



**Shimbia v Republic (Criminal Appeal 118 of 2023)
[2024] KEHC 1495 (KLR) (20 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 118 OF 2023
DR KAVEDZA, J
FEBRUARY 20, 2024**

BETWEEN

BONIFACE NAMAI SHIMBIA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the sentence delivered by Hon. Kitwaga SRM on 24th February 2022 at Kibera Chief Magistrate's Court Sexual Offences case no. 78 of 2015 Republic vs Boniface Namai)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of rape contrary to section 3 (1) (a) as read with section 3 (3) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to serve ten (10) years imprisoned. Being aggrieved, he filed a petition of appeal challenging his sentence.
2. In his petition of appeal, the appellant contended that the trial court erred in law and fact by failing to consider the time spent in remand custody during sentencing.
3. Section 333 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides that:
 - (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) 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

4. I have perused the sentencing proceedings of the trial before the subordinate court. I find that the applicant was arrested on 29th December 2015 and arraigned in court on 30th December 2015. He applied and was admitted to a bond of Kshs. 500,000 with one surety. On 4th March 2016, the bond



terms were reviewed and he was issued with an alternative cash bail of Kshs. 200,000. On 27th April 2016, the bail terms were further reviewed to Ksh. 50,000.

5. On 28th August 2018, the appellant paid the cash bail and was released forthwith until his conviction and sentence on 24th February 2022. He therefore spent 2 years and 8 months in remand custody.

6. In *Abmed Abolfathi Mohamed v Republic* [2018] eKLR the Court of Appeal held as follows;

“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 appellant’s sentence of imprisonment to run from the date of arrest on 19th June 2012.”

7. I note that during the appellant’s sentencing, the trial court considered his mitigation and noted that he was a first offender. The court then proceeded to sentence him to ten (10) years imprisonment. There was no indication from the court whether the 2 years and 8 months spent in remand custody were considered. The court’s failure to state that indeed the time was considered infers non consideration.

8. I find that this appeal on sentence is merited. The appellant shall continue to serve his sentence of ten (10) years imprisonment and shall be less by 2 years and 8 months. The sentence shall run from the date of his conviction which is 24th February 2022.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY 2024

D. KAVEDZA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Appellant present in person on the platform

Ms. Ntabo for the State

Joy/Omwoyo, Court Assistant

