



**Athman v Republic (Criminal Petition E007 of 2024)
[2025] KEHC 8097 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 8097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL PETITION E007 OF 2024**

JN NJAGI, J

MAY 16, 2025

BETWEEN

JAFARI GALOGALO ATHMAN APPLICANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in SO Case No 10 of 2018 at Hola)

RULING

1. The applicant was convicted by the lower court for the offence of gang rape and was sentenced to serve 13 years imprisonment. His appeal to the High Court on the conviction was unsuccessful but the court noted that the lower court had imposed an illegal sentence of 13 years imprisonment instead of the minimum 15 years. The court enhanced the sentence to 15 years imprisonment.
2. The applicant has now filed an undated application seeking for orders that the court considers the period spent in remand custody pending hearing and determination of the case and order that his sentence commences from the time of his arrest. Reliance was placed on Section 333(2) of the [Criminal Procedure Code](#) which required a court sentencing on accused person to take into account the period spent in custody awaiting trial.
3. The applicant also prays for review of sentence on the ground that he was a first offender, is a young man and reformed. He seeks that the court substitutes the sentence with a lesser lenient sentence such as non-custodial sentence.
4. The applicant mitigates that he regrets the offence committed and is remorseful. That he has learnt a lesson the hard way. That he has been highly disciplined in prison for the 7 years that he has been in prison. That he has done several courses in theology and is fully rehabilitated.



5. The application was opposed by the Respondent on the ground that the applicant did not appeal against the sentence. Therefore that the application ought to be dismissed.
6. I have considered the grounds in support of the application and the grounds in opposition thereto. I have in addition perused the record of the trial court and noted that the appellant was arrested on the 28/4/2019 and was arraigned in court on the 3/5/2019. He was sentenced on 13/2/2020. He was in custody during the trial which was a period of 9 ½ months.
7. Section 333(2) of the *Criminal Procedure Code* provides as follows:

“Subject to the provisions of section 38 of the Penal Code, every sentence is deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except there otherwise provided in this Code.”
8. The trial court when sentencing the appellant did not take into account the time the applicant had spent in custody awaiting trial. The applicant did not raise the issue with the High Court when he appealed against the sentence. The High Court did not thereby consider the issue when it enhanced the sentence against the appellant to 15 years imprisonment. In my view the provisions of section 333 (2) of the *CPC* are mandatory. I am therefore of the view that the time spent in remand custody awaiting trial ought to be taken into account during sentencing. The applicant’s is thereby entitled to the period of 9 ½ months being discounted from the sentence of 15 years imprisonment.
9. The applicant further seeks that the court reviews the sentence and grants him a more lenient sentence.
10. The sentence for gang rape as provided by section 10 of the Sexual Offences act, 2006, is one of not less than 15 years imprisonment. The High Court imposed on the applicant the sentence of 15 years imprisonment. This was the minimum sentence for the offence as provided by the relevant Act. The Supreme Court d in the case of *Republic v Joshua Gichuki Mwangi & 3 others*, petition No. 18 of 2023 (2024) KESC 34 (KLR) (12 July 2024) (Judgment) held that the sentences as provided under the Sexual Offences Act are lawful as long as section 8 of the *Sexual Offences Act* remain valid. This court is bound by the decisions of the Supreme Court and that being so, it has no power to interfere with the sentence imposed by Justice Githinji. The argument of the applicant on the issue is therefore dismissed.
11. In view of the foregoing the order that commends itself to me is for me to discount the period spent in custody pending trial which in this case is a period of 9 ½ months. Accordingly I order the period of 9 ½ months be discounted from the applicant’s sentence of 15 years imprisonment. The rest of the application is dismissed.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 16TH DAY OF MAY 2025

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Respondent

Appellant- present at G. K. Prison Malindi

Court Assistant – Ndonge

