



**Sire v Director of Public Prosecution (Criminal Petition
E031 of 2021) [2023] KEHC 1532 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E031 OF 2021
F GIKONYO, J
FEBRUARY 28, 2023**

BETWEEN

JOSHUA LEKAKENY SIRE PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. Before me is an undated application received in court on December 24, 2021 seeking orders that time spent in remand custody prior to conviction be considered pursuant to section 333(2) and 38 of the *Criminal Procedure Code*, articles 2, 10, 19(3), 22(1) (3), 23, 25(c), 27(1) (2), 28, 29(f), 27(1), (2), 50(2), (q), 159, 160(1), 165(3) (b) 259 and the sixth schedule (article 262) rule 7 (1) of the *Constitution*.
2. The applicant averred in his supporting affidavit that he was charged and convicted of the offence of unnatural offence contrary to section 162(a) *Penal Code* and sentenced to serve 21 years' imprisonment.
3. It was alleged that on June 21, 2009 at Nkareta area in Narok district within Rift Valley Province, the applicant had carnal knowledge of S.R. against the order of nature.

Applicant's Submission

4. The applicant stated that his case was 790/2018.
5. He argued that he is only seeking time spent in remand to be considered.

Prosecution's Submission

6. Ms. Torosi told this court that she did not have the judgment of the lower court to enable her to make oral submissions. She, however, asked the court to give a date for the ruling.



Directions

7. This court directed that the trial court’s file be submitted to the court.

Analysis and determination

8. The application herein is brought under section 333(2) of the *Criminal Procedure Code* which provides that: -

“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.”

9. The purport of the proviso to section 333(2) of the *CPC* has been explained in 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.”

10. Therefore, section 333(2) of the *CPC* pertains to fair trial, and courts should give real effect of the section (*Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, and *Bethwel Wilson Kibor v Republic* [2009] eKLR).

11. The petitioner/applicant faced a charge of offence against the order of nature (sodomy) contrary to section 162 (a) of the *Penal Code* that provides thus:

“Any person who—

- (a) has carnal knowledge of any person against the order of nature;

Or

- (b)

- (c)

is guilty of a felony and is liable to imprisonment for fourteen years:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—

- (i) the offence was committed without the consent of the person who was carnally known; or
- (ii) the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by



fear of bodily harm, or by means of false representations as to the nature of the act”.

12. In this case, the victim of the sodomy was a female minor aged 8 or 9 years at the time she testified in the estimation of the trial court.

13. The trial court in its judgment stated as follows;

“Accused person acted in a beastly manner to a child of tender age who will be affected for the rest of her life. A deterrent sentence is called for. The accused person is hereby sentenced to twenty-one years’ imprisonment.”

14. I have perused the trial court record and found that the applicant was first arraigned in court on 29/06/2009. He remained in custody till 26/5/2010 when he was convicted and sentenced. In all fairness, the sentence should run from the date he was first arraigned in court; in 29/06/2009.

Conclusion and orders

15. Accordingly, the applicant’s sentence of 21 years’ imprisonment shall run from 29/06/2009 when he was first arraigned in court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 28TH DAY OF FEBRUARY, 2023.

F. GIKONYO M.

JUDGE

In the presence of:

Petitioner

Ms. Mwaniki for DPP

Kasaso – CA

