



**Marita v Republic (Miscellaneous Criminal Petition E007 of 2022)
[2023] KEHC 21091 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL PETITION E007 OF 2022**

F GIKONYO, J

JULY 24, 2023

BETWEEN

JEREMIAH SAWE MARITA PETITIONER

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence) in Narok
CMCR No.1898 of 2014 and Narok HCCRA No. 21 of 2015)*

JUDGMENT

1. Before the court is an undated application received in court on May 2, 2022 seeking orders that time spent in remand custody prior to conviction be considered pursuant to Section 333(2) of the Criminal Procedure Code, and awarded a lenient definite sentence.
2. The petitioner averred in his supporting affidavit that he was charged and convicted of the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No 3 of 2006, and was sentenced to serve life imprisonment.

Petitioner's Submission

3. The petitioner submitted that this court has jurisdiction to hear and determine this application. The petitioner relied on the cases of *The Owners of Motor Vessel Lillian 'S' Vs Caltex Oil (Kenya) Ltd* [1989] KLR1, *Samuel Kamu Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others* Application No. 2 of 2011, Article 23(1) and 165(3)(b) of *the Constitution*, *Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai Estate & 4 Others* *Marete V Attorney General* [1987] KLR 690
4. The petitioner submitted that mandatory minimum sentences take away judicial discretion. The petitioner relied on *S V Toms* 1990(2)SA 802(A) at 806(h)-807(b), *S V Jahsen* 1999(2) SACR 368 (C) at 373 (g) –(h), *Mwangi V Republic* 9criminal appeal No. 84 of 2015[2022] KECA 1106 (KLR),



In searching for Smith; the constitutionality of mandatory sentences , Vol 39 No. 1 & 2, Osgoode law journal, 368(2001), Kent Roach Evans Wanjala Siibi Vs Republic [2019] Eklr, Eliud Waweru Wambui Vs Republic [2019] eKLR, English house of lords in Gillick Vs West Norfolk and Wisbech Area Health Area Health Authority [1985] 3 ALL ER , Daniel Kipkosgei Letting Vs Republic [2021] eKLR, Christopher Ochieng Vs Republic [2018] Eklr, Jared Koita Injiri Vs Republic[2019] eKLR, Evans Wanjala Wanyonyi Vs Republic[2019] Eklr, SS Vs Republic [2021]eKLR, Simiyu Vs Republic (Criminal Appeal No. 49 of 2018[2021] KECA 295 (KLR), JKM Vs Republic [2021] eKLR, Korir Vs Republic (Criminal Appeal 100 of 2019) [2021] KECA 305 KLR, Dismas Wafula Kilwake Vs Republic [2019] eKLR, Philip Mveke Maingi and 6 Others Petition No. 17 of 2021, Policy direction 4.1 of the sentencing guidelines policy 2015.

5. The petitioner urged this court to consider time served in remand custody. The petitioner relied on section 333(2) of the CPC, Ahamad Abolfathi Muhammed & Another Vs Republic, Bethuel Wilson Kibor Vs Republic.

Prosecution's Submission

6. Ms. Mwaniki indicated to this court that they have filed submissions. However, I have perused the court file and found no written submissions have been filed by the respondent.

