



**Eregae v Republic (Criminal Miscellaneous Application E051 of 2023)
[2023] KEHC 24038 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL MISCELLANEOUS APPLICATION E051 OF 2023
RN NYAKUNDI, J
OCTOBER 25, 2023**

BETWEEN

PETER EREGAE APPLICANT

AND

REPUBLIC RESPONDENT

(Being a review from original conviction and sentence in Lodwar Senior Principal Magistrates Court Criminal Case No. E718 of 2021 by Hon. D Orimba SPM on 21ST February, 2023)

RULING

Coram;

Before Justice R. Nyakundi

Mr Yusuf for State

1. The applicant was convicted with the offence of Burglary Contrary to section 304 (2) and stealing contrary to section 279(b) of the [penal code](#) and was sentenced to 3 years imprisonment under section 304(2) of the [penal code](#) and to serve 5 years under section 279(c).
2. The particulars of the charge were that on the night of 7th and 8th day of November, 2021 at Lodwar township in Turkana Central Sub-County within Turkana County at unknown time broke and entered the dwelling house of Susan Wanjiru Irungu with intent to steal therein and did steal from therein one mobile phone make Samsung A205F of IMEI 357545102421784 valued at Kshs. 12,500/=, the property of Susan Irungu Wanjiru.
3. The applicant sought review of the sentence pursuant to Section 332 of the Criminal Procedure code and article 22(1) 27(1) of the [constitution](#) of Kenya. I take note that the applicant has not challenged



neither the conviction nor the sentence meted but seeks the court to apply the provisions of section 333(2) of the [CPC](#) and take into account the time he has been in custody.

Analysis and Determination

4. I have considered the application and the court's mandate is to determine the application of section 333(2) of the [Criminal procedure code](#). The section 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.

5. The Judiciary [Sentencing Policy Guidelines](#) are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

6. In [Abamad Abolfathi Mohammed & another v Republic](#) [2018] eKLR 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.”

7. The Applicant was convicted on 21st February 2023 when judgment was read out and after mitigation, he was sentenced to serve 8 years imprisonment. The court in sentencing the accused person highlighted that the accused person's mitigation was considered. However, I share the same thoughts as the court in [Abamad Abolfathi Mohammed & another v Republic](#) [2018] eKLR that the trial court should have directed the applicant's sentence of imprisonment to run from the date of arrest on 12th November, 2021.

8. Therefore, in compliance with Section 333(2) [Criminal Procedure Code](#); computation of the sentence ought to include the period the Accused person was in custody during hearing and determination of the case before sentence was meted out.



9. The Accused was placed in custody on 12th November 2021 and sentenced on 21st February 2023. The 8 years sentence ought to start running from November 2021 when he was placed in custody to February 2023 when he was sentenced to serve 8 years imprisonment.
10. The sentencing process and its outcome are within the mandate of the trial court. However, since circumstances vary from case to case basis, this court shall intervene in exercise of revisionary jurisdiction pursuant to Article 165(6) (7) of the *constitution* as read with section 362 and 64 of the *Criminal Procedure Code* to correct any illegality, irregularity, impropriety and unjustness of the proceedings, order made by an inferior tribunal or subordinate court. The question is whether in this application the criteria set out in *S v Mbolombo* 1995 5 BCLR 614 (C) has been fulfilled. Thus
- “It is trite that, during the sentencing phase, formalism takes a back seat and a more inquisitorial approach, aimed at collating all relevant information, is adopted. The object of the exercise is to place before the court as much information as possible regarding the perpetrator, the circumstances of the commission of the offence, and the victim’s circumstances, including the impact which the commission of the offence had on the victim. The prosecutor, the defense counsel and the presiding officer all have a duty to complete the picture as far as possible at the sentencing stage. Material factual averments made during this phase of the trial ought, as a general proposition, to be proved on oath”.
11. I have taken the liberty to look at the succeeding judgements by themselves and the articulated records of the proceedings which dealt with conviction and final sentence as against the applicant. The information needed was availed to trial court and some presumably deducible from the trial and footnotes that may have been made by the learned trial magistrate. It was followed by the judicial discretion in reaching the decision as to the appropriateness and proportionate sentence for the offence accused of the applicant. The exercise of discretion during the proceedings of the criminal charge up to sentencing verdict has not been impeached by the applicant as stipulated under article 50 (6) (a) (b) of the *constitution* for this court to re-open a case for a new trial. It is trite that the high court under article 50 (6) (a) & (b) *supra* must judiciously use it’s discretion and be mindful of the supremacy of the *constitution* and the rule of law as it appertains to the criminal justice system. Structuring a new trial at the behest of an applicant who has not met the threshold of new and compelling evidence is likely to occasion a travesty of justice.
12. As on matters submitted before me I do not agree with the applicant that the sentence is unlawful. I agree with the purport of the prosecution case that proved the criminal elements against the applicant beyond reasonable doubt. The conviction is accordingly upheld as found but with regard to the sentence in consonant with section 333 (2) of the *criminal procedure code* it shall be deemed to commence on 16th November, 2021. To that extend the committal warrant to prison be and is hereby amended to reflect the spirit of the law herein prescribed by national assembly of Kenya. Orders accordingly.

DATED AND SIGNED AT LODWAR THIS 25TH DAY OF OCTOBER, 2023.

In the presence of;

The Applicant

Mr. Yusuf for the DPP

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R. NYAKUNDI



JUDGE

