



**Nyakundi v Republic (Criminal Appeal E041 of 2021)  
[2022] KEHC 15123 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 15123 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CRIMINAL APPEAL E041 OF 2021  
SN MUTUKU, J  
JULY 27, 2022**

**BETWEEN**

**ROBERT ONYARI NYAKUNDI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Robert Onyari Nyakundi was tried and convicted for the offence of obtaining money by false pretense contrary to section 312 as read with section 313 of the *Penal Code* in Ngong criminal Case No. 207 of 2016. He was sentenced to pay a fine of Kshs 1,000,000 in default to serve two years imprisonment.
2. He filed an appeal on 17<sup>th</sup> August 2021 contesting the conviction and sentence. He however informed the court on 30<sup>th</sup> June 2022 that he was not prosecuting the appeal because he is not contesting the conviction and sentence but he wanted this court to consider the number of years he spent in custody deducted from the sentence. He was sentenced on 3<sup>rd</sup> August 2021. He has almost served one year in prison. He told the court that he had been in custody for 7 months.
3. The appeal filed herein stands withdrawn. This court will be considering the time spent in custody against the jail term.

**Determination**

4. I have read Section 333(2) of the *Criminal Procedure Code* on the issue before me. It provides that:  
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.



5. I have also read the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provides that:

“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.”

6. This requirement, to consider, the time spent in custody is also contained in various decisions. In *Abamad Abolfathi Mobammed & Another v. Republic* [2018] eKLR, the Court of Appeal stated that:

“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.”

7. The Applicant herein informed the court that he spent seven (7) months in custody and prays that the time spent in custody be taken into account in calculating the prison term. I have read the records. The trial magistrate did not address that issue. The Applicant did not ask the trial court to consider time spent in custody. I have noted from the record that the Applicant spent time in custody before he could meet the conditions of bail.

8. I was not able to determine when he raised bail terms but going by the time he states (7 months) is not unreasonable. From the record, the time he spent in custody is about that time. The prosecution did not oppose this application. Consequently, I do hereby allow this application. The time spent in custody, seven (7) months, is hereby considered in computing the jail term. For avoidance of doubt, Robert Onyari Nyakundi shall serve jail term less the seven (7) months spent in custody before raising bail. Given he was sentenced to pay a fine of Kshs 1,000,0000 in default to serve two years imprisonment, and given that he commenced serving sentence on 3<sup>rd</sup> August, 2021, I am sure he has almost completed the term but that is for the prison authorities to work out the maths.

9. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF JULY, 2022.**

**S. N. MUTUKU**

**JUDGE**

