



Juma v Republic (Petition 93 of 2020) [2023] KEHC 20490 (KLR) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

PETITION 93 OF 2020

OA SEWE, J

JULY 20, 2023

BETWEEN

FIKI KATANA JUMA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This Petition was filed on the September 7, 2020 by Fiki Katana Juma, pursuant to the provisions of the Constitution as well as Section 333(2) of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya. The petitioner’s prayer was that the Court be pleased to consider the period served in custody prior to his imprisonment. In his Supporting Affidavit, the petitioner averred that he was charged, tried and convicted of the offence of attempted defilement and was sentenced to 10 years’ imprisonment without consideration being given to the pre-conviction detention period.
2. A perusal of the record of the lower court confirms that the petitioner was indeed charged in Shanzu Senior Principal Magistrate’s Criminal Case No 1205 of 2015 with one substantive count of attempted defilement contrary to Section 9(1) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on the 17th day of October 2015 at [Particulars withheld] Village in Kilifi County within Coast Region, he intentionally attempted to cause his penis to penetrate the vagina of RD, a girl child aged 5 years old.
3. In the alternative, the petitioner was charged with indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, in that, on the 17th day of October 2015 at [particulars withheld] Village in Kilifi County within Coast Region, he intentionally and unlawfully touched the vagina of RD, a girl child aged 5 years old.
4. Although he denied the charges, the petitioner was tried and found guilty of the substantive charge. He was accordingly convicted thereof and sentenced to 10 years’ imprisonment on November 24, 2017.
5. The petitioner filed the instant Petition seeking that his imprisonment be calculated from the date when he was arrested and charged; namely October 17, 2015. His Petition was accordingly filed



pursuant to Section 333(2) of the Criminal Procedure Code and the assertion that he spent time in remand from the date of his date of arrest up to 24th November 2017 when he was convicted and sentenced. The petitioner relied entirely on his Supporting Affidavit and prayed that his Petition be allowed.

6. On behalf of the respondent, Ms. Anyumba, learned Counsel for the State, had no objection to the Petition herein.
7. I have carefully considered the Petition, which is fairly straightforward. It raises the single issue of whether the petitioner has made out a good case to warrant reconsideration of his sentence for purposes of Section 333(2) of the Criminal Procedure Code. That provisions states:

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. For purposes of uniformity therefore the Judiciary Sentencing Policy Guidelines (under Clauses 7.10 and 7.11) explain that: -
 7. 10 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.
 7. 11 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.”
9. A perusal of the record of the lower court confirms that, although an order was made for the release of the petitioner on bond pending his trial, he failed to comply with the terms thereof and therefore remained in custody for the whole duration of his trial. The record further shows that, upon his conviction he was sentenced to 10 years imprisonment without any reference to the period of his incarceration prior to conviction and sentence.
10. It is plain therefore that failure to factor in the pre-sentence detention period, as complained of herein, amounts to a violation of an inmate’s fundamental right; and therefore that the Court has the jurisdiction to offer redress as appropriate. This was aptly discussed by Hon. Odunga, J. (as he then was) in Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) thus:

A holistic consideration of the above provisions clearly show that this court has the power to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and one such violation is the denial or threat of denial of freedom without a just cause such as where the sentence that a person risks serving is in excess of the lawfully prescribed one by failing to comply with section 333(2) of the Criminal Procedure Code.”



11. As to what is entailed in taking into account the period an accused person had remained in custody in sentencing under Section 333(2) of the *Criminal Procedure Code*, the Court of Appeal expressed itself in *Abmad Abolfathi Mobammed & Another Criminal* [2018] eKLR thus:

...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 the 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 appellants in custody. “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(s) 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 June 19, 2012...”

12. In the result, I find merit in the petitioner’s petition filed herein on September 7, 2020. The same is hereby allowed and orders granted as hereunder:
- (a) That the period of the petitioner’s detention between the date of his arrest on October 17, 2015 and the date of his imprisonment on November 24, 2017 be taken into account for purposes of Section 333(2) of the *Criminal Procedure Code*.
 - (b) In reckoning the applicant’s imprisonment term of 10 years, the period aforementioned be included accordingly.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF JULY 2023

OLGA SEWE

JUDGE

