



REPUBLIC OF KENYA



**Cheluget v Republic (Criminal Petition E028 of 2021)
[2022] KEHC 573 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E028 OF 2021**

F GIKONYO, J

MAY 31, 2022

BETWEEN

BENARD CHELUGET PETITIONER

AND

REPUBLIC RESPONDENT

*((Revision from Original Conviction/Sentence in Criminal Case No. 661 Of 2015
Of the Chief Magistrate's Court at Narok and HCCRA 30C of 2016 at Narok))*

RULING

Time spent in custody

1. The Applicant moved this court vide an application dated 8th November 2021 and filed on 9th November 2021 seeking for 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) (d), 23 (1) (f),25(c) ,27(1), (2), 50(2), (q), 159, 165 259 and the sixth schedule (article 262) rule 7 (1) of *the Constitution*.
2. On appeal, conviction and sentence to 10 years imprisonment was upheld for committing an indecent act to a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

Applicant's submission

3. The Applicant only pleads that time spent in custody be considered. He argues that he had spent 1 year and 6 months in remand.

Prosecution's submission

4. Mr. Ondimu opposed the application. He argued that the applicant should appeal to the court of appeal. He urged this court to dismiss the application.



Analysis and Determination

5. According to Section 333(2) of the Criminal Procedure Code: -

“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. The purport of, and court’s duty under the section has been explained 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.”

7. And it is the policy of law, and courts have insisted that this section should be given full effect (*Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR. (see also *Bethwel Wilson Kibor v Republic* [2009] eKLR)

8. The applicant herein was initially convicted of the offence of indecent act contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. In Narok High Court Criminal Case No 30C of 2016 his sentence to 10 years’ imprisonment was upheld. The appellate court (Bwonwong’a J.) stated as follows:

“.....sentencing is a matter for discretion of the trial court in terms of section 28(1) (b) of the penal code (cap 63) laws of kenya. An appeal court may only interfere with the discretion that is exercised by the trial court if that court proceeded on wrong principles in sentencing the appellant. Additionally, an appeal court may also interfere with the sentence imposed if it is manifestly lenient or excessive so as to amount to a miscarriage of justice.

In the instant appeal, I find that the trial court acted on the correct principles in sentencing the appellant. It therefore follows that there is no basis for this court to interfere with that sentence.

The upshot of the foregoing is that the appellant’s appeal is hereby dismissed.”

9. The Judge was categorical that he cannot interfere with the sentence imposed by the trial court of 10 years’ imprisonment because the trial court adhered to the correct principles in sentencing. A holistic consideration of this matter is that given the nature of the offence and the pronouncements by the judge, the applicant has had the advantage of Section 333(2) of the CPC and I do not find any violation of his right. Except, however, for clarity, the sentence herein shall run from the date of conviction. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION, THIS 31ST DAY OF MAY 2022



F. GIKONYO M

JUDGE

In the Presence of :

The Petitioner

Ms. Torosi for Respondent

Mr. Kasaso- CA

