



**Cheruiyot v Republic (Miscellaneous Criminal Application  
E021 of 2021) [2023] KEHC 2245 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2245 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS CRIMINAL APPLICATION E021 OF 2021**

**F GIKONYO, J  
MARCH 21, 2023**

**BETWEEN**

**KENNEDY KIPKOECH CHERUIYOT ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Revision from Original Conviction/Sentence of Hon.  
Z. Abdul (RM) in Narok CMCR No.1154 of 2011)*

**JUDGMENT**

**Time spend in Custody**

1. Before me is an undated application forwarded to court on June 7, 2021.
2. But, vide an application filed in court on February 15, 2022, the applicant sought to amend his application.
3. The applicant now seeks for orders that time spent in remand custody prior to conviction be considered pursuant to Articles 2,10, 19(3), 22(1) (3), 23, 25(c),27(1) (2), 28, 29(f),27(1), (2), 50(2), (q), 159, 160(1),165(3) (b) 259, and the sixth schedule (article 262) rule 7 (1) of the Constitution, Section 333(2) of the Criminal Procedure Code, and section 38 of the penal code.
4. The applicant was convicted for defilement of a girl aged 14 years under section 8(1) and sentenced to 20 years' imprisonment pursuant to section 8(3) of the Sexual Offences Act No 3 of 2006.
5. Mr. Ondimu counsel for the respondent filed a notice of enhancement of sentence dated 7/03/2022 pursuant to section 354(3)(b) of the CPC. The respondent sought the enhancement of the sentence of ten (10) years imprisonment imposed upon the applicant by the trial court to imprisonment for life years in accordance with section 8(2) of the SOA.



6. In response, the applicant filed an undated affidavit received in court on March 31, 2022.
7. The applicant averred that a reading of section 354(3) (b) of the CPC deals with appeals and not applications of this nature; notice of enhancement. Further that the prosecution is misleading the court that the applicant was sentenced to 10 years yet he was sentenced to the mandatory minimum sentence of 20 years as per section 8(1)(3) of SOA.
8. The applicant averred that if the prosecution wanted the sentence to be enhanced they could have lodged an appeal as at the earliest opportune time.
9. The applicant argued that his application is grounded under section 333(2) of the CPC, articles 25(c), 27, and 50 of the constitution, Johana Nyagaka V Republic [2021] eKLR. He has served a good number of years behind bars and is in need of total protection of the law as enacted and in its application.
10. The applicant averred that the notice of enhancement dated March 7, 2022 should be found to be an abuse of the court process and be dismissed.
11. In the end, the applicant urged that his application be heard in the interest of justice and equity in the avoidance of any miscarriage of justice.
12. The applicant also filed another undated affidavit received in court on October 21, 2022.
13. The applicant reiterated the averments in the earlier application. He has however added some further averments as listed below.
14. The applicant averred that the rule in section 354(1)(2) CPC is applicable in appeals against conviction. It does not have any absurdity or ambiguity to warrant a mischief or purposive interpretation.
15. The applicant averred that he is not a challenging conviction or against the sentence of 20 years imprisonment.
16. The applicant has relied on the cases of Mark Oiruri Mose V Republic [2013] eKLR, Rey V Pearson(1857), Supreme Court Of Canada In Rizzo & Rizzo Shoes Ltd [1998], County Government Of Nyeri & Anor v Cecilia Wangechi Ndungu [2015] eKLR and Frankline Kiprotich Rono V Republic [2021] eKLR
17. On December 2, 2022, Ms. Torosi counsel for the respondent filed another notice of enhancement of sentence pursuant to section 354(3)(b) of the CPC.
18. In the said notice of enhancement of sentence, the respondent is seeking the enhancement of the sentence of twenty (20) years imprisonment imposed on the applicant by the trial court to imprisonment for life years in accordance with section 8(2) of the SOA.

The directions of the court.

### **Analysis and determination**

Correcting error on the record

19. Putting the record straight; I wish to correct an error apparent on the face of the record in the directions issued by this court on 15/2/2023, that the Narok HC Misc. Cr. Appl. No 13 of 2020 and 36 of 2018 be withdrawn. The true position of things is that; the two cases were consolidated, heard and concluded. See Kennedy Kipkoach Cheruiyot v Republic [2020] eKLR.



