



**Kiyonga v Republic (Criminal Appeal E008 of 2023)  
[2023] KEHC 18708 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18708 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL APPEAL E008 OF 2023  
RN NYAKUNDI, J  
JUNE 12, 2023**

**BETWEEN**

**KEMI RENI KIYONGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Coram:** Before Hon. Justice R. Nyakundi

Mr. Mugun for the State

1. The appellant was charged and convicted after the trial for the offence of rape contrary to section 3(1) (a) (b) (3) of the *sexual offences Act*. On 20<sup>th</sup> November 2017 he was sentenced to 15 (fifteen) years imprisonment. The appellant was aggrieved by the sentence only from which he filed a Notice of Motion premised as follows:-
  1. That my Lordship, I was arrested, tried, charge and convicted to 15 years for the offence Rape
  2. That my Lordship, the applicant was is a first offender with no previous criminal record
  3. That My Lordship, the applicant was in custody till conviction from the date of arrest without being bailed out
  4. That my lordship, the applicant was in custody (remanded) for a period of one (1) year six (6) months.
  5. That my Lordship, the applicant asks the high court to involve section 333(2) of the penal code in resentencing the applicant
  6. That the high court is to recompense the high court with the period of time he was in custody to be included in his sentencing period.



7. That the applicant requests the high court to cautiously consider this matter referring to the case of Evans Kawayo in the high court of Lodwar Cr. File No. 18 OF 2020 eKLR in the case of Ahamad Abolfaiith Mohammed & Another vs rep( 2018) eKLR where the accused person was resented from the date of arrest.

### Resolution

2. I have anxiously and carefully considered the record, and further the provisions of the law on legality of sentence for the offence of rape. In appreciating the facts of the case and the evidence tendered before the trial court the learned magistrate had this to say before sentencing the Appellant. “ I have considered the accused’s mitigation as well as sentiments raised by the state counsel who has urged court to mete out a severe punishment for the accused herein. The accused although he is a first offender has not shown any remorse for the offence he committed. He attacked the complainant herein, an old woman fit to be his grandmother and has no qualms about it. In the circumstances therefore, owing to the sentiments of the offence against the accused is remorsefulness and the age of the victim herein, I hereby sentence the accused herein to serve fifteen years in jail.
3. In light of this statement a consideration of the sentencing judgement reveals that although the trial magistrate noted the mitigating factors but they did not outweigh the aggravating factors giving rise to the custodial sentence. It is obvious the prethola of material presented at the trial court spoke to the Appellants offensive conduct against the victim. At its core the trial court appreciated the notion of fair trial rights under Article 50 of *the Constitution* before imposing the final sentence. In relation to sentence, it is recognised by this court that no compelling extenuating circumstances persuasive enough to render a different decision on sentence than the one reached by the trial court. Fundamentally I see the Appellant potential benefit emerging from the decision of the Court of Appeal in Ahamad Abolfathi Mohammed & another vs Republic (2018) eKLR “ 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 a 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 he 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 Appellant in custody. “taking into account” the period spent into the 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 19<sup>th</sup> June, 2012.
4. The practical effect of this is that the decision or measure in section 333(2) of the CPC is retrospectively validated for the benefit of the convict of appellant. The legal obligation derived from the code is enforceable in terms of custodial sentencing verdict. How is it done? The persuasive case by the Supreme Court of Uganda in Rwabugande Moses v Uganda (2017) UGSC8 made the following observations: “It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision, consideration



of the remand period should therefore necessarily mean reducing or subtracting that period for the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.

5. The question whether credit for the period spent in confinement before final sentence is constitutionally required to be enforced has arisen severally within our jurisdiction mainly for two reasons. First denial of such a credit is an infringement of the fundamental rights and freedoms in our Bill of Rights. Second there is a potential prima facie case that the failure to grant such credit provided for under Section 333(2) of the CPC will constitute double jeopardy in violation of Article 25(a), 29, and 52(a) of *the Constitution*. What Section 333(2) of the code does it mandates the courts to give credit to convicts for the time served in official detention prior to sentencing upon entry of conviction against that particular offence. The current split on this issue within our jurisdiction the results in an equal treatment under Article 27 (1) & (4) of *the constitution* for individuals who are incarceration under similar conditions. Although in pre-final sentence incarceration might be merited the convicts have the right to expect that their period of detention before final judgement is to be credited to the decision on custodial sentence. The starting point for the trial court is the statutory interpretation of Section 333(2) of the code and it must be the language of the statute itself. The provisions on sanctions in the penal code and the *Sexual Offences Act* did not change the language or alter the meaning of the criminal procedure code as it relates to section 333(2). At the moment the inequities of the sentencing disparities are readily apparent from the various case law churned from the various courts. I presume the spirit of the law on this subject must have had in mind the conditions of confinement mirrored on those awaiting trials which sometimes take a span of more than three years before conclusion of their trials.
6. To determine this right in favour of the Appellant I exercise original jurisdiction within the ambit of section 333(2) to declare the 15 years in custody commence with effect from the date of arrest of the Appellant. In this respect the warrant of committal to prison be amended to reflect the credit due to the Appellant as from 31<sup>st</sup> May 2016.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 12<sup>TH</sup> DAY OF JUNE 2023**

**In the Presence of**

Accused Present

Mr. Mugun for the State

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**R. NYAKUNDI**

**JUDGE**

