



REPUBLIC OF KENYA



**Kipchumba v Republic (Criminal Petition E012 of 2023)
[2025] KEHC 3968 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL PETITION E012 OF 2023
JRA WANANDA, J
MARCH 28, 2025**

BETWEEN

VICTOR KIPKOGEI KIPCHUMBA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was charged in Iten Senior Principal Magistrate's Court (Sexual Offences) Case No. E009 of 2023, with the offence of rape contrary to Section 3(1)(a)(b) of the *Sexual Offences Act*. The particulars of the offence were that on 26/02/2023 at [.....] in Keiyo North sub-County, within Elgeyo Marakwet County, the Petitioner intentionally and unlawfully caused his penis to penetrate the vagina of EJC without her consent.
2. By the Judgment delivered on 3/10/2023, the Petitioner was convicted of the lesser offence of attempted rape and sentenced to serve 5 years imprisonment.
3. The Petitioner has now approached this Court with the Petition dated 28/11/2023 seeking that this Court reviews the sentence by taking into account the time that he spent in remand custody during the pendency of the trial. He relies on the proviso to Section 333(2) of the *Criminal Procedure Code* and in his Supporting Affidavit, he deponed that he was arrested on 2/06/2023 and sentenced on 3/10/2023.
4. I then gave the parties liberty to file written Submissions. While the State, through Prosecution Counsel, Mr. Clavin Kirui, filed the Submissions dated 14/06/2024, to date I have not come across any Submissions filed by the Petitioner
5. In his Submissions, Prosecution Counsel also submitted that the Petitioner was arrested and arraigned on 2/06/2023 and sentenced on 3/10/2023, a period of about 4 months. According to him, the Court exercised its wisdom and mandate in imposing the sentence in line with Section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act* which provides for a minimum sentence of 10



years' imprisonment but which may be enhanced to life. Further, according to him, the Petitioner was given a lenient sentence of 5 years imprisonment and he was also given a chance to mitigate which was considered. He conceded that Section 333(2) of the *Criminal Procedure Code*, the Judiciary Sentencing Policy Guidelines require that the period spent in remand custody be taken into account as was reiterated in the Court of Appeal case of Bethwel Wilson Kibor vs Republic (2009) eKLR and in accordance with this Court's supervisory jurisdiction under Article 165(6) of *the Constitution* of Kenya. He however cited the case of Hillary Kipkirui Mutai vs Republic (2022) eKLR, to argue that that the Petitioner is serving a very lenient sentence and therefore ought not to benefit from the provisions of Section 333(2) of the *Criminal Procedure Code*.

6. He urged further that an appellate Court should not interfere with the trial Court's discretion in sentencing unless it is demonstrated that the sentence was manifestly excessive, illegal, improper or based on misrepresentation of facts. He cited the Court of Appeal case of Bernard Kimani Gacheru v Republic and submitted that the Petitioner failed to demonstrate any of the above grounds and thus urged the Court to dismiss the Petition as it is unjustifiable and a waste of the Court's time.

Determination

7. The issue for determination is "whether the Petitioner is entitled to a review of sentence under the proviso to Section 333(2) of the *Criminal Procedure Code* relating to the period spent in remand custody during the trial".

8. 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."

9. The Judiciary Sentencing Policy Guidelines (2014) also provides as follows:

"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. In reiterating the above requirement, 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 22nd 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.



11. The Court of Appeal, in the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR further held as follows;

“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. 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 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 proviso 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 and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

12. The proviso above is couched in mandatory terms and for this reason, I decline to follow the authority of the case of *Hillary Kipkirui Mutai vs Republic* (2022) eKLR, cited by Prosecution Counsel.
13. A perusal of the Court file reveals that the Petitioner was arrested on 27/02/2023 (as per the Charge Sheet), arraigned on 28/02/2023 and was sentenced on 3/10/2023. This therefore contradicts with the Petitioner’s statement that he was arrested on 2/06/2023, which statement was also perpetuated in the Prosecution Counsel’s Submissions. I believe this was an error.
14. Be that as it may, there is no indication that the Petitioner left custody on bond. The presumption is therefore that he spent a period of about 7 months in remand.
15. The trial Court did not mention whether it took into account the period that the Petitioner spent in remand custody when sentencing the Petitioner as required by law. In the circumstances, I find that the Petitioner has established a case for review of the sentence but limited to the taking into account of the time spent by him in remand custody during the trial.

Final Orders

16. For the foregoing reasons, I rule and order as follows;
- i. The period that the Petitioner spent in remand custody, between the date of arrest, namely, 27/02/2023, and the date of sentencing, namely, 03/10/2023, shall be subtracted in the computation of the sentence of 5 years imprisonment.
 - ii. For avoidance of doubt therefore, the sentence or prison term of 5 years to be served by the Petitioner shall be computed as from the date of arrest, namely, 27/02/2023.

DELIVERED, DATED AND SIGNED AT ITEN THIS 28TH DAY OF MARCH 2025

.....



WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

The Petitioner (present from Kapsabet Prison)

Ms. Mwangi for the State

Court Assistant: Brian Kimathi

