



**Makeba v Director of Public Prosecution (Miscellaneous Criminal Application
E016 of 2022) [2023] KEHC 561 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL APPLICATION E016 OF 2022
F GIKONYO, J
JANUARY 31, 2023**

BETWEEN

ALEX RUGA MAKEBA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(Revision of Original Sentence in Narok CMCR No. 790 of 2018; conviction by Hon.
G. N. Wakabiu (C.M.) ON 15/03/2022 and Sentence by Hon. D. B. Ngayo(R.M.)*

RULING

Time spent in Custody

1. By an undated application received in court on May 5, 2022, the applicant is seeking orders that time spent in remand custody prior to conviction be considered pursuant to section 333(2) and 38 of the [Criminal Procedure Code](#), Articles 2,10, 19(3), 22(1) (3), 23, 25(c),27(1) (2), 28, 29(f),27(1), (2), 50(2), (q), 159, 160(1),165(3) (b) 259 and the sixth schedule (article 262) rule 7 (1) of the [Constitution](#).
2. The applicant averred in his supporting affidavit that he was charged and convicted of the offence of conspiracy to commit a felony namely stealing and sentenced to serve 4 years imprisonment.

Applicant's Submission

3. The applicant argued that he is seeking time spent in custody to be considered in his case No 790/2018.

Prosecution's Submission

4. Ms. Torosi urged the court to look at the court records and rule.



Analysis And Determination

5. The application herein is premised upon section 333(2) of the [Criminal Procedure Code](#) which provides that: -

“Subject to the provisions of section 38 of the Penal Code (cap. 63) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

6. Section 333(2) of the [CPC](#) appertains to fair trial. Its purport has been explained in Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) as follows:

“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.”

7. Courts are therefore bound to give real effect of section 333(2) of the [Criminal Procedure Code](#) ([Ahmad Abolfathi Mohammed & another v Republic](#) [2018] eKLR, and [Bethwel Wilson Kibor v Republic](#) [2009] eKLR).

8. Is there a violation of section 333(2) of the [CPC](#) herein?

Applying the test

9. I have perused the records of the trial court. The applicant herein was convicted for the offence of conspiracy to commit a felony contrary to section 393 of the [Penal Code](#) in Narok CMCR No. 790 of 2018. They were sentenced to serve 4 years imprisonment. In sentencing them, the trial court (Hon. D. B. Ngayo (R.M)) stated as follows: -

“6. Given all the foregoing factors, and while having regard to the sentencing policy guidelines as well as the mitigation by the accused, I find that there are aggravating circumstances in this case to justify imposition of a jail term. Accordingly, and while having regard to the time already spent in custody, I sentence the accused to four (4) years imprisonment. For avoidance of doubt, the sentence herein will start running from the date of conviction.”

10. The trial magistrate was alive to the fact that the accused person was in custody during the pendency of the case or during trial- a fact he categorically stated he had taken into account. In passing sentence, the trial magistrate exercised discretion despite the minimum sentence of 7 years imprisonment as prescribed in section 393 of the [Penal Code](#). See the section below, that:

“393. Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the



greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.”

11. In the circumstances of this case, the sentence as passed was not only lenient but also took account of the time spent in custody under section 333(2) of the CPC. I, therefore, do not find any merit in the application. Consequently, the application is dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 31ST DAY OF JANUARY, 2023

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F. GIKONYO M.

JUDGE

In the Presence of:

Ms. Koina for DPP

Applicant

Mr. Kasaso - CA

