



REPUBLIC OF KENYA



KENYA LAW
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**Bichanga v Republic (Criminal Appeal 58 of 2017)
[2023] KEHC 555 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 58 OF 2017
F GIKONYO, J
JANUARY 26, 2023
FORMERLY NAKURU HCCRA NO. 56 OF 2011**

BETWEEN

JARED BICHANGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence of Hon.
W.N. Njage (SPM) in Narok SPMCR No. 312 of 2010)*

JUDGMENT

Time Spent In Custody

1. The appellant has approached this court *vide* petition of appeal received in court on September 28, 2022.
2. The appellant was charged with two counts. count I; child trafficking contrary to section 13(a) of the *Sexual Offences Act* No 3 of 2006. count II; defilement of a girl under the age of 16 years contrary to section 8(1)(3) of the *Sexual Offences Act*. in the alternative charge to count II, he was charged with the offence of indecent act contrary to section 11(1) of the *Sexual Offences Act*.
3. The appellant was convicted on February 12, 2011 in both counts I and II. In count I, he was sentenced to serve ten (10) years imprisonment. in count II, he was sentenced to serve twenty (20) years of imprisonment. The sentences were to run concurrently.
4. On November 8, 2022, the appellant orally submitted that since time has passed by, he would like this court to just take into account time spent in custody. He, therefore, abandoned all other grounds of appeal.



- Ms Torosi urged this court to look at the record and deliver its judgment.

Analysis And Determination

Court's duty

- First appellate court re-evaluates the evidence and arrives at own independent conclusions. Except, bearing in mind that it neither saw nor heard the witnesses first hand. See *Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* (1972) EA, 32.
- I have carefully considered the oral submissions of the respective parties and the record of appeal. The appellant submitted that he has only one prayer before this court which he wishes to pursue: time spent in custody to be taken into account in the sentence. Hence, a single issue for determination: -
 - Whether the time spent in custody was taken into account by the trial court in passing the sentence?
- Section 333(2) of the *Criminal Procedure Code* appertains to fair trial; and serves to prevent a situation where a person serves a more severe sentence than prescribed or not proportional to the offence. See the explanation of this object in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) as follows:

“The provision 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.”
- Whereas, the section does not state how the time spent in custody should be taken into account in the sentence, merely stating you have taken such period into account is not enough (*Ahmad Abolfathi Mobammed & Ano v R* [2018] eKLR, and *Bethwel Wilson Kibor v R* [2009]). It is suggested that the court must be seen to have given the real-time effect of section 333(2) of the *Criminal Procedure Code* in sentencing. Some posit that this may be achieved by stating clearly when the sentence commences capturing the time spent in custody, especially where the accused remained in custody since the arrest. Others suggest that courts should clearly state in a demonstrable manner that the sentence includes the time spent in custody. There could be other suggestions, except, what should be avoided is to impose a sentence which in light of time spent in custody would over-shoot the sentence prescribed, or be tantamount to the maximum sentence prescribed unless the circumstances of the case justifies imposition of the maximum sentence.
- Nonetheless, is there a violation of section 333(2) of the CPC herein?

Applying The Test

- I have perused the records of the trial court and it is clear that the appellant herein was convicted of the offence of child trafficking contrary to section 13(a) and defilement contrary to section 8(1) (3) of SOA in Narok Criminal Case No. 312 of 2010. He was sentenced to serve 10 years and 20 years



imprisonment for the count I and II respectively. The sentences were to run concurrently. The trial court (Hon W N Njage (SPM)) stated as follows: -

court- the offence is serious and prevalent in Narok district a deterred sentence is called for.

sentence

count 1: accused sentenced to serve ten (10) years imprisonment

count2- accused sentenced to serve (20) twenty years imprisonment.

sentences to run concurrently

Right of appeal explained.

12. The trial magistrate did not mention whether he had taken into account time spent in custody. But what are the penalties provided for the offences committed by the appellant in law?

13. Of child trafficking: -

section 13. A person including a juristic person who, in relation to a child- (a) knowingly or intentionally makes or organizes any travel arrangements for or on behalf of a child within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against that child, irrespective of whether the offence is committed; (b) supplies, recruits, transports, transfers, harbors or receives a child, within or across the borders of Kenya, for purposes of the commission of any sexual offence under this Act with such child or any other person, is, in addition to any other offence for which he or she may be convicted, guilty of the offence of child trafficking and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings.

14. Of defilement: -

section 8(3) a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

15. The offences are serious and grave and are the epitome of sexual debauchery which society intends to punish, deter or hopefully stamp out of society as signified in the severe sentences prescribed in sections 13 and 8(3) of the SOA.

16. The trial court also reckoned that these offences are prevalent in Narok and was convinced deterrent sentence was necessary.

17. In the circumstances of this case, the sentence as passed was not excessive. It encompassed the time spent in custody. Therefore, I do not find any merit in the appeal. Accordingly, the appeal is dismissed.

18. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 26TH DAY OF JANUARY, 2023

F. Gikonyo M.

Judge

