



**Maina v Republic (Criminal Miscellaneous Application  
E029 of 2021) [2022] KEHC 3330 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3330 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL MISCELLANEOUS APPLICATION E029 OF 2021  
FN MUCHEMI, J  
JUNE 30, 2022**

**BETWEEN**

**SAMUEL WAHOME MAINA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application for determination is undated and has been brought under section 326 and 333(2) of the *Criminal Procedure Code* seeking for orders of taking into account the period the applicant spent in custody during the pendency of the trial the date of arrest being August 11, 2014.
2. The applicant was convicted in Nyeri Criminal Case No. S.O. 33 of 2014 of the charge of rape contrary to section 3 (1) (a) and (b) (3) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to 10 years imprisonment on 13/04/2016. He states that he was not bailed out since the date of arrest and has thus been incarcerated since the date of arrest which period he spent in remand. He urges the court to take into account that period of time he spent in remand.
3. Parties disposed of the application by way of written submissions.

**The Applicant's Submissions**

4. The applicant contends that he was arrested on 12/8/2014 and convicted on 16/4/2016 which period he spent in remand custody. He further contends that he has not lodged any appeal to the High Court against conviction or the sentence and neither is he contesting the conviction or the sentence imposed. He only seeks to have the time spent in remand to be taken into account in his sentence pursuant to section 333(2) of the *Criminal Procedure Code*.



5. He avers that he is a first offender who has reformed and is remorseful for what transpired. Moreover, he states that the respondent has not opposed his application and as such prays that his application be allowed.

### **The Respondent's Submissions.**

6. The respondent is not opposed to the application and submits that the trial court never indicated whether the time spent in remand was considered during sentencing. Further, the trial court did not indicate whether the nature of the offence and aggravating circumstances if any were considered during sentencing.
7. The respondent further submits that the case at the trial court was concluded on April 13, 2016 and thus the applicant's right to appeal has lapsed. Further the applicant was charged in the year 2014 and sentenced in the year 2016 and thus he spent 2 years in custody. However, there is no indication whether the applicant was in custody during the entire trial. Nevertheless, the respondent submits that the applicant is a suitable candidate to benefit from the provisions of section 333(2) of the *Criminal Procedure Code*. As such, the respondent prays that the sentence to commence from the date the applicant was remanded in custody pending trial.

### **Issue for determination**

8. The main issue for determination is whether the applicant is entitled to benefit from the provisions of the proviso to section 333(2) of the *Criminal Procedure Code*.

### **The Law**

9. 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.”

10. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.
11. The provisions of section 333(2) of the *Criminal Procedure Code* was 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 June 19, 2012."

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 September 22, 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 lower court record and note that the applicant was arrested on August 11, 2014 and sentenced on April 13, 2016. The court record also shows that in sentencing the trial magistrate took into account the fact that the applicant is a first offender, the mitigating factors and the gravity of the offence and sentenced the applicant to 10 years imprisonment. It is also apparent from the court record that the applicant was in remand during the pendency of the trial. Further, the record reflects that the trial magistrate did not indicate when the sentence was to start running and thus the period the applicant spent in custody was not taken into account.

15. Consequently, I find this application has merit and allow it accordingly.

16. The applicant's ten (10) year imprisonment sentence shall commence from the date of arrest, the August 11, 2014.

17. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**F. MUCHEMI**

**JUDGE**



**Ruling delivered through videolink this 30<sup>th</sup> day of June, 2022.**

