



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**PETITION NO. 40 OF 2019**

**DANIEL BUNDI NJUKI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**A. Introduction**

1. This is a judgment of the undated petition filed on the 7/11/2019 seeks for orders that the period spent in remand during his trial be considered as part of the sentence imposed on him on 11/09/2009.
2. The petitioner was charged before the trial court with the offence of defilement of a girl under the age of 14 years contrary to Section 8 (1) and (3) of the Sexual Offences Act, convicted and sentenced to twenty (20) years imprisonment.
3. The petitioner subsequently appealed to the High Court and to the Court of Appeal but both appeals were dismissed. The petitioner further states that he has since learnt various trades in prison and has annexed the relevant certificates.
4. Ms. Mati for the respondent did not oppose the application.

**B. Analysis & Determination**

5. I have considered the relevant provisions of the law, the petition herein as well as the submissions by both parties.
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. 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. The petitioner of course has a duty to prove that he spent the time he claims in custody pending trial.
8. I rely on the case of **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.”*

9. 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.”*

10. 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.”***

11. The record is clear that the petitioner was arrested on 24/09/2008. It is not disputed that he was convicted and sentenced on the 11/9/2009. As such, he spent the entire duration of the trial in custody. It is my considered view that this time spent in custody amounting to one (1) year. This period was not taken into account during sentencing.

12. Having established that one year was spent in custody and that it was not considered to form part of the petitioner’s sentence, I find that this petition is meritorious.

13. The petition is hereby allowed to the effect that the twenty (20) year imprisonment sentence do run from 24<sup>th</sup> September 2008.

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**