it was deponed that though the period served in custody pending trial should be taken into account in sentencing, the court has discretion in determining sentence in each particular case.

4. The petition proceeded by filing written submissions and both the petitioner and the Director of Public Prosecutions filed written submissions, which I have perused and considered. I note that the petitioner was sentenced to 20 years imprisonment which was the minimum statutory sentence for defilement.

5. The petitioner herein has asked that the period he was in custody during trial, be taken into account in sentencing him, thus he requests review of sentence.

6. I note that when the petitioner was convicted of defilement contrary to section 8(1) (3) of the Sexual Offences Act, before sentencing, he elected to say nothing in mitigation though he was given a chance to mitigate. The court then sentenced him to 20 years imprisonment which was the minimum sentence under the Sexual Offences Act after noting that he was not remorseful.

7. After the conviction and sentence by the trial court, appellant appealed to the High Court in Machakos HCCRA No. 183 of 2012 and the appeal was dismissed on 28th March 2015, and both conviction and sentence upheld. He has now come to this court seeking a review of the sentence and blaming the Director of Public Prosecutions and the Kenya Prison Service. In my view, none of the two can be blamed for the petitioner's problems.

8. Having considered the record, and the fact that the appellant said nothing in mitigation, and has not mitigated even before this court, I agree with learned Prosecuting Counsel that the only review of sentence that can be applicable herein is with regard to the period he was held in custody before conclusion of trial in the trial court. I note that he was charged in early September 2011, and sentenced on 3rd December 2012, which was about one (1) year and three (3) months.

9. Section 333(2) of the Criminal Procedure Code (cap.75 is clear on the period an accused person remains in custody during trial. It provides as follows –

Subject to the provisions of section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of the date on which it is pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under section 333(2) as prior to such sentence shall take into account the period spent in custody.

10. There are also a number of court decisions on this subject, including the Court of Appeal decision in **Ahamad Abolfathi Mohammed & Anor –vs- Republic (2018) eKLR** – in which the Court of Appeal stated that section 333(2) was introduced in 2007 to give the court power to include the period spent in custody in the sentencing.

11. In my view, since in the appeal in the High Court did not consider this point regarding the period served in custody and since the petitioner has come to this court by way of a Constitutional Petition, this court has jurisdiction to adjudicate and give orders in this petition to remedy his situation.

12. I thus allow the petition and order that the sentence of 20 years imprisonment imposed on the petitioner herein be and is hereby reduced by 1 year and 3 months.

Dated Signed & Delivered, this 29th day of July 2021, in open court at Makueni.

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GEORGE DULU

JUDGE