



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC CRIMINAL PETITION NO. E007 OF 2020

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. W. Juma (C.M) in Narok CMCR No. 728 of 2015 on 9th July, 2018 and HCCRA 19 of 2019 at Narok)

MICHAEL KARANJA GIKONYO.....PETITIONER

-versus-

REPUBLIC.....RESPONDENT

RULING

Time spent in custody

[1] The Applicant moved this court vide an application dated 2/12/2020 seeking for orders that time spent in custody prior to conviction and the time served upon conviction before reduction of the sentence by the High court be awarded pursuant to section 333(2) and 38 of the Criminal Procedure Code, Articles 27(1), (2), 22,23,47, (1), (2), 3(a) of the Constitution and that his sentence be reduced accordingly.

[2] The applicant on appeal had his conviction upheld and sentenced to 8 years in respect of the charge of defilement contrary to section 8(1) as read with section 8(3) of the sexual offences act no. 3 of 2006.

Applicant's submission

[3] The Applicant only pleads that time spent in custody prior to conviction and the time served in conviction before reduction of the sentence by the high court be taken into account. He argues that the prison authority has refused to take into account the time served and time spent in custody prior to conviction in the high court despite being stated in the judgment of this court.

Prosecution's submission

[4] Ms. Koina for the Respondent in her oral submission opposed the application and argued that section 333(2) of the Criminal Procedure Code does not state how much time should be taken into account.

ANALYSIS AND DETERMINATION

[5] The application herein is a request for consideration of time spent in custody prior to and after conviction up to the reduction of sentence 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 (emphasis mine).”

[6] Court's duty under the section has also 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] The Court of Appeal in ***Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR***. (see also ***Bethwel Wilson Kibor vs. Republic [2009] eKLR***) has explained and buttressed the duty to take in account the period an accused person had remained in custody in sentencing under section 333(2) of the Criminal Procedure Code is to give real effect of the section in the sentence imposed. Merely stating that you have taken account of time spent in custody is not sufficient if the sentence does not show that the period which an accused has been held in custody prior to being sentenced be taken into account.

[8] I have perused the trial court’s records and it is clear that the Petitioner herein was initially convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the sexual offences act no. 3 of 2006. In Narok High Court Criminal Case No. 19 of 2019 was subsequently sentenced to serve 8 years’ imprisonment. The trial court (Bwonwong’a J.) stated as follows: -

“.....i find that the trial court failed to take into account the supreme court decision in Francis Karioko Muruatetu and Another V Republic (2017) eKLR in sentencing the appellant. The court also erred in failing to take into account the period the appellant had been in custody in terms of section 333(2) of the criminal procedure code. I am therefore entitled to interfere with the sentence imposed. I therefore reduce it to eight years’ imprisonment, which the appellant now has to serve”

[9] A person who is sentenced in contravention of section 333(2) has recourse to this Court on the basis of denial or violation of a right to a less severe sentence. Failure to adhere to the proviso to section 333(2) of the CPC opens the accused to real risk of serving a more severe sentence than lawfully prescribed, thus, depriving him of liberty contrary to the law. See Article 29(a) of the Constitution which provides that:

Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

[10] Accordingly, section 333(2) of the CPC pertains to fair trial, and none adherence thereto is a violation or denial of a right under the Constitution for which redress may be sought pursuant to Article 23(1) of the Constitution which provides that: -

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

[11] For completeness see Article 165(3)(b) of the Constitution that:

Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

[12] The judge was categorical that he interfered with the sentence imposed by the trial court of 20 years’ imprisonment because the trial court did not *inter alia* adhere to section 333(2) of the CPC. HE REDUCED IT TO 8 YEARS. 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 and interest of justice, the sentence herein shall run from the date of conviction. It is so ordered.

DATED AND DELIVERED AT NAROK THIS 19TH DAY OF MAY 2021 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

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F. M. GIKONYO

JUDGE

In the presence of:

1. The applicant

2. Ms. Torosi for the Republic

3. Mr. Kasaso CA
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F. M. GIKONYO

JUDGE