



**Kiprop v Republic (Miscellaneous Criminal Application  
E012 of 2021) [2022] KEHC 11272 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11272 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2021**

**F GIKONYO, J**

**MAY 30, 2022**

**BETWEEN**

**NIXON TUWEI KIPROP ..... APPLICANT**

**AND**

**REPUBLIC.. ..... RESPONDENT**

*(Revision from Original Conviction/Sentence in Criminal Case No. 1344 of 2012 of the Chief Magistrate's Court at Narok delivered on 29/4/2014 by Hon. A.K.Ithuku (S.P.M) and HCCR. MISC. APP. NO. E009 of 2020 at Narok delivered on 25/01/2021 by Hon. Justice F.M. Gikonyo J.)*

**RULING**

**Time spent in custody**

1. The Applicant moved this court vide an undated application filed on 11<sup>th</sup> May 2021 seeking for orders that time spent in custody prior to conviction be considered pursuant to Section 333(2) of the *Criminal Procedure Code* and 38 of the *Penal Code*, Articles 27(1), (2), 47(1) (2) and 3 (a) of *the Constitution*.
2. The applicant was convicted of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to serve 20 years' imprisonment on 29/4/2014.
3. The applicant sought leave of court to appeal out of time but his application was dismissed by this court on 25<sup>th</sup> January 2021.

**Applicant's submission**

4. The Applicant only prayer is that time spent in custody be considered in his sentence.



### Prosecution's submission

5. Mr. Karanja urged this court to check the record as well as the trial court judgment on sentence to establish whether Section 333(2) of the CPC was considered.

### Analysis and Determination

6. The request herein is for time spent in custody to be taken account of in his sentence in accordance with 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.”

7. The purport of section 333(2) of the CPC was 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.”

8. Section 333(2) of the CPC pertains to fair trial, thus, it is the policy of law- and courts have insisted- that the section should be given real and full effect (Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR, and Bethwel Wilson Kibor vs. Republic [2009] eKLR).

### Applying the test

9. From the trial court's typed proceedings and judgment, the following relevant dates are discernible; the accused was arraigned in court on 8/10/2012 and was sentenced 29/4/2014 to 20 years' imprisonment. He was in custody for about one and half years.

10. I do note also that in passing sentence, under section 8 (2) of the Sexual Offences Act No. 3 of 2006, the trial court (Hon. A.K. Ithuku (S.P.M) stated inter alia as follows: -

“.....The plea on mitigation is noted. The offence committed is serious under Section 8(1) (3) of the Sexual Offences Act the accused person should serve for a period of not less than 20 years. He is hereby sentenced to serve in prison for a period of 20 years. Right of appeal in 14 days explained.”

11. The trial magistrate was aware that the offence was serious and this was indicated by the minimum sentence provided, i.e. 20 years. He stated that he took into account the plea on mitigation and found a sentence of 20 years' imprisonment to be appropriate. Except, in reference to the fetter in section 8(2) of the Sexual Offences Act, he may not have taken into account the time spent in custody before conviction. I am guided by Article 27(3) of the Constitution which requires that: -



- (3) 3) In applying a provision of the Bill of Rights, a court shall—
- (a) Develop the law to the extent that it does not give effect to a right or fundamental freedom; and
  - (b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom
12. In the circumstances of this case, the path that promotes enforcement of the right herein is for the sentence to run from the date he was arraigned in court.

**Conclusions and orders**

13. The upshot is that the instant application succeeds only to the extent that the sentence herein will run from the date of arraignment in court. In specific terms: -
- i. The 20 years' imprisonment imposed on 29/4/2014 shall run from 8/10/2012 being the date of first arraignment in court.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30<sup>TH</sup> DAY OF MAY 2022**

**F. GIKONYO M**

**JUDGE**

In the Presence of :

The Applicant

Ms. Torosi for Respondent

Mr. Kasaso - CA

