



**Ngowa v Republic (Criminal Appeal E011 of 2022)  
[2023] KEHC 21983 (KLR) (31 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21983 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E011 OF 2022  
DKN MAGARE, J  
AUGUST 31, 2023**

**BETWEEN**

**WANJE MWADORI NGOWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is an is an appeal from the judgment and sentence of the Hon Dr Julie Oseko in lower court Criminal Case Malindi No SO 24/2017 in the chief magistrate’s court at Malindi given on December 18, 2018. I have seen that the appellant was arrested on July 14, 2017.
2. Though granted bond of Kshs 200,000/=, he appears not to have utilized the same. I have seen committal warrants showing that the appellant has been in custody since arrest on 14/7/2017.
3. In the morning today in remand were not taken into consideration pursuant to section 333(2) of the *Criminal Procedure Code*. The state conceded that particular aspect and asked that I rely on the record. The said Section 333 provides as follows: -

“Warrant in case of sentence of imprisonment

- (1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
- (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. My understanding of this section is not that the court takes into account in reduction of sentence. The period is mathematically had regard of and that period counted in computing the period served.
5. It is not a nebular period but exact period. In *Boniface Mugo Maingi v Republic* [2021] eKLR Justice F. Muchemi stated as follows: -

“ 11. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Ahamad Abolfathi Mohammed & Another vs 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.”

6. This is in line with 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



7. It is established that the appellant was, according to the charge sheet arrested on 14/7/2017. He was arraigned in court on 17/7/2017. He was convicted and sentenced to 10 years in prison on 18/12/2018. He was in custody the whole of that period.
8. Consequently, I find that the Appellant is entitled to have the period he was in custody taken into account.
9. I therefore direct that the sentence of 10 years meted out shall run from the date of arrest, that is 14/7/2017.

#### **Determination**

10. The upshot of the foregoing, I make the following orders: -
  - a. The appeal is allowed to the extent only that the sentence of 10 years given in Malindi CMC SO No 24 of 2017 is confirmed. However, the same shall run from the day of arrest, that is, July 14, 2017, pursuant to section 333(2) of the *Criminal Procedure Code*.
  - b. File is closed.

**DELIVERED, DATED AND SIGNED AT MALINDI ON THIS 31<sup>ST</sup> DAY OF AUGUST, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM AND  
PHYSICALLY IN OPEN COURT.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

Miss Mutua for the state

Appellant in person

Court Assistant - Jungo

