



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. E001 OF 2020

BERNARD OOKO OLIECH..... PETITIONER

-VERSUS-

REPUBLICRESPONDENT

JUDGMENT

The Petitioner, **BERNARD OLIECH OOKO**, has invoked the provisions of **Section 333 (2)** of the **Criminal Procedure Code**.

1. He asked the Court to direct that the sentence which was handed down by the trial court should be calculated from the date when he was arrested.
2. **Section 333 (2)** reads 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 to 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.”

3. It was the Petitioner’s case that the sentence he was serving was not inclusive of the period which he had spent in custody whilst the trial was ongoing.
4. He explained that the Prison authorities had denied him the benefit bestowed by **Section 333 (2)** of the **Criminal Procedure Code**, because in their view, the orders issued by the Court of Appeal were ambiguous, thus incapable of being executed.
5. In response to the petition, Ms Maureen Odumba, learned Prosecution Counsel, submitted that the computation by the Prison authorities was accurate.
6. It is common ground that the Petitioner was charged for the offence of Murder.
7. On 18th December 2014 Majanja J. convicted him for the said offence, and the learned Judge then sentenced him to suffer death as by law prescribed.
8. The Petitioner challenged both the conviction and the sentence, through an appeal to the Court of Appeal.
9. On 21st November 2019 the Court of Appeal delivered its judgment, in which it upheld the Petitioner’s conviction.
10. However, on the question of the sentence, the Court of Appeal rendered itself thus;

“This Court is now bound by Francis Karioko Muruatetu & Another V Republic (2017) eKLR; that death sentence is not mandatory in a charge under Section 204 of the Penal Code.

On record is a detailed mitigation both by the appellant and his family members.

We also take into consideration the fact that the appellant was a first offender, for which reasons we are inclined to

interfere with the death sentence imposed by the trial court and substitute it with a sentence of 20 years.”

11. In my considered opinion, if the Court of Appeal stopped its judgment at that stage, it may have been arguable that it did not take into account the period which the Petitioner had spent in custody, whilst he was still on trial.

12. However, the Court of Appeal went further, and held as follows;

“This sentence shall take into account the period the appellant has been in custody pursuant to Section 333 (2) of the Criminal Procedure Code.”

13. The Court has pronounced itself with regard to **Section 333 (2)**. As the said pronouncement was rendered by a Court whose jurisdiction is higher than that of the High Court, I can neither add to nor subtract from that which they pronounced.

14. However, pursuant to **Section 333 (2)** of the **Criminal Procedure Code**, the period which the Petitioner spent in custody, whilst he was still on trial, must be factored in the calculations.

15. In the case of **AHAMAD ABOLFATHI MOHAMED & ANOTHER Vs REPUBLIC, CRIMINAL APPEAL NO. 135 OF 2016**, the Court of Appeal said;

“The appellants have been in custody from the date of their arrest on 19th June 2012. By dint of Section 333 (2) of the Criminal Procedure Code, the court has 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 conviction because that amounts to ignoring altogether the period already spent in custody.”

16. Accordingly, when the Prison authorities insist that the 20 Years’ imprisonment commences from the date when the trial court sentenced the Petitioner, the computation ignores the period which the Petitioner had spent in custody prior to being convicted.

17. The Petitioner was arrested on 11th November 2012.

18. On 19th July 2013 the trial court granted him Bond in the sum of Kshs 3.0 Million with 2 sureties. However, the Petitioner was unable to get sureties. Although he sought a reduction of the Bond Terms, the trial court rejected the application for review, on 30th September 2013.

19. The Petitioner remained in custody all through the trial, which lasted until 16th February 2015.

20. Accordingly, the Petitioner is entitled to have the Prison authorities take into account the period of **TWO (2) YEARS, THREE (3) MONTHS** and **FIVE (5) DAYS**.

21. I therefore find that when carrying out the computation of the period which the Petitioner should serve the sentence of 20 Years, the said period must be reduced proportionately by the time he spent in custody whilst he was still on trial.

22. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF MAY 2021

FRED A. OCHIENG

JUDGE