



REPUBLIC OF KENYA



**Lokurukwang v Republic (Miscellaneous Criminal Appeal 74 of 2020)
[2023] KEHC 24043 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL 74 OF 2020
RN NYAKUNDI, J
OCTOBER 25, 2023**

BETWEEN

ELMAS LOKAALE LOKURUKWANG APPLICANT

AND

REPUBLIC RESPONDENT

(Being a review from the original conviction and sentence in Kakuma Senior Principal Magistrates Court Criminal Case No. 74 OF 2020, Hon. J M Wekesa PM on 25th August, 2021)

JUDGMENT

Coram: Before Justice R. Nyakundi

Mr. Yusuf for the State

1. The appellant has moved the court under section 333 (2) of the [CPC](#) to have the period spent in remand custody stated to be one (1) year and two (2) months be taken into account. That it was an error of principle for the trial court to have proceeded with the quantum on sentence without reference to the provisions of the code.

Background

2. The appellant was arraigned in court on 23/6/2020 charged of the following offences. Count (1) Preparation to commit a felony contrary to section 308 (1) of the [penal code](#). Count 2 being in possession of a firearm without a firearm certificate contrary to section 4 (A) (1) as read with section 4 A (2) of the [firearms Act](#) chapter 114 laws of Kenya. Count (3) being in possession of ammunition without a firearm certificate contrary to section 4 (2) (a) as read with section 4 (3) (b) of the firearm Acts cap 114 laws of Kenya.



3. Going through a full trial pursuant to article 50 of *the constitution* and the protocols in the criminal procedure code the applicant was found guilty of the same counts and subsequently convicted and sentenced as follows; Count I – sentenced to serve 5 years imprisonment Count II – sentenced to serve 4 years imprisonment. Count III – sentenced to serve 4 years imprisonment. The sentences are meant to run concurrently.

Determination

4. The applicable law to the instant notice of motion is purely section 333(2) of the CPC. The language of the provision is to the effect that in determining the custodial sentence to be imposed on a person to convict on an offence, a trial court has to take into account anytime spent in custody by the person as a result of the offence before final judgment. In the event the court thinks it fit to take it into account circumstances to calculate the total sentence and then deduct an amount of credit based on the amount of time served to the overall period to be imposed it is obligated to give reasons in the judgment. The language of the court indicates that a trial magistrate or judge should consider and apply remand credit period and should not be denied without good reasons. It is our constitutional imperative under the bill of rights that no one shall be subjected to arbitrary arrest or detention without any justification or legitimate expectation as per the law established. Therefore *the constitution* ring-fences the bill of rights to guarantee and protect the rights therein to be enjoyed by every citizen. That any such person within our borders shall not be subjected or deprived of his or her liberty except on such grounds and in accordance with this constitution. In article 50 (2) (e) of *the constitution* everyone arrested, charged before a court of law is entitled to trial within a reasonable time and as stipulated in article 49 (1) (h) to be released on bail pending trial unless compelling reasons exist on the side of the state to limit that right. Indefinite remand custody pending trial is anathema in any country like Kenya which espouses a constitutional democracy and observes the rule of law. In article 9 (3) of ICCPR stipulates that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law as a consequence of article 50 (1) of the Kenyan constitution to exercise judicial power and shall be entitled to a trial within a reasonable time or to be released on favorable bond terms to await the hearing and determination of the charge.
5. In the present case I have perused the affidavit by the applicant and the trial court record it's clear that the applicant was incarcerated in remand custody pending the hearing of his case for a period of one year and 2 months. The impugned judgment did not address itself to the provisions of section 333 (2) of the criminal procedure code. In my view when it comes to sentencing trial judges should consistently keep in mind that in order to protect and guarantee rights to liberty and security of a person any pretrial deprivation of those rights should always be examined consistent with section 333(2) of the CPC objectively to proclaim discounted sentences on the period spent in remand custody pending determination of the criminal charge. It falls in the first place to the independent courts established under *the constitution* to ensure that in trials in a given case the pre-trial detention of an accused person does not exceed a reasonable time conceptualization under article 52 (e) of *the constitution*. To this end review of the case docket should pay due attention to the principle of the presumption of innocence under article 50 (2) (a) of *the constitution*, examine all the facts for and against the indictment canons of public interest and for the courts to decide whether there has been a violation of the fundamental rights and freedoms as guaranteed in *the constitution*. The trial courts in this respect should bear in mind that the standard and burden of proof of beyond reasonable doubt in criminal cases rests with the prosecution on behalf of the state and it never shifts to the defendant. The decision whether to remand an accused person before his or her trial is usually a matter of discretion of a court of law and must be influenced by the provisions of *the constitution* without whim or caprice. Many defendants, suspects or accused persons in remand custody awaiting trial are detained for reasons that they cannot raise



the applicable bond terms imposed by the courts. This is more so to the marginalized and vulnerable members of our society. They are not able to commit or afford the measure of bond terms in the interim to be guaranteed of their right to liberty, dignity or security pending the hearing and determination of their case. What the provision in section 333 (2) of the code is a legal a regulatory framework to ensure the rights set down in the human rights chapter of our constitution are adhered to in favour of the persons in pre-trial detention pending determination of the case. What measures are to be taken by the trial court is to give credit at the final judgment on sentence in the event the punishment so imposed has a component of custodial sentence. It must be shown that the period specifically spent in pre-trial detention has been credited to the convict. From a legal perspective the court should construe and interpret the words in section 333 (2) of the code to avoid an absurd results which will render the provision repugnant or inconsistent with the rest of the code on sentencing. The purpose of approach here is to give effect to the intention of parliament and make sense of the interpretation to protect and guarantee the rights of an accused person with regard to the period spent in remand custody. When determining of particular words in the provisions it doesn't formulate an arithmetic set of argumentation scheme to literally deal with computation of the period spent in remand custody. My understanding is for the trial court to interpret the provisions consistent with the legislative intent of according the convict discounted credit for the period he or she spent in remand custody. When faced with the piece of evidence by the applicant I am of the considered view that there is merit to review the sentence and factor in the one year and two months to the total quantum of sentence imposed by the trial court. The committal warrant to prison shall be amended in consonant with section 333(2) of the [criminal procedure code](#).

It is so ordered.

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

