



**Masire v Republic (Miscellaneous Criminal Application  
E002 of 2022) [2023] KEHC 2370 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2370 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2022**

**PN GICHOHI, J  
MARCH 22, 2023**

**BETWEEN**

**SAMWEL MOGIRE MASIRE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original Criminal Case No. 231 of 2013 at CM's Court at Kisii)*

**RULING**

1. By an undated Notice of Motion filed on January 17, 2022 under Art 23 (3) (F), 50 (2) (p) (q) of the Constitution and Section 333 (2) of the Criminal Procedure Code, the Applicant seeks orders that the Court reviews the sentence of Twenty (20) years imprisonment putting into account that he is a young man who still has a long way to go in life.
2. He seeks that the time spent in custody during trial be put into consideration. He states that was convicted and sentenced to 20 years imprisonment for the offence of Defilement contrary to section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No 3 of 2006 .
3. He swore an affidavit in support of the application and states that for the period he has been in prison, he has undergone rehabilitation and as a consequence, he has reformed, is remorseful and ready to be re-integrated. He further states that his appealed to High Court was dismissed vide Kisii High Court Appeal No 12 of 2014 but he has maintained high standard of discipline when in custody . He has also acquired three certificates in bible study. The Respondent concedes the application so long as it complies with Section 333(2) of the Criminal Procedure Code.

**Determination**

4. A perusal of the lower court record in Chief Magistrates Court Criminal Case No 231 of 2013 gives the background of this application. The record shows that the accused was charged with the offence



of Defilement Contrary to Section (8) (1) as read with Section 8 (3) of the Sexual Offences Act No 3 of 2006. The particulars being that on the night of 20<sup>th</sup> and 20is and February 21, 2013 at [Particulars Withheld] Sub location in Kisii South District within Kisii County intentionally and unlawfully did cause his penis to penetrate the vagina of SVN , a child aged twelve (12) years. He also faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offence Act No 3 of 2006.

5. The Applicant took plea on February 22, 2013 where he denied the charges. The Warrant of Commitment on Remand shows that after the plea , he was remanded in custody from that date (February 22, 2013). He remained in custody from then on until he was convicted on January 31, 2014. He was still in custody when he was sentenced to serve 20 years imprisonment on February 14, 2014.
6. Dissatisfied with the conviction and sentence , he appealed to High Court in in Criminal Appeal No 12 of 2014 which was dismissed and the Applicant is in prison serving the said sentence.
7. Section 333 (1) and (2) of the Criminal Procedure Code states;

' (1) 1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) 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.'

8. There is nothing to show that the Trial Magistrate put into consideration the period that the Applicant spent in custody when passing the above sentence of 20 years imprisonment. In the circumstances stated herein, the Applicant is only entitled to getting that period he has been in custody during the trial taken into account.
9. The application is therefore allowed to the extent that the Applicant's sentence of imprisonment of 20 years shall run from February 22, 2013, which is the date of plea , to February 14, 2014 when he was sentenced and committed to prison. The order be served on the office in charge of the prison where the Applicant is serving.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 22<sup>TH</sup> DAY OF MARCH, 2023.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

Applicant

Mr. Ochiengo for Respondent

**Kevin Isindu, Court Assistant**

