



**Okonga v Republic (Criminal Petition E047 of 2023)  
[2024] KEHC 14427 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14427 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E047 OF 2023  
E OMINDE, J  
NOVEMBER 21, 2024**

**BETWEEN**

**JAMES OKONGA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Petitioner was charged for the offence of rape contrary to Section 3 (1) (a) (b) (c) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence being that on 13<sup>th</sup> day of September 2020, at [Particulars withheld] Village in Soy County, intentionally and unlawfully caused his penis to penetrate the vagina of EJ without her consent.
2. In the alternative he was charged with committing an indecent act with an adult contrary to Section 11A of the *Sexual Offences Act* No. 3 of 2007 (2006). The particulars being that on 13<sup>th</sup> day of September 2020, at [Particulars withheld] Village in Soy County, intentionally and unlawfully caused his penis to penetrate the vagina of EJ without her consent.
3. He pleaded not guilty and matter went to full trial.
4. He was found guilty, convicted and sentenced to serve 10 years imprisonment.
5. The Applicant has now approached this Court with the Notice of Motion dated 27/07/2023, seeking re-sentencing under the proviso to Section 333(2) of the *Criminal Procedure Code*. The Applicant seeks to have his 10 years sentence factor in the time spent in remand custody.
6. On 1/10/2024, the Petitioner made oral submissions in Court. He asked the Court to factor in the period that he had spent in remand custody while sentencing him. This being from the date when he was arrested.



7. The State opposed the Petitioner’s petition vide the written submissions filed on 15/10/2024 by Prosecution Counsel, S.G Thuo. Counsel submitted that the decision in Muratetu did not invalidate mandatory or minimum sentences under the *Sexual Offences Act*. Counsel maintained that the 10 years sentence handed to the Petitioner was the minimum sentence provided for under the law and urged that the sentence and conviction be upheld and that this Petition be dismissed. Counsel relied on the Supreme Case being Petition No. E018 of 2023, *Republic V Joshua Gichuki Mwangi & Others*; where the Court affirmed that the apex Court did not invalidate mandatory or minimum sentences in the Penal Code.

### **Determination**

8. The sole issue for determination is
- “Whether the Petitioner is entitled to review of sentence under the proviso to Section 333(2) of the *Criminal Procedure Code*”.
9. 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.”
10. Let it be noted at this stage that in light of the fact that the Application by the Applicant seeks to have the period that he spent in remand factored into his sentence and does not seek to have his sentence invalidated, then the Supreme Court authority cited by the Counsel for the State is not relevant to this Application.
11. Having said that, it is clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be considered in meting out the sentence where it is not hindered by other provisions of the law.
12. On the above provision, the Court of Appeal in the case of *Bethwel Wilson Kibor Vs. 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 22<sup>nd</sup> 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.
13. In *Abamad Abolfathi Mohammed & Another Vs. Republic* [2018] eKLR the Court of Appeal held that:
- “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 required by section 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 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 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 provision 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 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.”

14. In the case of *Bukenya v Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013) the Court of Appeal stated that:

“Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement”

15. The *Judiciary Sentencing Policy Guidelines 2016* provides as follows as regards the issue of the time spent in remand:

Section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders – for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.

16. I have perused the proceedings of the lower court which shows that the plea was taken on 17<sup>th</sup> September 2020. There is nothing to indicate that the Applicant was out on bond throughout the



trial. I am therefore satisfied with his averment that he was in remand throughout the trial. He was sentenced on 24<sup>th</sup> June 2022. That brings the period to an aggregate of 2 years and 9 months.

17. Further, I am also satisfied that there being nothing on record to show that when sentencing the Applicant, the lower court factored in this period in the sentence passed, then I find merit in the Application and I allow the same.
18. I now hereby direct that the accused 10 year sentence be computed to include the 2 years and 9 months that he spent in remand custody. The Accused right to appeal within 14 days is explained

**READ DATED AND SIGNED AT ELDORET ON 21<sup>ST</sup> NOVEMBER 2024**

**E.OMINDE**

**JUDGE**

