



REPUBLIC OF KENYA



**Simiyu v Republic (Criminal Petition E083 of 2023)
[2025] KEHC 3923 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E083 OF 2023
E OMINDE, J
MARCH 27, 2025**

BETWEEN

MARTIN SIMIYU PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner was charged with the offence of rape contrary to Section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act*. The particulars of the offence were that on the 22nd Day of August 2021 at 1905 Hours at [Particulars Withheld], Sinoko Sub Location Nzoia location in Likuyani Sub County within Kakamega County he intentionally caused his penis to penetrate the vagina of VWM without her consent.
2. In the alternative, the Petitioner was charged with the offence of Committing an Indecent Act with an Adult Contrary to Section 11(a) of the same *Act*. Particulars being that on the same date, place and time, he intentionally touched the vagina of VWM with his penis against her will. At the conclusion of the trial the trial court convicted him on the main charge of rape and sentenced him to serve a term of 8 years imprisonment.
3. Being aggrieved with the sentence, the petitioner initially filed the present application dated 12th October 2023 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.



4. The applicant deposed that he was arrested on 25th October 2021 and sentenced on 4th May 2023 at Eldoret Chief Magistrates' Court and that he had spent 1 year and 6 months in pre-trial custody and urged the court to invoke the provisions of Section 333(2) of the [Criminal Procedure Code](#) and reduce his sentence appropriately. The Petitioner submitted that he is certain that the trial court failed to invoke the provisions of Section 333(2) of the [Criminal Procedure Code](#). He prayed that the application be allowed as prayed.

Respondents' submissions

5. The state through Prosecution Counsel S.G Thuo 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

6. 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.”

7. 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.”

8. The Court of Appeal, in the case of [Abamad Abolfatbi Mohammed & Another vs 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.

9. I have perused the record of the Trial Court. It shows that the plea was taken on 27th October 2021 and that the petitioner was in custody throughout the trial period. That he was sentenced on 4th May 2023. 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 1 year and 7 months be factored into the sentence of 8 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

