



**Masimba v Republic (D.P.P) (Miscellaneous Criminal Application
E053 of 2021) [2022] KEHC 12415 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION E053 OF 2021**

PJO OTIENO, J

JULY 29, 2022

BETWEEN

KEVIN OMUSULA MASIMBA APPLICANT

AND

REPUBLIC (D.P.P) RESPONDENT

RULING

1. By a Petition and a Notice of Motion filed in Court on the April 22, 2022 the Applicant prays that the Court grant him the benefit of having spent a considerable period in custody while undergoing trial to observe that by the time he filed the application he had served a third of the term imposed and that he be granted probation services in terms of the Probation Report which showed him to be in good standing with the Community.
2. The Petition and application were supported by an affidavit sworn by the Applicant which states that he was charged and convicted of the offence of robbery with violence in Mumias SPMCR.C. No. 205 of 2018 and sentence to serve a jail term of 3½ years on the June 19, 2019 and that the period he had served in custody while undergoing the trial was not reckoned with in terms of Section 333 (2) *CPC*. He cited to Court the decisions in HC. Pet. No. 15/2020 where the Court held that every convict serving sentence is entitled to a remission and that where an accused undergoes trial while in custody the sentence ought to take into account the period spent in such custody and that those serving sentences passed in violation of Section 333 (2) are entitled to have such sentences being reviewed by the High Court.
3. The Prosecution did not file any affidavit or indeed grounds of opposition resisting the Petition and the application but left it to court to decide the matter based on the record.
4. I consider the prosecution to have taken the view that what is sought from the Court is a revision or review based on questions of interpretation and application of the law. I do agree with the Prosecutor



that in such circumstances the task of the Court should be to review and peruse the record of the lower Court and to find for itself whether the law was followed. That may be done on the Court being moved or even by Court's own motion provided the Court's attention has been drawn to the matter in whatever way.

5. I have perused the record of the trial Court and I am not in doubt that there was never regard given to the mandatory requirements of Section 333 (2). In the record before me, the Court after taking mitigation the Court said:

“Presentence report is considered with the nature of the offence and the circumstances. The report says the offender has changed but it is not clear whether he changed in prison remand or before his arrest. If he changed before his arrest then he would not have committed the serious offence here.”

6. No reference is made to the fact that the Applicant was all the time, as trial proceeded, in custody and the Court did not specify the date of commencement of the sentence thus leaving it to the interpretation that it take effect from the date of the conviction.
7. That was a clear error that this Court must correct to give to the Applicant the benefit due to him under Article 50 (2) (b) of the *Constitution* as read with Section 333 (2) of the *Criminal Procedure Code*. Consequently the Petition is well merited and is allowed with the consequence that the sentence imposed by the trial court shall be computed from the date of arrest and committal to custody being the January 24, 2018.
8. It is unfortunate that the Applicant has served the sentence in full while this matter was pending, thus serving an excessive sentence. That is a scenario that need to be avoided by such petitions for resentencing, on the basis of non observance of Section 333 (2), being isolated and dealt with expeditiously by way of revision rather than being treated and let to compete with other complex and contested petitions.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF JULY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Applicant - Absent

Miss Chala for the Respondent

Court Assistant: Kulubi

