



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lomong v Republic (Criminal Revision E004 of 2024)  
[2024] KEHC 10370 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10370 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL REVISION E004 OF 2024  
RN NYAKUNDI, J  
AUGUST 23, 2024**

**BETWEEN**

**ELD/1076/2021/LS NAKADI MORU LOMONG ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

*(( Inn the matter of Application of the Period Spent in Remand Custody Pursuant to Section 333(2) of the Criminal Procedure Code Cap 75 Laws of Kenya and Sentencing Policy 2016))*

**RULING**

**Introduction**

1. The Petitioner/Applicant herein was charged and convicted for the offence of murder against Lokori Ngoriachana and Emanman Lokori alias Lorimind Lokoel contrary to section 203 as read together with section 204 of the [Penal Code](#) and sentenced to serve 20 years' imprisonment.
2. The Petitioner/Applicant being aggrieved with the said decision filed a Miscellaneous Application No. E018 of 2023 for sentence review under sections 333(1)(2), 362, 364(1), 365 of the [Criminal Procedure Code](#) which application was dismissed by this Honourable Court.
3. Before me for determination is a notice of motion application dated 12<sup>th</sup> September, 2023 expressed to be brought under the provisions of section 333(2) of the [Criminal Procedure Code](#), cap 75 laws of Kenya and sentencing policy guidelines 2016. The Petitioner/Applicant seeks orders as follows:
  - a. That the Petitioner is seeking for orders of reduction of his sentence on time spent in remand custody under section 333(2) of the *Criminal Procedure Code* cap 75 laws of Kenya.
  - b. That the Petitioner is seeking for orders for his sentence to be deemed to commence on the date of arrest since he never went out on bond.



- c. That the Petitioner is praying for any other orders that it may deem fit for his circumstance.
  - d. That the Petitioner is praying to be present during the hearing and determination.
4. The application is supported by the annexed affidavit of Nakadi Moru Lomong where the Petitioner/ Applicant avers as follows:
- a. That I was arrested and charged with an offence of murder contrary to section 203 as read with 204 of the *Penal Code* on 28/03/2017 and sentenced to serve 20 years by SPM's Court Lodwar in case no E4/2017 on 18<sup>th</sup> November 2021.
  - b. That I did not plead guilty and therefore went for the full trial at the Lodwar High Court
  - c. That during the trial I did not secure any cash bail/bond and was in the entire period in prison custody until the conclusion of the case. The date of arrest 28/03/2017 to date of sentence 18/11/2021 which comes to 4 years and 8 months.
  - d. That the trial Judge upon conviction pronounced the sentence to commence from the date of conviction on 18/11/2021 rather than the date of arrest 28/03/2017 thus failing to comply with section 333(2) of the *CPC*.
  - e. That today 12<sup>th</sup> September 2023, I am seeking for orders to comply with section 333(2) of *CPC* and sentencing policy 2016 so that the Petitioner does not undergo excessive punishment.
  - f. That, the Petitioner is seeking a reduction of his sentence by 4 years and 8 months which he was in custody from his sentence of twenty (20) years.
  - g. That the Petitioner is praying for any orders that it may deem fit or suitable for his circumstance.

### **Analysis and Determination**

5. On perusal of the application and the submissions, the main issue for determination herein is whether the applicant is entitled to review of sentence under Section 333(2) of the *Criminal Procedure Code*.

#### The Law

6. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.
7. It bears repeating that, the High Court has the mandate under Article 165 (3) of the *Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the constitution, A further leapfrog development; under article 50(2)(p) of the *Constitution*:
- 50(2) Every accused person has the right to a fair trial, which includes the right—(p)to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing
8. The High Court, in *Stephene Kimathi Mutunga v Republic* [2019] eKLR held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing



fundamental rights and freedoms as enshrined in the Constitution. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.

9. In *Michael Kathewa Laichena & Another v Republic* [2018] eKLR Majanja J. stated: “by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.
10. Article 50(6) of the *Constitution of Kenya* 2010 states that; A person who is convicted of a criminal offence may petition the High Court for a new trial if—(a) the person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and (b) new and compelling evidence has become available.
11. Section 333(2) of the *Criminal Procedure Code* provides: -

“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.”
12. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody.
13. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR where 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 333(2) 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 19<sup>th</sup> June 2012.”

14. The same court in *Betbwel Wilson Kibor vs Republic* [2009] eKLR expressed itself as follows: -

“By provision to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into 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 22<sup>nd</sup> September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

15. According to *The Judiciary Sentencing Policy Guidelines*:

"The provision 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."

16. This court is empowered by Article 165(6) of the *Constitution of Kenya* to review a decision by a subordinate court. Article 165(6) provides: -

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

17. The applicant was arrested on 28<sup>th</sup> March 2017 and convicted on 18<sup>th</sup> November 2021. Notably, the Applicant/Petitioner has not contested the sentence, he only seeks to have the duration he spent in custody be taken into account which is his legal entitlement in my considered view.

18. However, I note that during the sentencing of the Applicant/Petitioner herein on 18<sup>th</sup> November 2021, the Honourable Court stated that the learned Advocate of the Applicant urged this court to take into account the fact that the accused has been in custody since 2017 and the learned advocate further pointed out that the accused is remorseful hence this court should mete out a lenient sentence. The learned judge said that, "having considered the presentence report, the mitigating factors and the circumstances of the commission of the offence, I have come to the conclusion that the Accused deserves a custodial sentence. Nakadi Moru Lomon is hereby sentenced to serve 20 years' imprisonment."

19. I have considered the application and all the information available. It is thus crystal clear that the learned Judge took into consideration the provisions of section 333(2) of the *Criminal Procedure Code* while sentencing the Applicant/Petitioner herein. I am therefore inclined not to interfere with the 20 years' imprisonment imposed to the Applicant. Consequently, this application is devoid of merit and the same is dismissed.

**DATED SIGNED DELIVERED AT ELDORET THIS 23<sup>RD</sup> DAY OF AUGUST, 2024**

.....  
**R. NYAKUNDI**  
**JUDGE**

