



**Argwings v Republic (Miscellaneous Criminal Petition Application
E10 of 2022) [2022] KEHC 11392 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CRIMINAL PETITION APPLICATION E10 OF 2022**

RPV WENDOH, J

MAY 19, 2022

BETWEEN

FAITH AUMA ARGWINGS APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant Faith Auma Argwings was convicted for the offence of murder contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code by Mrima J. She was sentenced to serve twenty (20) years imprisonment.
2. The applicant has now filed an undated Notice of Motion seeking an order that the one year, two months that she spent in remand should be considered as part of the sentence meted on her.
3. Mr. Omooria, Prosecution Counsel opposed the application urging the court to dismiss it for want of merit and the fact that the applicant did not raise the issue before J. Mrima.

Section 333 (2) of the Criminal Procedure Code provides as follows:-

“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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”



4. The same provision is captured in clause 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines which read 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 (emphasis mine).”

5. In the case of Ahmad Abolfathi Mohammed & Another vs. Republic, the Court of Appeal had occasion to deal with the above provision wherein it confirmed that the court passing sentence must take into account the period one has been held in remand. The Court said as follows:

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.” [Emphasis mine].

See also *Bethel Wilson Kibor vs. Republic* (2009) eKLR.

6. I have considered the case before me. The offence of murder carries a death sentence. The Court did not however mete out the maximum sentence on the accused. The court did not specifically indicate that it had taken into account Section 333(2) of the Criminal Procedure Code but the court said as follows:

“The accused person indeed terminated two lives; that of the deceased and the unborn. Although the accused person was not charged with the death of the unborn child, this court is duty called to take such circumstances into account in sentencing.

By striking a balance between the interests of the accused person and those of the family of the deceased and having considered the Pre-Sentence Report I find that this is a case which involves aggravating circumstances and calls for severe sentence.

I would have readily handed down life sentence to the accused person, but for the sake of the young baby who is before court and who has known life outside of prison since birth, I will exercise restraint and leniency and sentence the accused person to twenty (20) years imprisonment.”



7. In my view, the court more than considered the one-year period that the applicant spent in remand and this court would not need to address Section 333 (2) of again.
8. In addition to the above, I have noted that the applicant filed a notice of appeal to the Court of Appeal dated 6/10/2021. Although she denied appealing to Court of Appeal, that notice has not been withdrawn and she has an opportunity to ventilate the issue of Section 333 (2) before this court.
9. Lastly, Mrimaf J who sentenced the applicant is a court of concurrent jurisdiction with this court and this court cannot sit on review or appeal of that court's ruling or judgment. This application is therefore an abuse of court and unmerited. It is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 19TH DAY OF MAY, 2022

R. WENDOH

JUDGE

Delivered in the presence of:

Mr. Omooria for ODPP

Applicant present

Ms. Nyauke Court Assistant

