



**Oganga v Republic (Miscellaneous Criminal Application
E019 of 2022) [2024] KEHC 5688 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
MISCELLANEOUS CRIMINAL APPLICATION E019 OF 2022**

F GIKONYO, J

MAY 8, 2024

BETWEEN

JOSHUA OGANGA APPLICANT

AND

REPUBLIC RESPONDENT

(Revision from Original Conviction/Sentence in Criminal Case No. 1050 of 2013 of the Principal Magistrate's Court at Kilgoris delivered on 10/07/2015 by Hon. A.K.Mokoross (S.R.M))

JUDGMENT

Time spent in custody

1. The Applicant's undated application filed on 29/11/2022 is seeking for orders that time spent in custody prior to conviction be considered pursuant to Section 333(2) of the Criminal Procedure Code, Articles 19(2), 20(2), 21(1), 28, 159(1)(a), (b) and d) 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 10/07/2015.

Applicant's submission

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

Prosecution's submission

4. Mr. Okeyo urged this court to check the record to establish whether Section 333(2) of the CPC was considered.



Analysis and Determination

- 5. In passing sentence, ‘...where the person sentenced... has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.’(Proviso to Section 333(2) of the Criminal Procedure Code)
- 6. The purport of section 333(2) of the CPC is 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 consider 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. As Section 333(2) of the CPC avoids ‘excessive punishment that is not proportional to the offence committed’, pertains to a fair trial. Thus, the policy of law- and the courts- insists on the section being given real and full effect (Abamad Abolfathi Mohammed & another v Republic [2018] eKLR, and Bethwel Wilson Kibor v Republic [2009] eKLR).

Applying the test

- 8. From the record of the trial court, the following relevant dates are discernible; the accused was arraigned in court on 06/12/2013 and was sentenced on 10/07/2015 to 20 years’ imprisonment in count I and 10 years’ imprisonment in count II. The sentences were to run concurrently.
- 9. The applicant was released on bond on 02/01/2014. However, he absconded and was arrested on 03/3/2014. The applicant remained in custody until sentencing.
- 10. In the circumstances of this case, the path that promotes enforcement of the right to appropriate sentence, is for the sentence to run from the date he was re-arrested in court.

Conclusions and orders

- 11. The upshot is that the instant application succeeds only to the extent that the sentence herein will run from the date of re-arrest. In specific terms: -
 - i. The 20 years’ imprisonment imposed on 10/07/2015 shall run from 03/03/2014 being the date of re-arrest.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF MAY, 2024.

.....
HON. F. GIKONYO M.
JUDGE

In the presence of: -
Applicant
Okeyo for DPP
Leken C/A

