



REPUBLIC OF KENYA



**Kiruo v Republic (Petition E009 of 2022) [2023] KEHC 752 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 752 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
PETITION E009 OF 2022  
LW GITARI, J  
JANUARY 26, 2023**

**BETWEEN**

**ELIAS MWENDA KIRUO ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The petitioner herein, *vide* an undated notice of motion application that was filed before this court on October 24, 2022 sought for following main orders:
  - i) That this honourable court be pleased to allow the petitioner’s petition under section 333(2) of the *Criminal Procedure Code* (CPC).
  - 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 October 24, 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 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 Mohammed & another v Republic \[2018\] eKLR](#) held as follows in this regard:

“The appellants have been in custody from the date of their arrest on June 19, 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 June 19, 2012.”

8. From the trial court’s record, the petitioner was arrested on May 31, 2019. On June 3, 2019, the trial court ordered that he could be released pending trial on a surety bond of Kshs 200,000/= or a similar cash bail. One Francis Kirugo Gaichu of identification number 7721246, the father to the petitioner, applied on June 7, 2019 to stand as a surety for the petitioner on the said bond terms. The said surety application was approved but the petitioner failed to pay the bond amount.

9. Consequently, 5 (five) witnesses in the support of the prosecution’s case testified before the petitioner testified in support of his case on October 22, 2019. The judgment in the matter was delivered on October 30, 2019. The petitioner, while standing his trial, remained in custody from May 31, 2019, when he was arrested, until October 30, 2019 when then trial court delivered the judgment in the matter. The petitioner was then sentenced to 20 years’ imprisonment. The petitioner appealed against both his conviction and sentence, and by a judgment that was delivered on March 4, 2021, the said appeal was dismissed.



10. From the foregoing, it follows that the petitioner spent time in custody from the date of his arrest and throughout his trial. This equates to a total of 5 months that the petitioner spent in prison while undergoing trial. From the provisions of section 333(2) of the *Criminal Procedure Code* quoted herein above, it follows that the petitioner's present application has merit.

### **Conclusion**

11. From the foregoing, I opine that the 5 months that the petitioner spent under custody while undergoing trial should have been taken into account by the trial court to proportionately reduce the sentence imposed. As such, the 20 (twenty) years sentence meted against the petitioner should be reduced by five months.

I therefore allow the petition. I order that the sentence imposed on the petitioner shall run from May 31, 2019 the time he was remanded in custody to await trial. The deputy registrar to issue an amended committal warrant and serve it on the officer in charge of the prison where the petitioner is serving his sentence.

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

**L W GITARI**

**JUDGE**

