



**Okoro v Prosecution (Criminal Petition E028 of 2021)
[2023] KEHC 20997 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL PETITION E028 OF 2021
SC CHIRCHIR, J
JULY 28, 2023**

BETWEEN

NGOLO PATRICK OKORO APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGMENT

1. The petitioner herein seeks for a review of sentence. The petition is Premised on Article 165 (3)(b) of [the Constitution](#) and Section 333(2) of the [criminal procedure code](#). From what I can decipher from the supporting affidavit, petitioner’s contention is that the period he had spent in custody was not factored in, when the sentence was meted out.
2. The application is not opposed by the Respondent.

Determination

3. Section 333(2) of the [Criminal Procedure Code](#) provides as follows;

“(2) 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.”
4. The Kenyan Judiciary sentencing policy guidelines in paragraph 7.10 provides as follows: “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 has been in custody during trial. Failure to do so impacts on



the overall period of detention which may result in excessive punishment that is not proportional to the offence committed”

5. In the case of *Abamad Abolfathi Mobammed & Ano vs Republic* (2018) e KLR, the court of Appeal held: 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 he had taken into account the period the appellants had been in custody, he ordered that their sentences shall take effect from the date of their conviction before 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 conviction because that amounts to ignoring altogether the period already spent in custody.”
6. I have perused the trial’s court record in Mumias S.O case no. 429 of 2018 and notice that the trial court failed to factor in the period spent in remand. There was no compliance therefore with the proviso to section 333(2) of the criminal procedure code, the judiciary sentencing policy guidelines, and past decisions on the subject.
7. I have also perused the record of the High court in Kakamega High Court Criminal Appeal No. 105/2015. While confirming the sentence as passed by the trial court, the high court did not also factor in the period spent in custody.
8. I have also taken note of the fact that the Respondent herein has conceded to his anomaly.
9. I consequently allow this petition. The Applicant’s sentence shall be reduced by 1 year 4 months, being the period he had spent in custody prior to the conviction and sentencing by the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JULY, 2023

S. CHIRCHIR

JUDGE

In the presence of:-

