

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC CRIMINAL APPLICATION NO.25 OF 2020

(In the matter of An Intended Appeal)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ELIPHAS KIRIMI KITHINJI.....RESPONDENT

(Intended Appeal from Conviction(s) and Sentence(s) of the Chief Magistrate's Court at Chuka in Criminal Case No. 1222 of 2014)

R U L I N G

The petitioner filed this petition on 10th August 2020 under **Section 333(1) and (2)** of the **Criminal Procedure Code**. The gist of the Petition is that the trial magistrate failed to comply with **Section 333(2)** of the **Criminal Procedure Code** by not taking into account the period spent in lawful custody before his conviction and sentence.

1. The background of this matter is that the petitioner was charged with rape contrary to **Section 3 (1) (b) (c)** of the **Sexual Offences Act** vide ***Criminal Case No. 1222/2014 in the Chief Magistrate's Court at Chuka.*** The petitioner was found guilty as charged, convicted and sentenced to ten years imprisonment on 29th November 2016. The petitioner did not prefer an appeal against the conviction and sentence. He has petitioned this court to order that the period spent in lawful custody during his trial be taken into account and reduce the sentence imposed.

2. The respondent did not oppose the application. I have considered the petition. **Section 333(1) and (2)** of the **Criminal Procedure Code** provides:-

“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) 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 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.”

The section provides that the period spent in lawful custody must be taken into account when passing sentence and upon conviction lawful custody starts to run on the day the petitioner was arrested for cognizable offence and ends on the date he is admitted to bail and if he remains in custody, on the date the sentence is imposed.

In this case the Petitioner was arrested on 13th December 2014 as shown on the charge sheet filed in court on 15th December 2014. The Petitioner remained in custody upto 20th November 2016 when a sentence of ten years was imposed. The record shows that the trial magistrate did not take into account the period the petitioner had spent in prison. **Section 333(2) Criminal Procedure Code** (supra) provides in mandatory terms that the period spent in custody during the trial be taken into account. This implies that the period spent in custody must of necessity reduce the sentence imposed at the conclusion of the trial. The trial magistrate did not comply with the Section. The petitioner was in lawful custody for a period of one year and eleven months. This period was not taken into account when passing the sentence.

I therefore find that the petition has merits. I order that the sentence imposed by the trial magistrate be reduced by a one year and eleven months. The order be served on the officer-in-charge G.K. Prison where the petitioner is serving sentence for compliance.

Dated, signed and delivered at Chuka this 17th day of December 2020.

L.W. GITARI

JUDGE