



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
(CHERERE-J)**

HCCRMISC E024 OF 2025

**BETWEEN
MARK OSORO**

MAKORIAPPLICAN

**T
AND**

REPUBLIC.....

.....RESPONDENT

RULING

1. The applicant, Mark Osoro Makori, was arrested on 16th February 2023 and charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The charge arose from an incident alleged to have occurred on 15th February 2023 involving DKK, a child aged 13 years, at Birongo area within Masaba North Sub-County, Nyamira County.
2. On 26th November 2024, the applicant was convicted and sentenced to serve five (5) years' imprisonment.
3. The applicant has now moved the court seeking that the sentence be backdated to the date of his arrest pursuant to section 333 (2) of the Criminal Procedure Code, which provides that where a court imposes a sentence of

imprisonment, the sentence shall, unless the court otherwise directs, be deemed to commence from the date on which the offender was first detained in custody in connection with the offence.

4. The purpose of section 333 (2) of the Criminal Procedure Code is to ensure that the period spent in pre-trial custody is taken into account so that an offender does not serve a period in remand in addition to the sentence imposed, thereby resulting in a disproportionate punishment.
5. However, the application of section 333(2) of the Criminal Procedure Code cannot operate in a manner that undermines a statutory sentencing framework. The provision does not confer discretion to sustain or perpetuate a sentence that is inconsistent with a mandatory minimum sentence prescribed by statute.
6. Section 8(1) as read with section 8(3) of the Sexual Offences Act provides that a person who commits an act which causes penetration with a child aged between twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The complainant in this case was aged thirteen (13) years and therefore falls squarely within that statutory bracket.

7. The sentence of five (5) years' imprisonment imposed upon the applicant falls far below the mandatory minimum sentence prescribed by law. To backdate such a sentence or otherwise exercise discretion in a manner that would effectively sustain a sentence below the statutory minimum would be contrary to the clear provisions of the law.

8. In the circumstances, the sentence imposed is itself illegal, having been passed in contravention of the mandatory minimum sentence prescribed by statute. The applicant should in fact count himself fortunate that the respondent has not sought enhancement of the sentence so as to bring it into conformity with the statutory minimum prescribed by law.

9. Accordingly, the undated notice of motion seeking application of Section 333(2) of the Criminal Procedure Code is declined.

**DELIVERED AT NYAMIRA THIS 10th DAY OF March
2026**



**WAMAE.T. W. CHERERE
JUDGE**

Appearances

Court Assistant - Anita
Applicant - Present
For the DPP - Mr. Chirchir (SADPP)