



REPUBLIC OF KENYA



**Elias v Republic (Petition E004 of 2022) [2023] KEHC 751 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 751 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
PETITION E004 OF 2022  
LW GITARI, J  
JANUARY 26, 2023**

**BETWEEN**

**NICHOLAS KINEGENI ELIAS ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Petitioner herein, vide an undated Notice of Motion application that was filed before this Court on June 8, 2022 sought for the following main orders:
  - i. That the Petitioner is poor and unable to pay for the costs of this petition.
  - ii. That this Court to specify how time spent in custody should be taken into account.
2. The application is based on the grounds on the face of it and is supported by affidavit of the Petitioner that was commissioned on March 31, 2022.
3. The application is not opposed.
4. The application is expressed to have been brought under the provisions of Section 333(2) of the Criminal Procedure Code (CPC) and Articles 19, 20, 22, 23, 25, 27, 28, 29, 50, 51, 51, 159, and 165 of the Constitution of Kenya.
5. Section 333(2) of the Criminal Procedure Code provides as follows:

“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. This position is also contained under Clauses 7.10 and 7.11 of the Judiciary [Sentencing Policy Guidelines](#) which state:
  7. 10 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.
  7. 11 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. The Court of Appeal in the case of [Abamad Abolfathi Mobammed & another v Republic](#) [2018] eKLR held as follows in this regard:
 

“The appellants have been in custody from the date of their arrest on 19th June 2012. 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(s) 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.”
8. From the records presented before this court, it would seem that the accused was arrested on July 7, 2014 and arraigned in court on July 9, 2014. He was charged with assault causing actual bodily harm contrary to Section 251 of the [Penal Code](#). He denied the charge. However before the trial commenced, the charge was amended and the applicant was charged with the offence of robbery with violence contrary to Section 296 (2) of the [Penal Code](#). As at the time the charge was amended, the applicant was still in custody as he had not been released on bail.
9. The Petitioner, while standing his trial, remained in custody from July 7, 2014, when he was arrested, until August 11, 2016 when the trial court delivered the judgment in the matter. The Petitioner was then sentenced to death. The Petitioner appeal against both his conviction and sentence, and by a judgment that was delivered on January 21, 2019, the said appeal was dismissed. The death sentence was set aside and the appellant was sentenced to serve twenty (20) years imprisonment.
10. It would seem that the applicant was in custody from July 9, 2014 upto August 11, 2016 as he awaited for the trial before the trial magistrate. This is a period of two years, (2) one (1) month and four (4) days. At the time he was sentenced to twenty years imprisonment by the High Court, he had spent another two (2) years, four (4) months and twenty one days. The petitioner had therefore spent a total of four (4) years, five months and twenty five days. It is my view that upon the death sentence which was imposed by the trial magistrate being set aside and a sentence of imprisonment being imposed,



the period the applicant had spent in prison awaiting his trial and his appeal, should have been taken into account to reduce the sentence imposed. The court of Appeal in the case of *Ahamad Ablofathi Mohamed & Another –v- Republic* (*//supra*) stated that:

“Taking into account” the period spent in custody means considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody.”

Section 333(2) of the Criminal Procedure Code is couched in mandatory terms and gives the court the power, authority and jurisdiction to include the period already spent in custody in the sentence that it metes out to the accused person.

As I have already observed, the period that the applicant spent in custody was not taken into account to reduce the sentence eventually imposed on the applicant. To this end and I find that the application before me has merits.

**In conclusion:**

1. The application by the applicant is allowed.
2. The period of four (4) years five (5) months and twenty five (25) days which the applicant had spent in prison before the sentence was imposed on him shall be taken into account to reduce the sentence imposed on the applicant.
3. The sentence of imprisonment shall therefore run from July 7, 2014.
4. The Deputy Registrar to issue an amended committal warrant and serve it on the officer-in-charge of the Prison where the accused is serving the sentence.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 26<sup>TH</sup> DAY OF JANUARY 2023.**

**L W GITARI**

**JUDGE**

