



**Abongo v Republic (Petition 4 of 2022) [2024] KEHC 488 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 488 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**PETITION 4 OF 2022**  
**OA SEWE, J**  
**JANUARY 25, 2024**  
**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23,**  
**24, 25, 27, 50, 51, 157, 159 OF THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE**  
**BETWEEN**  
**ANDREW ABONGO ..... PETITIONER**  
**AND**  
**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

- [1] The instant Petition was filed by Andrew Abongo (hereinafter, “the petitioner”) on 7<sup>th</sup> March 2022, essentially seeking that the period spent by him in remand be taken into account. The Petition was hinged on Articles 19, 20, 21, 22, 23, 24, 25, 27, 50, 51, 157 and 159 of the *Constitution* as well as Section 333(2) of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya. The petitioner averred that he is a convict serving a 10-year custodial sentence after being convicted of the offence of indecent act contrary to Section 11 of the *Sexual Offences Act*, No. 3 of 2006; and that his sentence did not factor in the period spent by him in remand. He therefore averred that it is mandatory that the period which an accused person has spent in custody prior to being sentenced be taken into account in meting out the sentence, unless otherwise ordered in accordance with the provisions of the law.
- [2] The Petition was predicated on the petitioner’s Supporting Affidavit filed therewith, in which he deposed that he was arrested on 17<sup>th</sup> November 2013 and charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. He added that he was given unreasonable



bond terms which he was unable to comply with; and therefore he remained in custody for the whole duration of his case. Ultimately, he was found guilty of the lesser charge of indecent act and was convicted and sentenced on 28<sup>th</sup> February 2017; having spent almost 4 years in prison. He consequently prayed that the period spent by him in remand be put into consideration pursuant to Section 333(2) of the [Criminal Procedure Code](#).

- [3] Directions were accordingly given that the record of the lower court be availed for perusal by the Court, with a view of ascertaining the correctness or otherwise of the petitioner's assertion. Later, on the 16<sup>th</sup> March 2023, the petitioner disclosed that he filed an appeal against his conviction, being Mombasa High Court Criminal Appeal No. 36 of 2017, but later withdrew the appeal before its hearing and determination. The original records of both the lower court file, Mombasa Chief Magistrate's Criminal Case No. 2813 of 2013 and Mombasa High Court Criminal Appeal No. 36 of 2017 were ultimately availed; whereupon the Petition was fixed for hearing.
- [4] The petitioner relied entirely on his Petition and his Supporting Affidavit and prayed that his prison term be counted from the date of his arrest. In his affidavit, he made specific reference to Sections 38 of the [Penal Code](#) and Section 333(2) of the [Criminal Procedure Code](#). He also relied on the decision of the Court of Appeal in [Abamad Abofathi Mohammed & Another v Republic](#) [2018] eKLR and [Bethwel Wilson Kibor v Republic](#) [2009] eKLR as well as Clauses 7.10 and 7.11 of the [Judiciary Sentencing Policy Guidelines](#) to underscore his assertion that it is mandatory that the period spent by an accused person in custody prior to being sentenced be taken into account in meting out sentence.
- [5] The respondent expressed no objection to the Petition. Accordingly, the issue for determination in this Petition is whether the petitioner has made out a good case to warrant reconsideration of his sentence for purposes of Section 333(2) of the [Criminal Procedure Code](#). That provision states:
- “Subject to the provisions of section 38 of the [Penal Code](#) (Cap. 63) 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] A perusal of the record of the lower court confirms that the petitioner was indeed charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#). He also faced an alternative charge of indecent and that, after trial, he was found guilty and convicted of the alternative charge of indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). The offences were alleged to have occurred on 17<sup>th</sup> November 2013 at Mshomoroni area in Kisauni District within the County of Mombasa, and the complainant was a girl then aged 15 years.
- [7] Although the petitioner denied the allegations against him, he was tried and found guilty of the alternative charge of indecent act with a child. He was accordingly convicted thereof on 28<sup>th</sup> February 2017 and sentenced to 10 years' imprisonment. Being aggrieved by his conviction and sentence, the petitioner filed Mombasa High Court Criminal Appeal No. 36 of 2017: *Andrew Abongo Otieno v Republic*. As indicated by the petitioner, the record of the appeal shows that the appeal was, on the 7<sup>th</sup> September 2018, marked as withdrawn on the appellants own application.
- [8] Thus, the record of the lower court confirms that in imposing the sentence of 10 years' imprisonment on the petitioner, no consideration was given to the provisions of Section 333(2) of the [Criminal](#)



Procedure Code, in the manner set out by the Court of Appeal in Abmad Abolfathi Mohammed & Another Criminal [2018] eKLR. Here is what the Court of Appeal had to say:

“... 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...”

[9] Accordingly, in the revised Judiciary Sentencing Guidelines (2023) (under Clauses 2.3.18 and 2.3.19) it is stated:

“2.3.18 Section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders – for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.”

[10] A careful perusal of the record of the subordinate reveals that, when the petitioner was first arraigned before the subordinate court on the 19<sup>th</sup> November 2013, an order was made for his release on bond in the sum of Kshs. 300,000/= plus a surety of a similar amount. He was however unable to comply with the terms of bond and was therefore remanded in custody. The record further shows that on the 3<sup>rd</sup> December 2013, the petitioner’s surety was approved and he was thus released on bond on the 4<sup>th</sup> December 2013. There is no indication that his bond was cancelled or that he was re-arrested and placed on remand thereafter. On the two instances when an order was made for his arrest, on the 15<sup>th</sup> April 2014 and on the 12<sup>th</sup> May 2015, the orders were lifted upon an explanation being given by the petitioner for his non-attendance.



[11] It is, therefore, clear from the lower court's record that the petitioner was arrested on the 19<sup>th</sup> November 2013 and was in remand until the 4<sup>th</sup> December 2013, when he was released on bond. He remained on bond pending his trial and was only taken into custody on the 28<sup>th</sup> February 2017 after his conviction and sentence. It is clear, therefore, that the petitioner only spent 15 days in remand.

[12] In the premises, am satisfied that the petitioner is entitled to a sentence review on that account, the failure being a violation of the petitioner's constitutional right to fair trial and equal treatment of the as envisaged under Articles 27 and 50(2) of the *Constitution*. In this regard, I am persuaded by the position taken by Hon. Odunga, J. (as he then was) in *Jona & 87 others v Kenya Prison Service & 2 others* (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) that:

“A holistic consideration of the above provisions clearly show that this court has the power to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and one such violation is the denial or threat of denial of freedom without a just cause such as where the sentence that a person risks serving is in excess of the lawfully prescribed one by failing to comply with section 333(2) of the *Criminal Procedure Code*.”

[13] Being of a similar posturing, I accordingly find merit in the petitioner's petition filed herein on 7<sup>th</sup> March 2022. The same is hereby allowed to the extent that the petitioner's 10-year imprisonment shall take into account the period of fifteen (15) days spent in remand before his release on bond on 4<sup>th</sup> December 2013.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**OLGA SEWE**

**JUDGE**

