



**Ratia v Republic (Miscellaneous Criminal Application E013 & E031 of 2021
(Consolidated)) [2023] KEHC 20741 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL APPLICATION E013 & E031 OF 2021 (CONSOLIDATED)**

F GIKONYO, J

JULY 24, 2023

BETWEEN

NICHOLUS RATIA APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence) in Narok CMCR
No.130 of 2014 and Naivasha HCCRA No. 105 of 2015)*

JUDGMENT

1. The applicant stated that he has abandoned all other grounds of his application except the one based on section 333(2) *Criminal Procedure Code*-time spent in custody.
2. The applicant was charged and convicted of the offence of rape contrary to section 3(1) (a) and (b) as read with 3(3) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to serve 15 years' imprisonment.

Applicant's Submission

3. The applicant orally submitted that he has been in jail since 2014. That he is reformed and young. He prayed that this court reduces his sentence by 5 years.

Prosecution's Submission

4. Mr Karanja argued that remission is by the prison authority and not the court.
5. Ms Torosi urged this court to look at the record and determine on section 333(2) of the *CPC*.



Analysis And Determination Of jurisdiction under s. 333(2) of CPC

6. The claim herein is anchored upon section 333(2) of the CPC. Ordinarily, objection to jurisdiction for redress under the section, is 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 it is skeptical 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. The court therefore has jurisdiction to try this petition.

Purport Of Section 333(2) of CPC

7. ‘...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
‘...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.
8. 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). The section, therefore, pertains to fair trial and justice.
9. 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 (*Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, and *Bethwel Wilson Kibor v Republic* [2009] eKLR).

Application of s. 333(2) of CPC

10. Perusal of the record- the trial court’s as well as appellate court’s- reveals that the applicant herein was convicted of the offence of rape contrary to section 3(1)(a) and (b) as read with section 3(3) of the Sexual Offences Act No 3 of 2006. And, he was sentenced to 15 years imprisonment. The conviction and sentence were upheld in Naivasha High Court criminal appeal No 105 of 2015.
11. The argument by Mr Karanja that remission is implemented by the prisons is correct. However, the applicant is not asking for remission.
12. The court, however, notes an element of review of sentence on the basis of the good conduct of the inmate post-sentence. Questions abound; some pundits argue that such review by court, especially where the sentence is determined on appeal to be appropriate, legal and constitutional, could be problematic in the absence of a properly grounded legal framework that establishes parole system that incorporates the court in such revision of sentence. This school of thought considers the court to be functus officio in such circumstances. Others argue that the power of mercy framework in the Constitution is capable of fully incorporating an effective parole system in accordance with the Constitution, which may also include the court in its implementation, and should adopt some of the judicial tools on oversight, monitoring and reporting back on relief such as conditional release; see the Probation Act. These are valid legal and constitutional concerns but for another day.
13. Be that as it may, this petition also seeks consideration of time spent in custody under section 333(2) of the CPC which is quite apart from remission and parole.
14. The court will not therefore, concern itself with the appropriateness of the sentence imposed on basis of the post-sentence mitigation factors.



15. Of relevance is to avert the risk of suffering ‘...an excessive punishment...’ in the failure to give full effect to section 333(2) of the [CPC](#).
16. I have perused the record and observed that the applicant was first arraigned in court on January 22, 2014. He remained in custody since arraignment before the trial court. Accordingly, it is only fair and just, and the court orders that the sentence herein shall commence from January 22, 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

