



**Tuei v Republic (Criminal Miscellaneous Application E094 of 2023)
[2023] KEHC 25650 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E094 OF 2023
HM NYAGA, J
NOVEMBER 23, 2023**

BETWEEN

ISAIAH KIPKORIR TUEI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant has filed an undated Application on 17th July,2023 seeking his current sentence of imprisonment to be substituted with a probation sentence.
2. He states that this court has jurisdiction to determine this Application under Article 165(3)(9) of the Constitution, 2010.
3. The Application is supported by an affidavit of the Applicant wherein he avers that he was convicted and subsequently sentenced to 3 years' imprisonment in Molo Criminal Case No. 1013 of 2020.
4. It is his further averment that he is reformed, completely remorseful and ready to adhere with the Laws of Land.
5. However, when the matter came up before me on 12th October,2023, the Applicant told court that his Application is to have his remand period taken into account.
6. I have perused the record and I have not seen an Application under Section 333(2) of the Criminal Procedure Code. What is before the court is an application brought under sections 362, 363 and 364 of the said Code. These provisions give this court the power of revision. The accused abandoned the said provisions and opted to rely on section 333(2) of the Criminal Procedure Code (CPC).
7. The state counsel on her part told court that the trial court sentenced the Applicant to three years' imprisonment, commencing from the date of the judgement and stated that she would not consider the period spent in custody as the Accused was a repeat offender.



8. Section 333(2) of the *Criminal Procedure Code*, states 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”.

9. It has been stated that in invoking section 333(2) of the *Criminal Procedure Code*, the court is not required to embark on an arithmetic journey to calculate time to be spent in custody. In the case of *Bukenya vs. Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013) it was held that;

“Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement.”

10. The provisions of section 333(2) of the *Criminal Procedure Code* were also the subject of the decision in *Abamad 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 19th June 2012.”



11. The same court in *Betbwel Wilson Kibor vs Republic* [2009] eKLR expressed itself as follows: -

“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”
12. The Judiciary Sentencing Policy Guidelines provide 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 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.”
13. In the case of *Osman Mohamed Balagha vs Republic* [2021] eKLR Aroni J. noted that ;

“It was not for the accused to remind the trial Court while sentencing to consider the time he spent in custody, the law obligates the court to consider the time the convict was incarcerated before conviction. From the record it appears that the trial court failed to consider the same.”
14. The Provisions of the said section 333(2) of the *CPC* are couched in mandatory terms.
15. The court called for other files involving the applicant. I note that in Molo Criminal case No. E1012 of 2020, the applicant was also convicted by the same court on 3rd November 2020 and was sentenced to 3 years imprisonment. The court ordered that his sentence commence from 23rd June 2020, when he was first remanded in custody. This means that the trial court had considered the remand period in passing the sentence as required by the law.
16. I have perused the trial court record in Criminal case No. 1013 of 2020 and I note that the trial magistrate when sentencing the Applicant to serve a custodial sentence stated as follows:-

“I do consider the accused’s mitigation and the nature of the offence and the fact that he is a repeat offender and as such, and in order to deter the court shall not consider that period he has already been in custody and in exercising discretion he is hereby sentenced to serve 3 years’ imprisonment from the date of judgement herein.”
17. In the circumstances, it is my considered view that the trial court having considered Section 333(2) of *CPC* in the first conviction then the accused has already benefitted from the same. He cannot now turn around and seek to apply the same provision in his subsequent conviction and sentence. He was already a convict during the second sentencing.



18. The only issue that needs to be pointed out is the fact that the trial court, having been aware that it had already convicted the applicant and was already serving his sentence, should have been clearer to the accused on whether the subsequent sentence was to run concurrently or cumulative to the earlier conviction. Section 37 of the *Penal Code* provides as follows;

“ 37. Sentences when cumulative

Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof.”

19. From the wording of the orders of the court, though not expressly stated, it can be concluded that the sentences were to run concurrently since the subsequent one commenced from the date of the judgement, while the applicant was serving his earlier sentence. As such the provisions of the said section 37 *Penal Code* were complied with. His sentence in Molo Criminal Case No. 1013 of 2020 is thus deemed to run concurrently to the sentence in Molo Criminal Case No. 1012 of 2020.

20. In the premises the Application lacks merit and I disallow it.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 23RD DAY OF NOVEMBER, 2023.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Murunga for state

Applicant

