



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**PETITION NO. 41 OF 2019**

**ANTHONY MURIIITHI NJERU.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling pertains to the undated petition filed on the 7/11/2019 in which the petitioner seeks for orders that the period spent in custody before being sentenced ought to have been taken in to account as part of the imposed sentence.
2. The petitioner was charged with incest by a male person contrary to Section 20 (1) of the Sexual Offences Act, convicted and sentenced to serve ten (10) years imprisonment. The petitioner subsequently filed an appeal vide Embu Criminal Appeal No. 20 of 2017 but subsequently withdrew the same.
3. It is the petitioner's case that he was arrested sometime in January 2016 and spent time in custody up to 17/03/2017 when he was sentenced, a duration within which was not taken into consideration during his sentencing.
4. The petitioner relied on Section 333 (2) of the Criminal Procedure Code as well as the cases of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR, Republic v Douglas Muthaura Njoribi Misc. Application No. 4 of 2015 at Meru** and **John Njenga Gacheri v Republic HC. CRA No. 31 of 2016 at Kiambu**.
5. Ms. Mati for the respondent did not oppose the application.

**B. Analysis & Determination**

6. I have considered the petition herein as well as the submissions by both the petitioner and the respondent.
7. **Section 333(2) of the Criminal Procedure Code** provides that:

**“(2) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”**

8. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so.
9. I associate myself with the decision in **Ahamad Abolfathi Mohammed [supra]** where 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 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.”**

10. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself 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. ”**

11 According to *The Judiciary Sentencing Policy Guidelines*:

**“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. The charge sheet brought against the petitioner reveals that he was arrested on the 2/02/2016. It is not disputed that he the petitioner was convicted and sentenced on the 17/03/2017 and that he spent the duration of his trial in custody. This is supported by the record that the applicant was not able to raise a surety for the bond of Kshs. 100,000/= granted on 18/02/2016.

13. I find the application merited and I hereby allow it as prayed. The ten (10) year imprisonment sentence shall run from the date of arrest being 2/02/2016.

14. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7<sup>TH</sup> DAY OF APRIL, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Petitioner through video link**