



**Maiyo v Republic (Miscellaneous Criminal Appeal E056 of 2019)
[2023] KEHC 27068 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27068 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E056 OF 2019
RN NYAKUNDI, J
DECEMBER 20, 2023**

BETWEEN

BENJAMIN KIPLIMO MAIYO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant underwent trial for the offence of murder contrary to section 203 as read with section 204 of the *penal code* and was convicted and a sentence of 15 years was imposed by this court. The applicant being aggrieved preferred an application challenging the impugned judgment on the basis of section 333(2) of the *Criminal Procedure Code*.
2. The applicant now seeks review of the sentence pursuant to Section 333(2) of the *Criminal Procedure code*. The applicant prays that the court considers the said provision and take into account the time he has been in custody.

Analysis And Determination

3. 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.
4. 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.

5. In the case of *Abamad Abolfathi Mohammed & another v 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. It follows then that the court should state in its decision that it indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.
7. The punishment prescribed by the law for the offence of murder is a death sentence under section 204 of the *Penal Code*. I note that this court considered the accused’s mitigation and meted an appropriate custodial sentence of 15 years. Given the period one should serve for such an offence, I believe this court considered the provisions of section 333(2) of the *Criminal Procedure Code*. It is my considered view that the applicant is enjoying a rather lenient sentence and cannot seek refuge in the provisions of section 333(2) of the *Criminal Procedure Code*.
8. In the end, I believe this court considered the bounds of section 333(2) of the *Criminal Procedure Code* in issuing the custodial sentence and proper directions were so issued. For clarity purposes, the sentence meted upon the applicant shall run from January 29, 2019, when this court sentenced the accused person. The application is thus dismissed.

DATED AND SIGNED AT ELDORET THIS 20TH DAY OF DECEMBER, 2023

In the presence of

Mr.Mugun for the State.

R. NYAKUNDI

JUDGE

