



**Ekare v Republic (Miscellaneous Criminal Application E020 of 2024)  
[2024] KEHC 12996 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12996 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
MISCELLANEOUS CRIMINAL APPLICATION E020 OF 2024**

**JN ONYIEGO, J  
OCTOBER 24, 2024**

**BETWEEN**

**JULIUS NKOLONG EKARE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The appellant was arrested and arraigned before the Chief Magistrate’s Court at Garissa on 08.06.2020, charged with the offence of; trafficking in narcotic drugs contrary to; section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 (herein “the Act”).
2. The particulars of the charge were that Julius Nkolong Enkare, Adam Gituma Mugambi and Mohammed Jelle Adan on 07.06.2020 at around 0200hrs at Kambi Samaki in Benane Division within Lagdera Sub County, Garissa County were found trafficking narcotic drugs to wit 446Kg of cannabis sativa with an estimated street value of Kenya Shillings Thirteen Million, Three Hundred and Eighty Thousand Shillings (13,380,000) in a motor vehicle registration number KCL 015Y Isuzu Lorry in contravention of the said *Act*.
3. The appellant pleaded not guilty and the case proceeded to full hearing. The prosecution case was supported by evidence of six (6) witnesses.
4. At the conclusion of the case, the trial court rendered a judgement dated 18.01.2022 stating that the prosecution had proved its case beyond reasonable doubt. The court subsequently convicted the appellant and sentenced him to serve twenty (20) years imprisonment; and in addition, a fine of Kes.40,140,000 or one-year imprisonment.
5. However, the appellant being aggrieved by the decision of the trial court appealed against the said judgment via an amended petition of appeal filed in court on 11.10.2023 citing grounds that:



- i. The trial magistrate erred in law and in fact in convicting the appellant on defective charges.
  - ii. The trial magistrate erred in law and in fact in convicting the appellant without having regard to the credibility of the prosecution witnesses.
  - iii. The trial court erred in law and fact by holding that he was the driver of the alleged mv carrying cannabis.
  - iv. The trial magistrate erred in law and in fact in convicting the appellant and thereafter sentencing the appellant without considering his defence.
6. Upon canvassing the appeal, the court dismissed the same on conviction but reduced the sentence of 20 years to 10 years. Undeterred, the applicant approached this court through a notice of motion dated 29-06-24 seeking the court to consider the period spent in remand custody ranging from 06-06-2020 until the date of his sentence on 18-01-22.
  7. In response, the state stated that the court is functus officio. That having determined the appeal and reduced the sentence, it can not revisit the issue again. It is trite that a trial court is duty bound to factor the period spent in remand custody when meting out sentence pursuant to section 333(2) of the CPC. See Evereste v Republic (2024) KEHC 4543(KLR)(3may 2024)(ruling) where the court held that section 333(2) of the CPC is mandatory
  8. There is no dispute that the applicant was in remand custody from 06-06-2020 to 18-01-2022 translating to 1 year and 7 months 24 days. In view of the mandatory nature of section 333(2) of the CPC and considering that the issue was not canvassed during the hearing of the appeal, it will not be prejudicial for this court to exercise residual authority to revisit and review the sentence by factoring the period spent in remand custody.
  9. Accordingly, the application is allowed and the period spent in remand custody shall be considered when computing sentence.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**J. N. ONYIEGO**

**JUDGE**

