



**Tirop v Republic (Criminal Petition E059 of 2023)
[2024] KEHC 8083 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E059 OF 2023
JRA WANANDA, J
JULY 5, 2024**

BETWEEN

KIMUTAI TIROP PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner has approached this Court vide the undated Notice of Motion but filed on 21/08/2023 seeking review of sentence. The Petition is expressed to have been brought under the provisions of Article 50(2)(p)(q) of *the Constitution* of Kenya and also Section 333(2) of the Criminal Procedure Code.
2. The background of the matter is that the Petitioner was charged in Eldoret Chief Magistrates' Criminal Court Case No. 3 of 2006 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars were that on 14/12/2018 at Katanin village, Kapyemit location in Turbo Sub-County within Uasin Gishu, he intentionally cased his penis to penetrate the anus of SK, a child aged 17 years old. There was also an alterative charge of committing an indecent act with the child
3. The Petitioner pleaded not guilty and the matter proceeded to trial. Upon considering the evidence and the testimonies tendered, the trial Court convicted the Petitioner of the main charge and sentenced him to 20 years' imprisonment.
4. The Petitioner appealed against the conviction vide Eldoret High Court Criminal Appeal No. E045 of 2021. The Appeal was however dismissed in its entirety by the Judgment delivered on 9/02/2023 by Hon. Lady Justice J. Mongare.



5. It is against the recounted background that the Petitioner has now filed the instant Petition seeking that in computing the sentence imposed, the period spent in custody be taken into account. The State never filed any response.
6. The issue that arises for determination is “whether this Court should review the sentence imposed against the Petitioner by taking into account the period that he spent in remand custody before being sentenced”.
7. In regard thereto, Section 333(2) of the Criminal Procedure Code 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.”
8. Although the Petitioner should have raised all these matters in the said Eldoret High Court Criminal Appeal No. E045 of 2021, I will nevertheless consider them.
9. I note from the charge sheet on record that the Petitioner was arrested on 21/12/2018 and arraigned on 24/12/2018. He then took plea on 28/02/2018 and was later granted bond of Kshs 100,000/- with one surety on 16/04/2019. However, upon perusal of the record, it is evident that the Petitioner did not manage to raise the bond and therefore remained in custody throughout the trial until he was convicted and later sentenced on 9/07/2021. The period that he spent in remand custody before sentencing was therefore from the date of arrest, 21/12/2018, to 9/07/2021, the date of sentence, a period of about 2 years and 7 months.
10. On the application of the proviso to Section 333(2) aforesaid, the Court of Appeal in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR, stated as follows:

“By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J.* who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.
11. 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.”



12. In the circumstances, I find that the Petitioner has established a case for review of the sentence but limited only to the taking into account of the time that he spent in remand custody before he was sentenced.

Final Order

13. In the circumstances, I allow the Application but only to the extent of applying the proviso to Section 333(2) of the Criminal Procedure Code in the computation of the sentence.

14. Consequently, I direct as follows:

- i. That the period that the Petitioner spent in remand custody between the date of arrest, namely, 21/12/2018, and the date that he was sentenced, namely, 19/07/2021, shall be subtracted in the computation of the sentence of 20 years imprisonment imposed by the trial Court.
- ii. In other words, the Petitioner's 20 years imprisonment sentence shall be computed to run as from the date of arrest, namely, 21/12/2018.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 5TH DAY OF JULY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Onjoro for the State

Applicant (Present virtually from Eldoret Main Prison)

Court Assistant: Brian Kimathi

