



REPUBLIC OF KENYA



KENYA LAW
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**Kiplagat v Republic (Criminal Petition E090 of 2023)
[2025] KEHC 2853 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2853 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E090 OF 2023
E OMINDE, J
MARCH 13, 2025**

BETWEEN

JOSHUA KIPLAGAT PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner was charged with the offence of rape of a person with mental disability contrary to section 7 of the *Sexual Offences Act*. The particulars of the offence were that on 6th February 2022 at (particulars withheld) within Uasin Gishu County he intentionally caused his penis to penetrate the vagina of RJ without her consent with the view that she is a person with mental disability. The trial court convicted him of the main charge and sentenced him to 7 years' imprisonment.
2. Being aggrieved with the sentence only, the petitioner filed the present application dated 23rd October 2023 seeking that the court considers the time he spent in remand under Section 333(2) of the *Criminal Procedure Code* and reduce his sentence. The application is premised on the grounds on the face of it and the averments in the affidavit in support of the application.
3. The applicant deposed that he was arrested on 16th February 2022 and sentenced on 5th September 2023 at Eldoret Chief Magistrates' Court. Further, that he had spent 19 months in pre-trial custody and urged the court to invoke the provisions of Section 333(2) of the *Criminal Procedure Code* and reduces his sentence appropriately.

Hearing of the Petition

4. The petition was prosecuted by way of written submissions.



Petitioners' Submissions

5. The Petitioner submitted that he is certain that the trial court failed to invoke the provisions of Section 333(2) of the *Criminal Procedure Code* and reiterated his application. Additionally, he stated that he was a first offender and that he was remorseful for the offence he committed. He prayed that the application be allowed as prayed.

Respondents' submissions

6. The state filed submissions through Prosecution Counsel S.G Thuo dated 16th December 2024. Counsel urged that the state concedes to the sentence review and further, that the petitioner spent a period in custody being 9th February 2022 to 3rd June 2023 which period was never factored in thus offending Section 333(2) of the *Criminal Procedure Code*.
7. Counsel pointed out that the sentence of 7 years for an offence which attracts a jail term of not less than 10 years was lenient and there is nothing on record to prove that the applicant has reformed to warrant interference by the court. He cited the case of Republic vs Joshua Gichuki Mwangi & Others – Supreme Court Petition No. e018 of 2023 which affirmed that the apex court did not invalidate the mandatory or minimum sentences in the penal code. Counsel urged the court to exercise its discretion in considering the pre-trial period spent in custody and the legality of the 7-year sentence.

Consideration of time spent in custody

8. Section 333(2) of the *Criminal Procedure Code* is mandatory. 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 was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody.”
9. The Judiciary Sentencing Policy Guidelines (2014) also provides as follows:

“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.”
10. The Court of Appeal, in the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR held as follows;

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

11. I have perused the record of the Trial Court. It shows that the plea was taken on 9th February 2022. That the applicant was in custody throughout the trial period. That he was sentenced on 5th September 2023. The record of sentencing shows that the period spent in remand was not considered. In this regard, I find merit in the application by the appellant and order that the aggregate period of 1 year and 7 months be factored into the sentence of 7 years’ imprisonment meted out upon the appellant. Right of Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 13TH MARCH 2025.

E. OMINDE

JUDGE

