



REPUBLIC OF KENYA



**Ekai v Republic (Criminal Petition E054 of 2023)  
[2025] KEHC 3905 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3905 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E054 OF 2023  
E OMINDE, J  
MARCH 27, 2025**

**BETWEEN**

**LOBEI EKAI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Petitioner was charged with the 2 counts of Robbery with Violence contrary to Section 296(2) of the *Penal Code* in Counts 1 and 2 and the offence of Rape contrary to Section 3(i)(a)9b) as read with Section 3(3) of the *Sexual Offences Act* in count 3.
2. The particulars of the charge in Count 1 are that on the 6<sup>th</sup> August 2014 at West Indies in Eldoret, while armed with an offensive weapon, namely a knife robbed Joyce Jepkemboi Maina of a mobile phone make Nokia N.75 valued at Ks 20,000/= and cash Ks. 21,840/= all valued at Ks 41,480/= and immediately before the time of such robbery threatened to use actual violence on the said Joyce Jepkemboi Maina.
3. The particulars of the charge in count 2 are that that on the 6<sup>th</sup> August 2014 at West Indies in Eldoret, while armed with an offensive weapon, namely a knife robbed Madonna Jemai of a mobile phone make Nokia Lumia 520 N.75, Forme touch screen all valued at Ks 19,000/= and immediately before the time of such robbery threatened to use actual violence on the said Madonna Jemai.
4. The particulars of Count 3 are that on the particular date time and place, he intentionally and unlawfully caused his penis to penetrate the vagina of Madonna Jemai without her consent. In the alternative to this count, the Petitioner was charged with the offence of Committing an Indecent Act with an Adult Contrary to Section 3(3) and 11(5) of the *Sexual Offences Act* particulars being that on the same date and at the same place he unlawfully and intentionally caused his penis to get into contact with the vagina of Madona Jemai without her consent.



5. At the conclusion of the trial the court convicted the petitioner on all the three counts, sentenced him to death on each of the counts of robbery with violence and the sentence in the rape case was held in abeyance. Being aggrieved with both conviction and sentence, the petitioner appealed to this court and on 6<sup>th</sup> December 2018, Hon Justice A.C. Mrima dismissed the appeal against the convictions with respect to the two counts of robbery but allowed the appeal against sentence and directed that the petitioner be produced before the trial magistrate for resentencing. In preparing this Ruling, I was not able to trace the trial courts proceedings on resentencing.
6. However, the record has a judgement of the Hon Justice F. Tuiyot in Criminal Appeal Case No. 141 of 2018. In the said judgement it is indicated that in resentencing the petitioner, the trial magistrate sentenced the petitioner to a term of 30 years' imprisonment on count I and 20 years' imprisonment and ordered that the sentences to run consecutively. The petitioner had appealed to the Court of Appeal against the sentence. The Appeal was allowed to the extent that the sentences are to run concurrently hence a sentence of 30 years' imprisonment.
7. The petitioner initially filed the present application in the year 2022 seeking that the court considers the time he spent in remand under Section 333(2) of the *Criminal Procedure Code* and also reduce his sentence under the provisions on Article 50(2)(p) of the *Constitution* and Sections 362 as read with Section 364 of the *Criminal Procedure Code*. Subsequently however, on the date of the hearing of the Application, the petitioner orally stated to court that he has since abandoned his application for resentencing and is only pursuing his application as brought under Section 333(2) of the *Criminal Procedure Code*. The application is premised on the grounds on the face of it and the averments in the affidavit in support of the application.
8. The applicant deposed that he was arrested on 20<sup>th</sup> August 2014 and sentenced on 4<sup>th</sup> August 2017 at Eldoret Chief Magistrates' Court and urged the court to invoke the provisions of Section 333(2) of the *Criminal Procedure Code* and reduces his sentence appropriately.

#### **Respondents' submissions.**

9. The state through Prosecution Counsel S.G Thuo in his oral submissions stated that the state does not oppose the petitioner's Application to withdraw the Application for re-sentencing and conceded to the prayer that the petitioner's sentence be reviewed under the provisions of Section 333(2) of the *Criminal Procedure Code* as he has prayed. Counsel for the State further conceded that the petitioner did spend the entire period of the trial in custody as stated by the petitioner and that this period was never factored into his sentence thus offending Section 333(2) of the *Criminal Procedure Code*.

#### **Consideration of time spent in custody**

Section 333(2) of the *Criminal Procedure Code* is mandatory. It 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.”

10. 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.”

11. The Court of Appeal, in the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR held thus on the same said issue;

“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.

12. I have perused the record of the Trial Court. It shows that the plea was taken on 14<sup>th</sup> August 2014 and that the petitioner was in custody throughout the trial period. That he was sentenced on 4<sup>th</sup> August 2017. The record of sentencing shows that the period spent in remand was not considered. In this regard, I find merit in the application by the appellant and order that the aggregate period of 3 years that the appellant spent in remand custody be factored into the sentence of 30 years’ imprisonment meted out upon the appellant. Right of Appeal 14 days.

**READ DATED AND SIGNED AT ELDORET ON 27TH MARCH 2025**

**E. OMINDE**

**JUDGE**

