



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna v Republic (Criminal Appeal 191 of 2017)  
[2022] KEHC 3339 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL 191 OF 2017**

**A. ONG'INJO, J  
JUNE 23, 2022**

**BETWEEN**

**GEORGE MAINA NJUGUNA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against sentence from the Judgment by Hon.A. Ndungu In the Chief Magistrate Court at Mombasa Criminal Case No. 1454 of 2015 delivered on 8th May 2017)*

**JUDGMENT**

1. The Appellant George Maina was charged in the Chief Magistrates Court in Mombasa, Criminal Case Number 1454 of 2015 with the offence of Sexual Assault contrary to section 5(1)(4) as read with section 5(i)(2) of the sexual offences Act 3 of 2006
2. Particulars are that on the 13<sup>th</sup> day of December 2015 at Mshomoroni area in Kisauni Sub-County within Mombasa County unlawfully used his fingers to penetrate the vagina of VK a girl aged 3 8/12.
3. In the alternative the Appellant was charged with the offence of committing an Indecent Act with a child contrary to section 11(1) of Sexual Offence Act Number 3 of 2006.
4. The Appellant was convicted at the conclusion of the trial and sentenced to serve a 10-year prison term. The Appellant was aggrieved by the sentence and he filed an Undated Amended grounds of appeal citing the following grounds reproduced herein verbatim; -
  - a. That the learned magistrate contravened section 333(2) of the CPC while sentencing me.
  - b. That in this instant appeal I the appellant will be mitigating further and praying for leniency.
5. The appeal was canvassed vide written submissions.



6. The Appellant filed undated submissions. In a nutshell he submitted that the learned Magistrate had failed to adhere to provisions of section 332(2) of the Criminal Procedure Code by failing to take into consideration the 1 year 4 month and 23 days he had spent in custody while sentencing him. The Appellant submitted further that he had reformed tremendously on account of undertaking academic and spiritual courses while in prison reasons thereto the Court ought to set the rest of his sentence aside.
7. The Respondent filed submissions dated 4<sup>th</sup> April 2022. In a nutshell they submitted that the sentence was lawful and proper and the Court ought to dismiss the appeal.

### **Analysis and determination**

8. Having heard and read pleadings from both parties, I find that the issue for determination is; Was the sentence meted out to the Appellant lawful and proper?
9. Section 5 (2) of the Sexual Offence No. 6 of 2003 provides that a person found guilty of Sexual Assault is, ‘...liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.’
10. The Appellant herein was sentenced to 10 years in prison which is within the range set in the above section. However, the Criminal procedure code cap 75 under section 333(2) provides that time spent in custody ought to be put into consideration when meting out sentence. The section provides thus; “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 (emphasis mine).”
11. This duty is also echoed in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that: - “The proviso 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.”
12. The Court of Appeal in Abmad Abolfatbi Mohammed & Another Criminal Appeal No.135 of 2016 (2018) eKLR held thus: “By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”



13. From the Records of the lower Court the Appellant was apprehended on 16<sup>th</sup> December 2015 and was in custody all through the trial process. In total he spent 1 year 4 months 23 days in custody prior to sentencing. The trial Court while sentencing failed to pronounce itself on this. I therefore order that sentence of 10 years should take effect from 16<sup>th</sup> December 2015.

**DATED, SIGNED AND DELIVERED AT MOMBASA IN OPEN COURT THIS 23<sup>RD</sup> DAY OF JUNE 2022.**

**HON. LADY JUSTICE A. ONG'INJO**  
**JUDGE**

**In the presence of:-**

Ogwel - Court Assistant

Mr. Ngiri for Respondent

Appellant – Present in person

**HON. LADY JUSTICE A. ONG'INJO J**

**23/06/2022**

