



REPUBLIC OF KENYA



KENYA LAW
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**Minigwo v Republic (Miscellaneous Criminal Case 226 of 2021)
[2023] KEHC 26993 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL CASE 226 OF 2021
RN NYAKUNDI, J
DECEMBER 20, 2023**

BETWEEN

DAVID MINIGWO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being a Resentencing from the Judgement of the Court
Delivered on 9/12/2020 in High Court Cr. No. 44 of 2012)*

RULING

1. The applicant application is premised under the Notice of Motion filed in Court and expressed to be brought within the provisions of Section 333(2) of the *Criminal Procedure* and Section (39) 2 in Reliance with Article 1(1) 2(4) 19(3) 27,28, 47 and 48 165 (3) of the *Constitution* of Kenya 2010, Together with Section 356, 357, 359 (4) and Section 201 of the *Criminal Procedure* Code CAP 75 of the Laws of Kenya.
2. In the aforesaid Notice of Motion seeks the following orders:
 1. That the period spent in remand be computed to the current sentence
 2. That the said period so spent during the pre-trial period to start from the date of arrest.
3. It is grounded on the following reasons:
 1. That during the delivery of judgement I was nervous and could not comprehend what was going on
 2. That upon being ferried to prison I have reconsidered and come to terms that the period spent in remand has been accounted for being 8 years



3. That Section 333(2) of the *Criminal Procedure Code* cap 75 of the laws of Kenya allows and decrees the reconstitution and fresh computation of the period spent in remand as was held by Justice George Odunga sitting in Machakos (2021) eKLR
4. The factual matrix of this application is based on the indictment of the applicant for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. In a full trial held before the High Court the judgment of the court as pronounced in 18th November 2020 whereas the verdict on sentence of 7 years imprisonment was read on the 9th December, 2020. The application for bond was filed before the same court vide a Notice of Motion dated 7th November, 2012 pursuant to Article 49 (1) (h) of the *Constitution*. In appreciating the material evidence the court ruled as follows: This is not a suitable case for which bail/bond should be granted. I accordingly dismiss the application. This is the substratum of the subject matter before this court. This application was not responded to by the state to capture its typology in so far as the remedies being applied for by the applicant are concerned.

Analysis And Determination

5. The *Constitution* in Art 50 (6) (a) & (b) donates the jurisdiction to the High Court to deal with such petitions or motions of a similar nature with that of the Applicant. It is couched in the following language: That a person who is convicted of a criminal offence may petition the High Court for a new trial if
 - a. The person's appeal if any has been dismissed by the highest court to which the person is entitled to appeal or the person did not appeal within the time allowed for appeal and
 - b. New and compelling evidence has become available.
6. The other provision of relevance is Art. 165 (3) of the *Constitution* empowering the High Court to exercise jurisdiction to determine the question whether a right or fundamental freedom in the Bills of rights has been denied, violated, infringed or threatened, to hear any question respecting the interpretation of this constitution including the determination of:
 - i. The question whether any law is inconsistent with or in contravention of the *Constitution*
 - ii. The question whether any said to be done under the authority of this constitution or of any law is inconsistent with or in contravention of this constitution.
7. The question is whether the applicant is still an active litigant in our judicial system given the finality of the decision by the trial court in which he elected not to file an appeal to the court of appeal. There are interests of justice involved in this application when one appreciates the spirit of Article 50(6) (a) & (b) of the *Constitution*. Some of the balancing act to exercise jurisdiction are as stated in the case of *R. v Wignman* 1987 (1) SCR 246 where the Supreme Court of Canada remarked as follows: " The appropriate test is whether or not the accused is still in the judicial system. As expressed in the Crown's factum, this test affords a means of striking a balance between the wholly impractical dream of providing perfect justice to all those convicted under the overruled authority and the practical necessity of having some finality in the criminal process" Finally in criminal proceedings is of the utmost importance. On the face of the record it might appear the applicant's motion is flawed as a consequence of timing and whether this court is a forum of conveniens. Is it a ripe matter justiciable before this court? I think so. Because in formal and constitutional adjudication of cases, as the Canadian court stated in *Ferreira v Levin* suffice it to say that a doctrine of ripeness serves the useful purpose of highlighting that the business of court is generally retrospective, it deals with situation of problems that business of a court is generally retrospective. It deals with situation of problems and have already ripened or crystallized and not with prospective or hypothetical ones. It goes without saying the interest



