



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Lalo v Republic (Criminal Revision E022 of 2023)
[2023] KEHC 26041 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL REVISION E022 OF 2023
M THANDE, J
NOVEMBER 30, 2023**

BETWEEN

LALO MWANZIJE LALO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By an application filed on 13.7.23, the Applicant seeks that the period of 6 months from 10.8.21 to 17.2.22 spent in remand custody be considered as part of his 6 year sentence that was imposed upon him, in Mariakani Criminal Case No. E358 of 2021. The Applicant states that he was charged with the offence of burglary and stealing and was on 17.2.22 sentenced to 6 years imprisonment. He averred that the period of 6 months spent in custody was not taken into account in the sentence. He further contended that Article 50(2) of the Constitution provides that an accused person should have the benefit of the least severe of the prescribed punishments for an offence. The Applicant cited the case of Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) (Judgment), where the Court held that Section 333(2) applied to an original sentence as well as a resentence.
2. The Respondent did not file any response and urged the Court to make a decision after looking at the lower court file.
3. The lower court record shows that the Applicant was charged with the offence of burglary contrary to Section 304(2) of the Penal Code and stealing contrary to Section 279(b) of the Penal Code. Following trial, the Applicant was convicted on both counts. For the offence of burglary, he was sentenced to 2 years imprisonment while for the offence of stealing, he was sentenced to 4 years imprisonment. Both sentences were to run consecutively.



4. The Applicant's complaint is that the trial court failed to take into account the period of 6 months he spent in custody during trial.
5. Section 333(2) of the *Criminal Procedure Code* provides as follows:

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.

6. The proviso to Section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the period an accused spent in custody pending trial.
7. In the case of *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, the Court of Appeal addressed its mind to the proviso to Section 333(2) of the *Criminal Procedure Code* and stated:

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*. That provision provides as follows:

" 333(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."

The appellants have been in custody from the date of their arrest on 19th June 2012. 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(s) 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 19th June 2012.

8. Flowing from the above authority, a trial court must take into account in a meaningful way, the period spent by an accused person in custody, pending trial. As such, the imposed sentence must be reduced proportionately by the period already spent in custody. The Court of Appeal went on to state that the



proviso to Section 333(2) was introduced in 2007 to give the court power while sentencing a person convicted of an offence, to include the period already spent in custody.

9. The only way to ascertain that the period spent in custody during trial was taken into account when imposing sentence, is by looking at the record. From the record however, it can be seen that during sentencing the Applicant, the trial court only considered that the Applicant was a first offender and stated:

I hereby sentence him as follows:

- a. Limb I Burglary – 2 years imprisonment.
- b. Limb II Stealing c/s 279(b) – 4 years imprisonment.

Sentences to run consecutively.

10. There is no mention by the trial court that the period of 6 months from 10.8.21 to 17.2.22 that the Applicant had spent in custody pending trial, was taken into account when sentencing him. This is a serious omission on the part of the trial court, as it amounts to non-compliance with an express statutory provision.
11. In the end, I find that the Application filed on 13.7.23 is merited and is allowed on terms that the sentence imposed upon the Applicant shall run from the date of his arrest, that is to say, 10.8.21.

DATED AND DELIVERED IN MALINDI THIS 30TH DAY OF NOVEMBER 2023

.....

M. THANDE

JUDGE

