



**Njuguna v Republic (Miscellaneous Petition E027 of 2021)
[2022] KEHC 2988 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 2988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS PETITION E027 OF 2021**

F GIKONYO, J

MAY 31, 2022

BETWEEN

SIMON NJUGUNA APPELLANT

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence in Criminal Case No. 1418 of 2015
Of the Chief Magistrate's Court at Narok and HCCRA 16 of 2016 at Narok)*

RULING

Time spent in Custody

1. Before me is undated application filed on November 5, 2021 which seeks for orders that time spent in custody prior to conviction be considered pursuant to Section 333(2) and 38 of the [Criminal Procedure Code](#), Articles 19(3), 22, 23,25(c) , 28, 29(f) ,27(1), (2), 50(2), (q), 159, 165 259 and the sixth schedule (article 262) rule 7 (1) of [the Constitution](#).
2. An appeal filed by the applicant upheld his conviction but reduced sentence to 10 years for rape of a person with mental disability contrary to Section 7 of the [Sexual Offences Act](#) No. 3 of 2006.

Applicant's Submission

3. The Applicant now argues that the judge did not consider the time spent in custody in his re-sentence.

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. 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.”

6. 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.”

7. Thus, courts should give real effect of Section 333(2) of the Criminal Procedure Code (*Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, and *Bethwel Wilson Kibor v Republic* [2009] eKLR).

8. The charge was rape of a person with mental disability contrary to Section 7 of the Sexual Offences Act No. 3 of 2006. In Narok High Court Criminal Case No. 16 of 2016 his sentence was reduced to 10 years’ imprisonment. The appellate court (Bwonwong’a J.) stated as follows: -

“.....I find that the trial court did not follow the correct principles in sentencing the appellant. In the circumstances I find there is merit in the appeal against sentence and hereby reduce it to ten years imprisonment. The upshot of the foregoing is that the appellant’s appeal is hereby dismissed on conviction, appeal on sentence herein reduced.”

9. A holistic look at the case; the serious nature of the offence, and the fact that the judge reduced the sentence from 20 years’ imprisonment to 10 years, the time spent in custody is subsumed in the sentence. I do not find any violation of his right. I reject his application.

10. 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 Applicant

Ms. Torosi for Respondent



Mr. Kasaso- CA

