



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**PETITION NO. 45 OF 2019**

**DAVID NYAGA KIRINGA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**A. Introduction**

1. In the undated petition filed on the 13/11/2019, the petitioner seeks re-hearing of the sentence on the grounds that the court should make a finding that his sentence should run from the date of arrest as opposed to the date of conviction as provided for within Section 333(2) of the Criminal Procedure Code.
2. The petitioner was charged of the offence of attempted defilement contrary to Section 9 (1) (3) of the Sexual Offences Act and subsequently convicted and sentenced to serve ten (10) years imprisonment. The petitioner subsequently appealed to the High Court vide Embu Criminal Appeal No. 19 of 2015 which appeal was dismissed.
3. The petitioner submitted that he was arrested on the 29/06/2013 and was subsequently convicted on the 16/03/2015; a period he alleges was of one year and nine months, which the trial court did not take into consideration during his sentencing.
4. Ms. Mati for the respondent did not oppose the applications as they were grounded in law specifically Article 50 (2) (1) of the Constitution and Section 333 (2) of the Criminal Procedure Code. Reliance was placed on the cases of **Ahmed Abolfathi Mohamed (supra)** and that of **Joseph Mutunga & Another v Republic [2019] eKLR**.

**B. Analysis & Determination**

5. The law applicable is **Section 333(2) of the Criminal Procedure Code** which provides: -

**“(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.”**

6. It is therefore a statutory requirement that while sentencing an accused person, the court takes into account 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 the 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. 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.”**

10. The record shows that the petitioner was arrested on the 30/06/2013 and was convicted and sentenced on 16/03/2015. Therefore, the time the petitioner spent in custody was not taken into account for there is no order to that effect in the trial record. The date of arrest as indicated in the charge sheet is 30/06/2013.

11. The ten (10) year imprisonment sentence imposed on the petitioner on 16/03/2015 shall run from the date of 30/06/2013.

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**