



**Cheserek v Republic (Criminal Petition E010 of 2023)
[2024] KEHC 9941 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL PETITION E010 OF 2023
JRA WANANDA, J
JULY 31, 2024**

BETWEEN

RYSON KIPLAGAT CHESEREK PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was charged in Iten Senior Principal Magistrate’s Criminal Court Case No. E852 of 2021 with the offence of threatening to kill contrary to Section 223 of the Penal Code.
2. The particulars of the offence were that on 14/11/2021 in Kapkuto Sub-Location, Koibatek Location, Marakwet East within Elgeyo Marakwet County, he wilfully and unlawfully threatening to kill with an axe her own mother, Eunice Kimoi Cheserek.
3. The Petitioner pleaded not guilty and the matter proceeded to full trial after which the trial Court convicted the Petitioner. The Court, upon hearing the Petitioner’s mitigation and considering that the Petitioner had previous convictions, on 7/09/2022 sentenced him to 3 years imprisonment.
4. The Petitioner has now approached this Court with the Notice of Motion dated 04/12/2023, seeking re-sentencing under the proviso to Section 333(2) of the Criminal Procedure Code which requires that the period spent in custody during a criminal trial, before sentencing, be into account when computing sentence. The Petitioner thus prays that the 3 years sentence be computed to run from 14/11/2021, the date when he was arrested, instead of 7/09/2022 when he was sentenced.
5. In opposing the Application, the Respondent through Prosecution Counsel, Mr. Calvin Kirui filed Submissions dated 13/06/2024.
6. Counsel submitted that the Petitioner was arrested and arraigned in Court on 14/11/2021, and that the trial Court delivered its Judgment on 7/09/2022, about 10 months later. He argued that the trial



Court exercised its wisdom and mandate in imposing the sentence was in line with Section 223 of the Penal Code which provides for a sentence of up to 10 years imprisonment. According to Counsel, the Petitioner was given a lenient sentence which was within the trial Court's discretion and that he was also given a chance to mitigate during trial and the same was recorded and considered upon by the trial Court.

7. Counsel then cited the case of Hillary Kipkirui Mutai Vs. Republic [2022] eKLR and submitted that the Petitioner having been given a very lenient sentence, ought not to benefit from the proviso to Sections 333(2) above and urged the Court to dismiss the Petition.

Determination

8. The sole issue for determination is "whether the Petitioner is entitled to review of sentence under the proviso to Section 333(2) of the Criminal Procedure Code".

9. Section 333(2) of the Criminal Procedure Code provides as follows:

"Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

10. On the above provision, the Court of Appeal in the case of Bethwel Wilson Kibor Vs. Republic [2009] eKLR, (Supra) stated as follows:

"By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

11. The Judiciary Sentencing Policy Guidelines (2014) also provides as follows:

"The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

12. A perusal of the Charge Sheet contained in the trial Court record reveals that the Petitioner was arrested on 15/11/2021 and arraigned on 16/11/2021 when he took plea. There is no indication that he was granted bail or bond and I therefore trust that he remained in custody throughout the trial. Since he was then sentenced on 07/09/2022, the period spent by the Petitioner in custody was about 10 months.

13. From the Judgment, there is no indication whether in meting out sentence, the trial Court took into account the period spent by the Petitioner in remand custody. Article 50(2) (q) of the Constitution of



Kenya, 2010, gives the right to every accused person of a fair trial which includes “if convicted, to appeal to, or to apply for review by, a higher court as prescribed by law.” In the circumstances, I find that the Petitioner has established a case for review of the sentence but limited to the taking into account of the time spent in custody. This is what the Court had in mind in *Ahamad Abolfathi Mohammed & Another Vs. Republic* [2018] eKLR the Court of Appeal held that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section of the Criminal Procedure Code. By dint of section 333(2) of the criminal Procedure Code the Court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on June 19, 2012.”

Final Order

14. In the circumstances, I make the following Orders:

- i. The period that the Petitioner spent in remand custody between the date of arrest, namely, 15/11/2021, and the date of sentencing, namely, 07/09/2022, shall be subtracted in the computation of the sentence of 3 years imprisonment imposed against the Petitioner.
- ii. For avoidance of doubt therefore, the sentence or prison term of 3 years to be served by the Petitioner shall be computed as from the date of arrest, namely, 15/11/2021.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY 2024

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Petitioner – in person

Ms. Limo for the State

Court Assistant: Brian Kimathi

