



**Koech v Republic (Miscellaneous Criminal Application
E009 of 2022) [2023] KEHC 2508 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CRIMINAL APPLICATION E009 OF 2022**

**RL KORIR, J
MARCH 29, 2023**

BETWEEN

PHILIP KOECH APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Philip Koech, the Applicant herein was charged with the count of stealing a motor cycle contrary to section 278A of the *Penal Code*. He was also charged with the second count of having suspected stolen property contrary to section 323 of the *Penal Code*.
2. A trial was conducted and the Accused was found guilty on the 1st charge (stealing a motor cycle contrary to section 278A of the *Penal Code*) and was convicted and sentenced to serve 4 years in prison by Hon. Omwange J.
3. The Applicant was acquitted on the second charge.
4. The Applicant filed an Application on February 22, 2023 where he sought to have the time he spent in custody be included in his Sentence. He stated that the trial court failed to take into account the period that he has spent in custody i.e. from May 25, 2019 to February 3, 2022.
5. It was the Applicant's case that the trial court failed to order that the sentence commence from the date he was arrested. He submitted that he wanted the court to take into account the time he had spent in custody.
6. Mr. Njeru, the prosecution counsel did not oppose the application and he left it to the court's discretion.
7. Upon considering the Application, the trial court proceedings and the Applicant's submissions, the only issue for determination is whether the Application is merited and sentence ought to be reduced.



8. In the circumstances of the case, the relevant section of law is 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.

9. The foregoing provision of the law imposes an obligation on the trial court to take into account the period the Accused has spent in Remand in the determination of an appropriate sentence. The Court of Appeal in *Abmad Abolfatbi Mohammed & another* (2018) eKLR held thus:-

“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(2) 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.”

10. Similarly in the case of *Bukenya vs Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013), the Supreme Court of Uganda stated that:-

“Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement.”

11. The Judiciary Sentencing Policy Guidelines at paragraphs 7.10 and 7.11 state 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.”

12. The Applicant was arrested on May 28, 2019. From a perusal of the court record, the Applicant was also convicted on June 3, 2019 by the Principal Magistrate’s Court in Criminal Case Number 449 of 2019 for the offence of stealing stock. He was sentenced to serve 5 years imprisonment. From the record, there are no bond or bail proceedings which means that the Accused was in pre-trial custody from the date of his arrest (May 28, 2019) until he was convicted and sentenced by the trial court in Keroka (June 3, 2019) which is a period of 5 days.
13. The Applicant was sentenced by the trial court in Sotik on February 3, 2022 where he was sentenced to serve 4 years imprisonment. In its Ruling, the trial court considered that the Applicant was a repeat offender.
14. In sentencing the Accused, the court made no mention on when the sentence was to run in view of the fact that the Accused was already serving a sentence for an earlier offence. Section 14 of the Criminal Procedure Code provides as follows:-
 - (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
15. It is therefore lawful to pass consecutive sentences in the circumstances prescribed above. In Peter Mbugua Kabui vs Republic (2016) eKLR the Court of Appeal stated as follows:-

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.” (Emphasis added)
16. The Applicant was dishonest when he stated that he wanted the time he spent in custody to be accounted for in his sentence. According to him, he was in pre-trial detention from the date of his arrest (May 28, 2019) to the date of his sentencing (February 3, 2022).
17. It is my finding that the Accused was in pre-trial detention for only 5 days. As indicated earlier in this Ruling, the Applicant was serving a lawful sentence in prison from June 3, 2019 and was still serving the same sentence when the trial court in Sotik sentenced him on February 3, 2022. Therefore aside from the 5 days, the issue of pre-trial detention does not exist.
18. In the end, the notice of motion application filed on February 22, 2023 has no merit and is hereby dismissed. The Applicant shall serve the sentence imposed by the trial court.

Orders accordingly.

Ruling delivered, dated and signed this 29th day of March, 2023.

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R. LAGAT-KORIR



JUDGE

Ruling delivered in the presence of the Applicant, Ms. Boiyon holding brief for Mr. Njeru for the State and Siele (Court Assistant)

