



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 94 OF 2020

GEOFFREY NGOTHO MUTISO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein Geoffrey Ngotho Mutiso was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was sentenced to death and consequently appealed against the conviction and mandatory death sentence which appeal was dismissed. On 8/10/2019 the Petitioner was resented to 27 years imprisonment as per the directions of the supreme court in the infamous Francis Kariokor Muruatetu & Another v Republic case.

2. The Petitioner is now before this court seeking for consideration and computation of the time spent in remand pending trial and which was 3 years and 4 months as per the provisions of Section 333[2] of the Penal Code.

Section 333(2) of the *Criminal Procedure Code* provides as hereunder:

(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) 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.

3. From the foregoing it is clear that the law has in mandatory terms provided that the period during which an accused has been held in custody prior to being sentenced must be taken into account in computing the period of the sentence. Further, the constitution under Article 20(3) provides that a court should interpret a law that most favours a fundamental right. This court is guided by the holding of the court in **Ahamad Abolfathi Mohammed & Another v 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 19th June 2012.”

4. 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.

5. Guided by the provisions of the law and the facts of this Court, I hereby make the order for the relevant authorities including the prison facility where the petitioner is being held to take into account the period spent in custody by the accused, in computing his sentence.

It is ordered accordingly.

Dated, Signed and Delivered at Mombasa this 28th day of September, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for State

Ms. Peris Court Assistant