



REPUBLIC OF KENYA



**Imo v Republic (Criminal Petition E005 of 2021)
[2022] KEHC 10230 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E005 OF 2021**

**F GIKONYO, J
JUNE 30, 2022**

BETWEEN

SAMUEL SANTORE IMO PETITIONER

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence in Narok
CMCR No. 48 Of 2015 and Narok HCCRA 75 of 2016)*

RULING

Time Spent in Custody

1. Before me is Petitioner's application filed on 5th May 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 165(1), 159(1), 160(1), 22(1) (3), 25, 26,28, 29, and 50(2) (q) of *the Constitution*.
2. The application is based on the grounds set out in the face of the application and the petitioner's supporting affidavit.

Petitioner's submission

3. The petitioner submitted that time spent in remand was not taken into account in his sentence.
4. The petitioner relied on the following authorities;
 - i. The *Owners of Motor Vessel Lilian 'S' Vs Caltex Oil (Kenya) Ltd* [1989] KLR 1.
 - ii. *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others* Application No. 2 Of 2011.
 - iii. Article 165(3), 259, 27(1), 25(c) and 50(2) (p) of *the Constitution*.



- iv. International covenant on civil and political rights (ICPPR).
- v. David s weissbrodt, the right to a fair trial under the universal declaration of human rights and the international covenant on civil and political rights(martinus nijhoff (2001)
- vi. Dakar declaration and recommendations on the rights to a fair trial in Africa.
- vii. *Natasha Singh vs CBI* [2013] 5 C 741.
- viii. *Rattiram V State of M.P. [2012] 4 SCC516*
- ix. *Zabira Habibullah Sheikh & Another vs State of Gujarat & Others* AIR 2006 SC 1367
- x. Alister Anthony Pereira V State of Maharashtra
- xi. *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
- xii. *Bethwel Wilson Kibor V Republic* [2009] eKLR
- xiii. Judiciary sentencing policy guidelines.

Prosecution’s submission

5. Mr. Karanja orally submitted that he had perused the petition and the record should guide the court in determining the request before the court.

Analysis and Determination

6. The application herein is a request for consideration of time spent in custody pursuant to the provisions of 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 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.”

8. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR. (See also *Bethwel Wilson Kibor vs. Republic* [2009] eKLR) buttressed the duty of court in taking account of the period an accused person had spent in custody in sentencing under Section 333(2) of the Criminal Procedure Code. Thus, the need to give the section real effect. Merely stating that you have taken account of time spent in custody is not sufficient if the sentence does not reflect that fact.



9. The petitioner herein was initially convicted and sentenced to pay Kshs. 20,000,000/= in default to serve life imprisonment in respect of each of the following three counts; i) possession of wild life trophy namely three elephant tusks, ii) dealing in wild life trophy namely three elephant tusks, and iii) keeping wildlife trophy namely three elephant tusks all contrary to section 95 as read with section 92 of the Wildlife Conservation And Management Act, 2013.
10. On appeal, the appeal on conviction in count I was dismissed. The appeal against sentence was allowed with the result that the sentence of shillings twenty million and life imprisonment in each of the counts I, II, and III were quashed. In respect of count I, the petitioner was sentenced to a fine of shillings one million in default to serve twelve months' imprisonment. In addition, the appellant was sentenced to ten years imprisonment. see Samuel Santore Imo v Republic [2018] eKLR. The appellate court (Bwonwong'a J.) stated as follows: -
- “.....the upshot of the foregoing is that the appeal against conviction in count I is hereby dismissed. The appeal against sentence is allowed with the result that the sentence of shillings twenty million and life imprisonment in each of the count I, II and II are hereby quashed.
- IN respect of count I, in the light of the mitigating and aggravating factors, I hereby sentence the appellant to a fine of shillings one million in default 12 months imprisonment. In addition, the appellant is hereby sentenced to ten years imprisonment.”
11. I do note that the petitioner was first arraigned in court on 13/1/2014. However, given the serious nature of the offence, and the result of his appeal which imposed appropriate sentence, I do not think section 333(2) of the CPC was violated. There is no possibility of him serving a harsher sentence than provided. Accordingly, I find no proof of violation or denial of a right under the Constitution for which redress may be given pursuant to Article 23(1) and 165(3)(b) of the Constitution.
12. In the upshot, find that the petition lacks merit and is dismissed. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION, THIS 30TH DAY OF JUNE, 2022

F. GIKONYO M.

JUDGE

IN THE PRESENCE OF:

1. The applicant
2. Ms. Torosi for DPP
3. CA – Mr. Kasaso

