

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.840 OF 2018

JOSHUA MUTIGA MUNGANIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Joshua Mutiga Mungania was convicted of **rape** contrary to **Section 3** of the **Sexual Offences Act**. The trial court held that the prosecution had established, to the required standard of proof, that on 5th December 2015 at Muteero Rise in Karen within Nairobi County, the Applicant intentionally and unlawfully penetrated N.W.M. without her consent. The Applicant was sentenced to serve ten (10) years imprisonment. The Applicant has applied to this court to have the period that he was in remand custody taken into account in determining the ultimate period that he will serve in prison. The Applicant complained that the trial court did not take this period into account and therefore sentenced him to serve a longer period than he is entitled to. Mr. Momanyi for the State did not oppose the application. He submitted that the court should exercise its sentencing discretion and accordingly take into account the period that the Applicant was in remand custody prior to his conviction.

This court has carefully considered the facts of this case and the Applicant's grounds for seeking to have the custodial sentence meted on him revised by this court. It was clear from the application that the Applicant was entitled to have the period that he had spent in remand custody taken into account before the trial court sentenced him to serve the custodial sentence. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016** (unreported) held thus at Page 28:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

In the present application, the Applicant was convicted under **Section 3** of the **Sexual Offences Act** which provides under **Sub-section 3** for the punishment, upon conviction, of a term of not less than ten (10) years imprisonment. The Applicant was sentenced by the trial court to serve a term in prison of ten (10) years. The Applicant was in prison from the date he took plea i.e. 8th December 2015 to the date of his conviction and sentence i.e. 7th June 2018. This is a period of two (2) years and (7) seven months. This period should have been taken into account by the trial court when it sentenced the Applicant. In the premises therefore, the Applicant has a case when he requests for this court to take this period into consideration.

In the circumstances therefore, the custodial sentence imposed on the Applicant of ten (10) years imprisonment is set aside and substituted by a custodial sentence of seven (7) years and five (5) months with effect from 7th June 2018. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF JUNE 2020

L. KIMARU

JUDGE