



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**PETITION NO. 50 OF 2019**

**BASILO MWANIKI IRERI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. This petition dated 15<sup>th</sup> November 2019 seeks for order that the period spent in remand custody before being sentenced be taken in to account as part of the imposed sentence.
2. The petitioner was charged with rape contrary to Section 3 (1) (c) (3) of the Sexual Offences Act, convicted and sentenced to serve fifteen (15) years imprisonment. The petitioner has subsequently exhausted all avenues of appeal.
3. It is the petitioner's case that he stayed in custody for 3 days and was subsequently released on bond a period which he wants to be considered by the court. The petitioner further states that he has since learned carpentry and upholstery during the pendency of his sentence and as such he is able to earn a living for his family.
4. Ms. Mati for the respondent opposed the application on the ground that the petitioner had confirmed that he was released on bond after 3 days and urged the court to dismiss the application for lack of merit.

**B. Analysis & Determination**

5. I have considered the petition herein as well as the submissions by both the petitioner and the respondent.

6. 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.”*

7. 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.”*

8. 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.”*

9. The record of the proceedings of trial court shows that the petitioner was arrested on the 24/01/2011 and the record shows that he was released on bond on the 28/01/2011. He was therefore in custody for only four (4) days. It is thus clear that the petitioner spent the pendency of his trial out on bond. Despite the short stay in custody the petitioner is entitled to benefit from the provisions of Section 333 (2) of the Criminal Procedure Code.

10. All considered, it is my considered view that the instant petition is meritorious and is hereby allowed.

11. It is hereby ordered that the sentence of fifteen (15) years imprisonment imposed on 2/12/2012 do commence from 24<sup>th</sup> January 2011.

12. 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**