Analysis And Determination

Of lenient definite sentence

7. This petition relates to section 8(2) of SOA which- it was argued that- provides for a mandatory sentence, and in respect thereto, the court is content to cite the Court of Appeal - '...that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing'. And, that; 'the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it' (Dismas Wafula Kilwake vs. Republic [2018] eKLR)
8. The court also consider that the offence is serious. The victim was a child of tender age- she was 3 years old. The manner the offence was committed was brutality causing her injuries and infection. The child will also suffer post traumatic effects; loss of personal worth and integrity of person apart from agonizing memories of the incident. Moreover, these kind of offences have become prevalent. The aggravating factors, despite him being a first offender and remorseful, justify a deterrent sentence.
9. The life sentence imposed by the trial court pursuant to section 8(2) of the Sexual Offences Act, is '...indicative of the seriousness with which the Legislature and the society take the offence of defilement' (supra Dismas Wafula case), especially given that the child was only 3 years old when the petitioner assaulted her sexually. The act was a beastly act committed on such child of severely tender years. The sentence was, among other things, upheld in Narok High Court Criminal Appeal No. 21 of 2015.
10. However, the petitioner has sought for definite period of imprisonment. And, following the recent decision by the Court of Appeal in which life sentence was declared unconstitutional, and in line with application of precedent, the court sets aside the life sentence, and in lieu thereof, sentence the petitioner to 30 years' imprisonment.
11. But, the court notes that, to avoid such eventuality, some jurisdictions, in exercise of legislative authority to prescribe penalty for an offence, have enacted legislation to provide the amount of time or number of years which constitute life sentence. The enactment makes life sentence determinate on the spun of the period of imprisonment which also gives the inmate hope and an opportunity to be reformed and re-integrated back into society; and, in deference and respect to human dignity and



freedom, to eke a living as a free person and to become a productive citizen. Such legislative action also creates a basis for consistency in sentencing rather than leaving it to varying adjustments by individual judges in exercise of discretion. These are some of the major reasons why legislature should provide the omission. My reading of Muruatetu judicial discussion on this subject revealed these nuggets.

Of jurisdiction; redress under s. 333(2) of CPC

12. The petitioner has made a specific prayer that time spent in custody be taken into account in sentencing in accordance with section 333(2) of the CPC.
13. The prosecution has argued that the court has already pronounced itself on sentence in the appeal filed by the petitioner, and does not have the jurisdiction to review sentence.
14. The court is acutely aware that section 333(2) of the CPC may be argued, as a ground of appeal. Nevertheless, the court is skeptical of any proposition that the matter of section 333(2) of the CPC cannot found a cause of action under section 23(1) and 165(3) of *the Constitution* for a redress of violation of the right to a less severe sentence or not to be detained arbitrarily. Therefore, this court has the jurisdiction to entertain the request.

The purport of section 333(2) of CPC

15. ‘...Every sentence shall be deemed to commence from ... the date on which it was pronounced, except where otherwise provided in this Code’. ‘Provided that where the person sentenced... has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.’ (Section 333(2) of the Criminal Procedure Code).
16. The purport of the proviso to section 333(2) of the CPC is to avoid ‘...an excessive punishment that is not proportional to the offence committed’ (Judiciary Sentencing Policy Guidelines under clauses 7.10).
17. Therefore, whereas the section does not state how time spent in custody should be taken into account, courts should give real effect- in most practical terms as possible- of Section 333(2) of the Criminal Procedure Code in most (Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR, and Bethwel Wilson Kibor v Republic [2009] eKLR).

Application of s. 333(2) of CPC

18. Accordingly, the court has perused the trial court’s records. The Petitioner herein was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. And, he was sentenced to life imprisonment. The conviction and sentence were upheld in Narok High Court Criminal Appeal No. 21 of 2015. Nonetheless, the court has, following the recent decision by the Court of Appeal declaring life sentence to be unconstitutional, set aside the life sentence and in lieu thereof, sentenced him to serve 30 years’ imprisonment.
19. Nonetheless, to avoid the sentence from becoming, ‘...an excessive punishment that is not proportional to the offence committed’ (supra Judiciary Sentencing Policy Guidelines), the court should give full effect to the essential core and purport of section 333(2) of the CPC.
20. Although the petitioner was granted bond, he remained in custody from the time of arraignment before the trial court. Accordingly, the sentence of 30 years’ imprisonment imposed herein shall commence from 18/11/2014. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 24TH DAY OF JULY, 2023.



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F.GIKONYO

JUDGE

In the presence of:-

Applicant

Ms. Mwaniki for the Republic

Kasaso - CA

