



**Kipkemoi v Republic (Miscellaneous Criminal Application
E106 of 2021) [2023] KEHC 3947 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E106 OF 2021**

JN KAMAU, J

APRIL 25, 2023

BETWEEN

JOHN KIPKEMOI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Applicant herein, together with others, was charged and tried for the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* on Count I, conveying suspected stolen property contrary to Section 323 of the *Penal Code* on Count II and handling stolen goods contrary to Section 322(1)(2) of the *Penal Code* on Count III. He was convicted of the offence of handling stolen goods contrary to Section 322(1) of the *Penal Code* and was sentenced to three (3) years imprisonment.
2. Being dissatisfied with the said decision, he filed the present application for review of sentence on December 22, 2021. His application was premised on Section 333(2) of the *Criminal Procedure Code*.
3. In his affidavit in support thereof, he urged this court to consider the time he had spent in custody prior to his conviction, which was a period of seven (7) months and two (2) days, a fact that he reiterated in his Written Submissions that were filed on February 28, 2023. He pointed out that he was arrested on March 16, 2021 and was convicted on October 18, 2021. In that regard, he relied on the case of *Abolfathi Mohamed & Said Mansour Mousavi vs Republic* [2018] eKLR.
4. He asserted that he was married with two (2) wives and five (5) children who had been suffering since his incarceration and that the children risked dropping out of school. He added that he was remorseful of the actions that led to the criminal activity and was reformed. He contended that he had trained in Grade 3 masonry (industrial training) and prisoner's journey which skills he believed would enable him integrate well back to society and avoid crime.



5. He pleaded with this court to consider granting him Community Service Order (CSO) pursuant to the recent directives by the Hon Chief Justice on prison decongestion and community service order.
6. The Respondent was not opposed to his prayer under Section 333(2) of the *Criminal Procedure Code*. In its Written Submissions that were filed on February 28, 2023, it conceded that the period the Applicant spent in custody between March 25, 2021 and October 18, 2021 when he was arraigned in court and sentenced respectively ought to be considered.

Legal Analysis

7. Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) 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.”
8. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Abamad Abolfathi Mohammed & Another vs Republic (supra)*.
9. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines provide 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.”
10. A reading of the Trial Court’s Judgment showed that the Learned Trial Magistrate did not consider the provisions of Section 332 (2) of the *Criminal Procedure Code* while imposing the sentence upon the Applicant herein. He rendered himself as follows:-

“The probation reports for all three accuseds are not favourable. I therefore sentence each accused to serve 3 years in jail. 14 days right of appeal.”
11. A perusal of the Charge Sheet showed that the Applicant was arrested on March 16, 2021. A reading of the proceedings showed that he was sentenced on October 18, 2021. He was never released on bond. He had therefore stayed in custody for seven (7) months and two (2) days before he was convicted, a period which ought to be taken into account at the time of computing his sentence. The question of whether or not this court could substitute his sentence with CSO was a different matter altogether.
12. Section 3 (1) (a) and (b) of the *Community Service Order Act* No 10 of 1998 stipulates that:-
 - “1. Where any person is convicted of an offence punishable with—
 - a. imprisonment for a term not exceeding three years, with or without the option of a fine; or



- b. imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service."

13. Further, Section 3(10) of the [Community Service Order Act](#) provides that:-

"Subsection (1) of this Act shall not apply to a person who is convicted under the following legislation—

- a. the Anti-Corruption and Economic Crimes Act, 2003 (No 3 of 2003);
- b. the Sexual Offences Act, 2006 (No 3 of 2006);
- c. the Prohibition of Female Genital Mutilation Act, 2011 (No 32 of 2011);
- d. the Prevention of Terrorism Act, 2012 (No 30 of 2012);
- e. the Proceeds of Crime and Anti-Money Laundering Act, 2009 (No 9 of 2009);
or
- f. the Bribery Act, 2016 (No 47 of 2016)."

14. As submitted by the Applicant, there is currently an exercise for decongestion of prisons, which exercise will be conducted continuously pursuant to the directions of the Hon Chief Justice Martha Koome that were issued on December 7, 2022.

15. As the offence the Applicant had been charged with was not excluded in Section 3(10) (a)- (f) of the [Community Service Order Act](#), the process for review of the sentence under the said Act could be initiated by the Prison where he is being currently held for consideration by this court as he cannot initiate the same."

Disposition

16. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Application lodged on May 6, 2022 was merited and the same be and is hereby allowed.

17. It is hereby ordered and directed that the period of seven (7) months and two (2) days being the period the Applicant spent in custody between March 16, 2021 and October 18, 2021 being the date of his arrest and the date he was convicted respectively be taken into account when computing his sentence in accordance with Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).

18. The Prison where the Applicant is currently being held is at liberty to initiate the process for review of his sentence under the [Community Service Order Act](#) if he is found to be suitable for such release in line with the directions of the Hon Chief Justice Martha Koome.

19. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL 2023



M. S. SHARIFF

JUDGE