of the applicant in the remedy being applied for is often indicative of the issue of ripeness for the court to exercise jurisdiction. Under the Kenyan Constitution, there are key constitutional imperatives as deduced in Art. 25 (a) of the freed from torture and cruel, inhuman or degrading treatment or punishment, Art. 27 on Equality and freedom from discrimination. That is every person is equal before the law and has the right to equal protection and equal benefit of the law. In addition Art. 50 (2) (a) of the Constitution to the effect that every accused person has a right to be presumed innocent until the contrary is proved. In the same Art. Sub section (e) every accused person has a right to have the trial begin and conclude without unreasonable delay. The general duty to promote the Bill of Rights in our Chapter 4 of the Constitution becomes particularly important so as to avoid an inconsistency between a legislative provision on the Bill of Rights. In our case, it is to accord the purposive interpretation of Section 333(2) of the Criminal Procedure Code so that it conforms with the Bill of Rights guaranteed by the Constitution 2010. Why is this important in so far as the treatment of offenders detained before trial is concerned. The basic protections of the rights of detained persons are found in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These instruments were adopted to promote the dignity of all hi beings, including persons accused of crime. Indeed, persons accused of crime are provided specific protection. They are guaranteed the rights to a fair trial, to the presumption of innocence and to appeal of any conviction. They are also protected by the prohibition of torture and other cruel inhuman or degrading treatment or punishment the right to equal protection of law, and the right to freedom form arbitrary arrest of detention. With regard to Art. 10 (2) (a) of the Covenant on Civil and Political Rights presumption of innocence is given priority as the starting-point for all standards in the area of pretrial detention. Persons not yet convicted of the crime of which they have been accused are guaranteed the right to separate treatment appropriate to their status as unconvicted persons.

8. The applicant has now approached this court for review of the sentence as a new trial pursuant to Section 333(2) of the Criminal Procedure code. The applicant prays that the court applies the provisions of section 333(2) of the CPC and take into account the time he spent in pre-trial detention before conclusion of his case.
9. 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.
10. The Judiciary Sentencing Policy Guidelines 2023 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.
11. In Abamad Abolfathi Mobammed & 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.”

12. The Applicant was arraigned before court on 18th June, 2012 and his trial on the merits concluded on 9/12/2020 when the sentence of 7 years imprisonment was imposed by this court. All other factors taken into account are textually captured in the judgement of the court. In addition, court in sentencing the applicant the court considered that he was a first-time offender but did not consider the period that he was in remand custody. 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 arraignment on 18th June, 2012.
13. Therefore, in compliance with Section 333(2) of the *Criminal Procedure Code*; computation of the sentence ought to include the period the applicant was in custody during the hearing and determination of the case before sentence was meted out.
14. This is a case the applicant was indicted, pleaded not guilty to the charge and during an interlocutory application under Art. 49 (1) (h) of the *Constitution*, he was found to be unsuitable to enjoy the Right to Bail pending trial. He was therefore to be remanded in custody since the 18th of June 2012 when the court decreed as having been found guilty of the offence followed with a conviction and the sentence of 7 years. In my view, pursuant to Art. 50 (6) (a) & (b) of the *Constitution* there is existence of compelling evidence to invite this court to make a declaration under Section 333(2) of the *Criminal Procedure Code*.
15. Given this background the approach to standing on justiciability of the Bill of Rights matters dramatically contrast with statutory approach. The constitutional jurisdiction demands of the court that the mandate given to it is to strive to uphold constitutional rights for the Kenyan people to enjoy the full measure of protection which they are entitled to since the promulgation of the Supreme Law of the Republic. within the constitutional imperatives on sentencing a court should adopt a legal model of sentencing which captures the spirit of the law in Section 333(2) of the *CPC*. Any other verdict in absence of taking cue of the provisions may be an affront to human dignity, equality before the law, and inhuman and degrading treatment. For purposes of this application the committal warrant in reference to the applicant be and is hereby amended to incorporate the commencement date of 8/6/2012 consistent with Sections 333(2) & 382 of the *Criminal Procedure Code*.

DATED SIGNED AND DELIVERED AT ELDORET THIS 20 DAY OF DECEMBER 2023

In the Presence of

Mr. Mugun for the State



Applicant.

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R. NYAKUNDI

JUDGE

