



**Ashumba v Republic (Criminal Appeal E034 of 2021)
[2024] KEHC 12976 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E034 OF 2021
AC BETT, J
OCTOBER 24, 2024**

BETWEEN

ABUBAKAR ASHUMBA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Appellant, Abubakar Ashumba filed a Petition of Appeal on September 8, 2021 in which he urged the court to quash the conviction and set aside the sentence arising from Mumias (MSO No. 36 of 2019). The Appellant had been convicted for the offence of defilement of a minor contrary to Section 8(1) (3) of the *Sexual Offences Act*. The trial Magistrate then proceeded to sentence the Appellant to ten (10) years imprisonment upon taking into account his mitigation and the contents of the Pre-sentence Report.
2. After the Appeal was admitted, the parties were directed to file written submissions which they did whereby the court retired to write its Judgement.
3. On perusing the Appellant's submissions, I noted that he only made submissions in respect to the sentence and being mindful of the fact that he is unrepresented, I decided to keep the Judgement in abeyance and seek clarification first.
4. When the matter was mentioned for purposes of seeking the Appellant's clarification, the Appellant stated that he wishes to abandon his Appeal and to apply for an order that his sentence runs from the date of his arrest. His reasoning was that he has almost served the full sentence and the appeal will no longer serve any useful purpose.
5. The Respondent is not opposed to the Appellant's application.



6. From the record, the Appellant was arrested on 30th August 2019. He was arraigned in court on 2nd September, 2019 and was in custody until 26th September 2019 when he was released on bond. The Appellant was therefore in custody for a period of twenty four (24) days.
7. Section 333 (2) of the Criminal Procedure Code provides as follows:

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“(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.
8. The Appellant claims that he was in custody from the date of his arrest on 28th August 2019 to the date of his conviction on 27th August 2021. Nothing could be further from the truth as the Appellant enjoyed his freedom after his release on bond until the date of his sentencing. Section 333 (2) contemplates a situation where an accused is in custody during the hearing. Applying the said Section to the Appellant’s case, he is only eligible for three (3) weeks reprieve. In the premises, the court finds that the application is misconceived as it lacks a legal basis.
9. Considering the fact that the Appellant was unrepresented, and in the spirit of Article 50 of *the Constitution*, this court is of the view that the Appellant’s appeal should be heard for the ends of justice to be met. I therefore decline the application to withdraw the Petition of Appeal. The Appellant is granted twenty one (21) days to file his submissions on the Appeal to enable the court consider the Appeal and determine it on merit.
10. Those are the orders of the Court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF OCTOBER 2024.

A. C. BETT

JUDGE

In the presence of:

Appellant present

No appearance for the Prosecution

Court Assistant: Polycap

