



REPUBLIC OF KENYA



KENYA LAW
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**Daro v Republic (Criminal Petition E002 of 2022)
[2023] KEHC 1649 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 1649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL PETITION E002 OF 2022**

JN NJAGI, J

JANUARY 18, 2023

BETWEEN

ABDIRAHMAN DAWA DARO PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The petitioner has approached this court under the provisions of article 50 (2)(p) of the *Constitution of Kenya 2010* which pertains to right to fair hearing. His case is that he filed an appeal at the High Court in Marsabit High Court Criminal Appeal No.14 of 2017 challenging a conviction at the lower court where on the November 21, 2017 he was found guilty of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to suffer death. The appeal on conviction was unsuccessful but the High Court (Chitembwe J.) substituted the death sentence with 15 years imprisonment. The petitioner now argues that the High Court did not consider the period spent in custody when it imposed the sentence of 15 years' imprisonment. He urges this court to make a finding to that effect and order that the sentence of 15 years imprisonment commences from the time of arrest, which was on March 21, 2017.
2. The application is made pursuant to section 333 (2) of the *Criminal Procedure Code* which requires a court when sentencing an accused person who has been in custody during trial to take into account the period spent in custody. In the instant case the Judge who heard the appeal ordered that the sentence commences from the date of conviction, which was on November 21, 2017.
3. The Petitioner filed written submissions. The Prosecution Counsel did not tender any submissions. He stated that they were conceding to the orders sought in the petition.



4. In urging the court to order that the sentence commences from the date of arrest the Petitioner made reliance on the decision of the Court of Appeal in *Abamad Abolfathi Mohammed vs Republic* (2018) eKLR where it was held that:

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.

5. I have considered the grounds adduced in support of the petition. The issue raised by the petitioner concerns sentencing. It is to be noted that sentencing is essentially an exercise of discretion by the trial court - see *Bernard Kimani Gacheru v. Republic*, Cr. App No. 188 of 2000.
6. It is clear from the judgment of the Judge who sentenced the Petitioner that the Judge had the provisions of section 333(2) in mind when he ordered that the sentence commences from the date of conviction. Whether or not the Judge was correct in ordering that the sentence runs from the date of conviction and not from the date of arrest is a question that should be raised in an appeal and not in a review of the sentence by this court. This court has no power to review the orders of a Judge of concurrent jurisdiction where the issue complained of ought to be raised with an appeal court. It is to be noted that in the case of *Abamad Abolfathi Mohamed* (supra) that the Petitioner relied on, it is the Court of Appeal which dealt with the matter on appeal and not the High Court. It is therefore my finding that I have no power to interfere with the sentence imposed by Justice Chitembwe.
7. The upshot is that the petition lacks merit and is dismissed.

Delivered virtually, dated and signed at Nairobi this 18th day of January 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ochieng for Respondent

Appellant – present virtually at Marsabit Law Courts

Court Assistant -Abdow

14 days R/A.



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