## Issues

20. Arising from the application and the notice of enhancement of sentence, are two issues for determination;
  - i. Whether the sentence imposed upon the applicant should be enhanced; and
  - ii. Whether time spent in custody should be considered in the sentence.

### Issue No 1: Enhancement of sentence

21. In an appeal against a sentence, the court has the power to sustain, increase, or reduce the sentence, or alter the nature of the sentence (section 354(3)(b) of the [Criminal Procedure Code](#)). Enhancement of sentence is therefore substantive process.
22. The test, however, is that the High court will not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors or taken into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle. (Shadrack Kipkoech Kogo v R., Eldoret Criminal Appeal No253 of 2003, the Court of Appeal, and [Wilson Waitegei V Republic](#) [2021] eKLR).

### Applying the test

23. The respondent in its notice of enhancement of sentence sought the enhancement of the sentence of twenty (20) years imprisonment imposed upon the applicant by the trial court to imprisonment for life in accordance with section 8(2) [SOA](#).
24. The relevant penalty clause is Section 8(3) of the [Sexual Offences Act](#) which provides as follows: -
  - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
25. From the record, the applicant was convicted of the offence of defiling a child aged 14 years and was sentenced to serve 20 years' imprisonment in accordance with section 8(2) & 8(3) respectively.
26. The prosecution has not shown the sentence was illegal or that the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is so inordinately excessive or patently lenient as to be an error of principle (Shadrack Kipkoech Kogo v R., and [Wilson Waitegei V Republic](#) [2021] eKLR).
27. It bears repeating that, Notice of Enhancement of Sentence is a substantive process and matter which must be founded upon sound and substantive factual as well as legal basis. The applicant was categorical that he was not contesting the sentence imposed. He simply was seeking consideration of time spent in custody to be taken into account in the sentence in accordance with section 333(2) of the [CPC](#). Despite these submissions, the manner the prosecution treated the notice did not evince any seriousness towards or appreciate the legal purport of the notice. The notice was not supported by any substantive material or arguments. I therefore, find the notice a candidate for rejection.



## Issue No 2: Time spent in custody

28. The application herein is premised upon the proviso to 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.”

29. The purport of the proviso to section 333(2) of the [CPC](#) has been explained in [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.”

30. Therefore, section 333(2) of the [CPC](#) pertains to fair trial, and courts should give real effect of the section ([Abamad Abolfathi Mohammed & another v Republic](#) [2018] eKLR, and [Bethwel Wilson Kibor v Republic](#) [2009] eKLR).

31. The victim was a girl aged 14 years. The relevant penalty clause is therefore, section 8(3) of the [Sexual Offences Act](#) No 3 of 2006 that provides thus:

8(3) “A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

32. The trial court (Hon. Z. Abdul (R.M.) in sentencing the applicant stated as follows;

“ Accused shall be sentenced to serve 20-year imprisonment. 14 days right of appeal.”

33. The trial court did not indicate whether he took into account time spent in custody in sentencing the applicant. The trial court record show that the applicant was first arraigned in court on November 18, 2011. He remained in custody till November 13, 2012 when he was convicted and sentenced- one year shy four days only. This is a substantial period of time. And, given the fact that the sentence of 20 years’ imprisonment was not lenient, it is only fair and just that it should commence from the date he was first arraigned in court; on November 18, 2011. In this manner, the court accounts for the period of confinement, and also avoids arbitrary-confinement arguments. But, I quickly add that, section 333(2) of the [CPC](#) does not tell how the court should take account of the period spent in custody; but giving effect to the section in sentencing should be seen or easily deducible from the circumstances of the case or the decision by the sentencing court.

## Conclusion and orders

34. In light thereof, I make the following specific orders;



- i. The sentence of 20 years imprisonment imposed upon the applicant shall run from November 18, 2011- the date when he was first arraigned in court.
- ii. The amended notice of enhancement of sentence dated December 1, 2022 is dismissed.

35. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 21<sup>ST</sup> DAY OF MARCH, 2023.**

.....

**F. GIKONYO M.**

**JUDGE**

**In the presence of:**

Applicant

Ms. Mwaniki for DPP

Mr. Kasaso – CA

