



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**MISCELLANEOUS CRIMINAL REVIEW APPLICATION**  
**NO. E003 OF 2022**  
**MARK MUTWIRI MBOGO.....APPLICANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**  
**RULING**

**Brief Facts**

1. The application for determination dated 12<sup>th</sup> January 2022 and brought under **Article 50(2) of the Constitution and Section 333(2) of the Criminal Procedure Code** seeks for orders to take into account the period the applicant spent in custody pending disposal of the case. the date of arrest is given as 27<sup>th</sup> March 2011.
2. The applicant was convicted in CM Nyeri Criminal Case No. 316 of 2011 of the offences of Attempted Murder contrary to section 220 of the penal Code and Assault Causing Actual bodily harm contrary to Section 251 of the Penal Code. He was sentenced to fifteen(15) years imprisonment for the offence of attempted murder and three(3) years for the offence of Assault Causing Actual bodily harm. The applicant states that he was arrested on 27<sup>th</sup> March 2011, charged, convicted and sentenced to 15 years and 3 years, which sentences were ordered to run concurrently.
3. The applicant said he appealed against both conviction and sentence which appeal was dismissed by the High Court on 28<sup>th</sup> July 2016. He states that he was not bailed out and has thus been incarcerated which period he spent in remand. He urges the court to take into account the period of time spent in remand during the pendency of the trial.
4. Parties disposed of the application by way of written submissions.

**The Applicant's Submissions**

5. The applicant contends that the application is unopposed, as the respondent has not filed any replying affidavit or grounds of opposition. The applicant further relies on **Section 333(2) of the Criminal Procedure Code** and states that the trial court after sentencing stated that both sentences were to run concurrently and thus he was not accorded **Section 333(2) of the Criminal Procedure Code**. The applicant further submits that section 333(2) is couched in mandatory terms and the learned magistrate was obliged by law to take into account the period he had spent in custody keeping in mind that he was never released on bail since the day of his arrest, 27<sup>th</sup> March 2011. As such, the applicant submits that the trial court failed to take into account the period he spent in custody as the learned magistrate failed to order that the sentence would commence from the date of arrest i.e 27/3/2011 and was therefore silent as to when the sentence would commence. To support his contention, the applicant relies on the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.**

**The Respondent's Submissions.**

6. The respondent submits that at the time of committing the offence, the applicant was armed with a G3 rifle which is a dangerous weapon capable of causing fatal injuries. Further, the applicant inflicted very serious injuries on the two victims with the same weapon. The applicant was a police officer at the time of committing the offence and the offence was committed at the police station. Further, the respondent submits that the applicant's act was well planned and intentional based on the fact that he had extensive training and experience to handle a firearm. The act was unprovoked and the first victim sustained injuries on the head that could have been fatal.
7. The respondent submits that the applicant through his counsel mitigated and urged the court to consider the 4 years spent in remand. The

trial court proceeded to sentence the applicant and recorded that the period in remand had been considered. The respondent further contends that the applicant was accorded a fair trial until sentencing and that it is apparent that the court was guided by the gravity of the offence and the aggravating factors in the case.

8. The respondent further submits that the applicant is serving a legal sentence and moreover, he got off easy with a sentence of 15 years as opposed to the maximum sentence of life imprisonment. As such, the respondent contends that the applicant is not entitled to a review of the sentence.

#### **Issues for determination**

9. On perusal of the application and the submissions, the main issue for determination is whether:-

- a. This court has jurisdiction to entertain the instant application.
- b. The applicant is entitled to the orders for review of sentence under Section 333(2) of the Criminal Procedure Code.

#### **The Law**

10. Section 333(2) of the Criminal Procedure Code provides:-

**“Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”**

11. It is clear from the above proviso that the law requires courts while sentencing do take into account the period the accused spent in custody.

12. The same court in **Bethwel 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 22<sup>nd</sup> 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.”**

13. According to **The Judiciary Sentencing Policy Guidelines**:

**“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.”**

14. I have perused the judgment of the trial court on sentencing and note that the learned magistrate stated clearly that he has taken into account the period the applicant has spent in custody. The trial court noted that the charge was a serious one and attracts a penalty of life imprisonment. The court took into account all these factors and sentenced the applicant to serve 15 years.

15. It is important to note that the applicant appealed to the High court against conviction and sentence as he has stated in his petition. In determining the appeal the High court considered the propriety of the sentence. The appeal was dismissed for lack of merit. This means that the sentence imposed by the trial court has already been reviewed by the High Court. The question whether this court has jurisdiction to review sentence already reviewed by a judge of equal jurisdiction and in the same court as this one, namely the High Court.

16. Article 50(2) of the Constitution gives the right to every accused person of a fair trial which includes:-

- a. “If convicted, to appeal to, or to apply for review by, a higher court as prescribed by law.”

The foregoing provision rules out the intervention of the High Court to review the orders of another judge in a criminal case.

17. Among the sentence issues for consideration on appeal before the High Court and which it dealt with were whether the conviction was safe and whether the sentence was commensurate to the offences. The Scope of consideration of sentence includes the application by the trial court of Section 333(2) of the Criminal Procedure Code. It is clear that the High Court dealt with the issue of sentence review on appeal.

18. Consequently, I am of the considered view this court lacks jurisdiction to entertain this application.

19. The application is hereby struck out for want of jurisdiction.

20. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 31<sup>ST</sup> DAY OF MARCH, 2022**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEOLINK THIS 31<sup>ST</sup> DAY OF MARCH, 2022**