



REPUBLIC OF KENYA



**Mwalo v Republic (Miscellaneous Criminal Application E015 of 2022)
[2022] KEHC 16564 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E015 OF 2022**

JN KAMAU, J

DECEMBER 20, 2022

BETWEEN

LUCAS OCHIENG' MWALO APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

INTRODUCTION

1. The Applicant herein was tried and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. He was sentenced to death.
2. On October 28, 2019, he filed Criminal Petition No 62 of 2019 seeking a review of his sentence. On April 14, 2020, Cherere J allowed his said Petition and reduced the sentence to twenty (20) years imprisonment in line with the case of *Francis Muruatetu & Another vs Republic & 5 Others* [2016] eKLR
3. The Applicant filed the present application for review of sentence on January 25, 2022. In his affidavit in support thereof, he contended that his application was premised on Section 333(2) of the *Criminal Procedure Code*. In that regard, he relied on the case of *Abolfathi Mohamed & Said Mansour Mousavi vs Republic* [2018] eKLR and urged the court to consider the time he had spent in custody prior to his conviction.
4. In his Written Submissions that were filed on September 27, 2022, he placed reliance on the case of *Bethwel Wilson Kibor vs Republic* [2009] eKLR where it was held that where a convicted person had been in custody prior to being sentenced, such sentence had to take into account the period he had already served in custody as provided in Section 333(2) of the *Criminal Procedure Code*.



5. He invoked the Judiciary Sentencing Policy Guidelines on Section 333(2) of the *Criminal Procedure Code* and also placed reliance on the case of *Robert Achapa Okello vs Republic* [2008] eKLR where it was held that the period spent in custody ought to be construed as retribution as a debt paid for the crime that was committed.
6. He asserted that prior to his conviction on October 5, 2016, he had spent more than five (5) years in custody. He thus urged this court to allow his said application.
7. The Respondent did not oppose his prayer. In its Written Submissions that were filed on July 26, 2022, it conceded that the period the Applicant spent in custody could be considered.

Legal Analysis

8. Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides 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.”
9. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Abamad Abolfathi Mohammed & Another vs Republic (supra)*.
10. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines (under) provide 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.”
11. Having said so, this court noted that Cherere J pronounced herself on the date when the aforesaid sentence was to start running. She rendered herself as follows:-

“I therefore re-sentence him to 20 years’ imprisonment from date of the date of (sic) his sentence on October 5, 2016(emphasis court).”
12. Notably, this court’s hands were tied by the learned judge’s pronouncement of when the Applicant’s sentence was to commence. As the learned judge was of equal and competent jurisdiction as this court, this court could not purport to review and/or vary and/or sit on appeal on her decision. As she had since left the jurisdiction of this court and could not therefore review her orders, if at all there was an error, the only option that was left to the Applicant herein was to appeal to the Court of Appeal if he was dissatisfied with her decision.



Disposition

13. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application for review of sentence that was lodged on January 25, 2022 was not merited and the same be and is hereby dismissed.
14. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER 2022

J. KAMAU

JUDGE

