



**Malongo v Republic (Miscellaneous Criminal Application
E023 of 2022) [2023] KEHC 20438 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL APPLICATION E023 OF 2022**

**F GIKONYO, J
JULY 13, 2023**

BETWEEN

VINCENT ANYANJE MALONGO APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence) in Narok
CMCR No. 297 of 2013 and Narok HCCRA No. 56 OF 2017)*

JUDGMENT

Time spent in Custody

1. Before the court is an undated application received in court on June 20, 2022 seeking orders that time spent in remand custody prior to conviction be considered pursuant to section 333(2) of the Criminal Procedure Code, articles 22(1), 23(1), 27(10), 50(2)(p) (q), 159(2), and 165(3)) of the Constitution. He prays that the period of 1 year and 7 months he spent in custody be computed into his sentence.
2. The applicant 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(3) of the Sexual Offences Act No. 3 of 2006, and was sentenced to serve 20 years' imprisonment.

Applicant's Submission

3. The applicant orally submitted that he is claiming time spent in custody. The High court dismissed his appeal but he did not file any appeal to the Court of Appeal.

Prosecution's Submission

4. Ms. Torosi orally submitted that the court has already pronounced itself on sentence. His remedy now lies in the Court of Appeal.



Analysis And Determination

5. ‘...Every sentence shall be deemed to commence from, ... the date on which it was pronounced, except where otherwise provided in this Code.’ Section 333(2) of the *Criminal Procedure Code*
6. ‘...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.’ Ibid.
7. 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.
8. Thus, 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 (*Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, and *Bethwel Wilson Kibor v Republic* [2009] eKLR).

Of jurisdiction

9. The prosecution has argued that the court has already pronounced itself on sentence in the appeal filed by the petitioner. The court is acutely aware that section 333(2) of the CPC may be argued in, as a ground of appeal. Nevertheless, the court is skeptical of the correctness 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 redress of violation of the right to less severe sentence or not to be detained arbitrarily.

Application of s. 333(2) of CPC

10. 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(3) of the *Sexual Offences Act* No. 3 of 2006. And, he was sentenced to serve 20 years’ imprisonment. In Narok High Court Criminal Appeal No. 56 of 2017, the conviction and sentence was upheld.
11. Both courts noted that the offence was serious and resulted into physical as well as psychological injury to a young girl of the age of 13 years. Nonetheless, whereas the sentence imposed was appropriate sentence, the risk of making the sentence imposed ‘...an excessive punishment....’ will be everted by giving full effect to section 333(2) of the CPC.
12. In that connection, as the petitioner remained in custody since arraignment before the trial court, the sentence herein shall commence from March 19, 2013. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 13TH DAY OF JULY 2023

F. GIKONYO M.

JUDGE

In the presence of:

1. Applicant present
2. Ms. Mwaniki for DPP present



3. Kasaso C/A

