



**Ngugi v Republic (Miscellaneous Criminal Application
E073 of 2021) [2023] KEHC 20431 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS CRIMINAL APPLICATION E073 OF 2021**

**G MUTAI, J
JUNE 30, 2023**

BETWEEN

JOHN NJOROGE NGUGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Freedom is sweet. The applicant has moved the court for umpteenth time seeking freedom.
2. The petitioner was charged, convicted by the learned Senior Principal Magistrate, I. Thuku on May 29, 2019 in case Ngong CMCC 83 of 2017. He filed an appeal *vide* Kajiado Criminal Appeal No 25 of 2019. In the petition of appeal dated June 4, 2019 the appellant sought to analyse the decision of the learned magistrate.
3. The court, Mwita J the court quashed count 4 and affirmed sentence in count 1. Conviction in counts in courts 1 and II affirms sentence in court and relied with fear in jail to run concurrently.
4. The court below had sentenced the accused to 5 years in prison for counts 1 -11 each. The sentences were to run concurrently. The High Court ordered in HCCA 2 5 of 2019 made its decision on the sentence. The finding is binding as this court has no jurisdiction to overturn a decision of a court of competent jurisdiction. However, the applicant has made another application based on section 333 (2) of the *Criminal Procedure Code*.
5. The appellant thereby prays that he is entitled to equal protection and benefit of law. He is of the view that he was arrested on January 3, 2018. He alleged to have suffered. The court notes that as per section 333 (2) of the *CPC* commences on January 3, 2018 when he was arrested and excluded any period he was on bond.



6. All the sentences of the judgment in Kajiado HCCR No 25 of 2019 John Njoroge Ngugi v Republic to remain , except the commencement date of arrest. The record indicates that the appellant has already had his cake and has eaten it. The sentence he is serving is lawful. Therefore, he must equally get the benefit of serving a lawful sentence.
7. On perusal of the application and the submissions, the main issue for determination herein is whether the applicant is entitled to review of sentence under section 333(2) of the Criminal Procedure Code in spite of having appealed to this court successfully. The appellant had successfully appealed *vide* in Kajiado High Court criminal appeal number 25 of 2019. The court herein reduced the sentence and quashed some counts on May 4, 2020.
8. This application was filed soon thereafter in 2021. The issue is whether the applicant is entitled to the benefits of section 333 section 333(2) of the Criminal Procedure Code, which provides as doth:-

“Subject to the provisions of section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”
9. The state opposed that the court is not entitled to consider the same. However, there was no evidence shown that the accused was otherwise lawfully held. He according to the charge sheet upon arrest on May 27, 2015. Though the case appears to be a 2017 matter, it was pursuant of transfer to the Kajiado Court from Kibera Law Courts.
10. The court has no option than to consider the period in lawful custody in respect of this matter. It could be a different matter, if he is already serving another sentence. This was seen in the decision of Boniface aHon Lady Justice Muchemi stated as doth: -
11. The provisions of section 333(2) of the Criminal Procedure Code was the subject of the decision in Abamad Abolfathi Mohammed & another v Republic [2018] eKLR where the Court of Appeal held that:-

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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. 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.”

12. It is clear from the above proviso that the law requires courts while sentencing do take into account the period the accused spent in custody.

13. In the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR, the court expressed itself as follows: -

“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at September 22, 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

According to The Judiciary Sentencing Policy Guidelines:

“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.”

14. On the other hand, Justice L Gitari also held as follows in *Republic v Eliphias Kirimi Kithinji* [2020] eKLR: -

“The section provides that the period spent in lawful custody must be taken into account when passing sentence and upon conviction lawful custody starts to run on the day the petitioner was arrested for cognizable offence and ends on the date he is admitted to bail and if he remains in custody, on the date the sentence is imposed.

15. Though the two judges appear to be of the same position, they are saying a different thing. The section 333(2) does not go into the length of the judgment but to the commencement of the judgment. It does not affect the length of the sentence or otherwise reduce it in some judicious way. It is a mathematical question. It converts the actual days spent into custody to part of the sentence meted out.

16. Even if it is 2 days. In a case of this nature where the appellant was in custody then released on bond, the few days in custody shall be taken into consideration while excluding the entire period he was on bond.

17. Therefore, the period of 39 days from March 27, 2015 when the accused was arrested to May 4, 2015, the time he was released on cash bail shall be deducted from his sentence.

18. Otherwise the sentence imposed by this court in Kajjado High Court criminal appeal number 25 of 2019 continues save for the deduction of those days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE 2023 VIA MICROSOFT TEAMS.



GREGORY MUTAI

JUDGE

In the presence of:-

Ms. Nyaroita for the State;

The Applicant in person

Mr. Arthur Ranyundo – Court Assistant

