



**Njoroge v Republic (Miscellaneous Criminal Application  
E089 of 2021) [2023] KEHC 322 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 322 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CRIMINAL APPLICATION E089 OF 2021**

**A. ONG'INJO, J  
JANUARY 26, 2023**

**BETWEEN**

**FRANCIS GITHUTHE NJOROGE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Francis Githuthe Njoroge through an application filed on October 26, 2021 seeks that the Honourable Court be pleased to award him the 2 years, 2 months and 24 days spent in remand as provided for under Section 333 (2) of the *Criminal Procedure Code* cap 75 Laws of Kenya. Further that the Honourable court be pleased to commute the remainder of the sentence of 1 year 12 days to a non- custodial sentence as provided for under Section 24 (b) of the *Penal Code* Cap 63 and Section 3 (1) (b) (2) (a) (b) (vii) of the *Community Service Order Act* No. 10 of 1998 in consideration of his diabetic medical condition.
2. His grounds are that he was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. That he was arrested on 16<sup>th</sup> June 2011 and held at Kaloleni Police Station for 14 days and on 30<sup>th</sup> June 2011, he was remanded at Shimo La Tewa Maximum Prison. That on 3<sup>rd</sup> September 2013, he was released and out on bond up to 1<sup>st</sup> October 2015 when the said bond was cancelled in preparation for judgment on conviction and sentencing. That he was convicted and sentenced to serve 12 years for the offence of Manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code* by Lady Justice Maureen A. Odero (Hon.) at Nakuru High Court on 8<sup>th</sup> October 2015. That his sentence was remitted to 8 years by the Kenya Prisons Services Pursuant to Section 46 (2) of the *Prisons Act* Cap 90 Laws of Kenya. That he was in remand for a total of 2 years 2 months and 24 days. That by 30<sup>th</sup> June 2020, he had spent 4 years, 8 months, and 24 days of the 8 years awarded after remission. That after deduction of the total period spent in remand, he was left with one year 12 days to spend in prison. That the Applicant filed an appeal in the Court of Appeal against



the High Court judgment which has not been heard to date but he has since made an application for withdrawal of the same.

3. The application was canvassed by way of written submissions filed in court on 26<sup>th</sup> October 2021 where emphasis was laid on the cases of *Elizabeth Mwiya v Republic*, Misc. Application No. 62 of 2018, *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR Criminal Appeal No. 135 of 2016 and *Vincent Sila Jona and 87 Others v Republic* [2021] eKLR Constitution and Human Rights Petition No. 15 of 2020 where the courts applied Section 333 (2) of the *Criminal Procedure Code* where in sentencing the courts are required to factor in the period spent in remand.
4. Section 333(2) of the *Criminal Procedure Code* upon which this application is premised provides: -

“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 (emphasis mine).”
5. In the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) it is provided that: -

“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.”
6. Upon perusal of the application and the judgment in High Court Criminal Case No. 22 of 2011 delivered on 22<sup>nd</sup> April 2015, it is indicated that the applicant was sentenced to 12 years imprisonment on 8<sup>th</sup> October 2015, although he alleged that he was in remand custody for 2 years, 2 months and 24 days, this court has not had the opportunity to peruse the proceedings in the trial court as they were not provided to establish this fact. It is however true that the Applicant is entitled to a remission of 1/3 of his sentence in the Kenya *Prisons Act* and that he would therefore be due for release on 8<sup>th</sup> October 2023. In consideration of the period served, this court finds that the same is sufficient to rehabilitate the applicant and is therefore released forthwith unless lawfully held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,**

**THIS 26<sup>TH</sup> DAY OF JANUARY 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

**Ogwel- Court Assistant**

Mr. Ngiri for Respondent

Applicant present in person

**HON. LADY JUSTICE A. ONG'INJO**



**JUDGE**

