



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**PETITION NO. 66 OF 2020 (CONSOLIDATED WITH**

**PETITION NO. 18 OF 2021)**

**1. AGGREY RASTO WANDEI**

**2. FERDINARD INDANGASI MUSEE.....PETITIONERS**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT**

1. The consolidated Application is brought by way of a Notice of Motion dated **1/02/2021**. The Petitioners are seeking that their respective sentences be reduced by the time they spent in remand custody while awaiting trial before the lower court. Their Application is premised on **Section 333** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**.

2. The Petitioners were convicted for the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code and sentenced to death in Criminal Case No. 1972 of 2007. They appealed in HCRA. No. 250 of 2008. The appeal was dismissed and sentence upheld.

3. Pursuant to the Supreme Court declaration in **Francis Kariokor Muruatetu & Another vs. Republic SCK Pet. No. 15 of 2015 (2017) eKLR** which declared mandatory death sentence for the offence of murder unconstitutional, the Petitioners were heard and resented separately by this court in **Petition No. 52 of 2019 (Aggrey Rasto Wandei)** and **Petition No. 4 of 2018 (Ferdinand Indangasi Musee)** to serve a definite jail term of twenty (20) years from the date of conviction.

4. **Ms. Wanjohi** learned prosecutor submitted that having perused the Court's record, she has ascertained that the Petitioners spent 1 year and 3 months in remand before they were convicted. Consequently, the prosecution had no objection to the instant application.

**The Determination**

5. 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.*

6. It is evident that Section 333(2) enjoins a court to take into account the period spent in custody where the person sentenced has, prior to such sentence, been held in custody. Therefore, in undertaking a resentencing, the Court is enjoined to find out the period for which the convict was in custody prior to the date of resentencing including the period he served pending his trial and after his initial conviction and sentencing. That whole period must be taken into account in computing the sentence to be imposed on him by the Court. Unless this is done, the resentence is likely to fall foul of Article 50(2) (p) of the Constitution, which provides that:

*50(2) Every accused person has the right to a fair trial, which includes the right—*

*(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*

7. In Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR where the Court of Appeal held:

***“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 19<sup>th</sup> June 2012.”***

8. In the result, it is my finding that the petitioners have made out a good case for reduction of their respective sentences by the period of their pre-conviction detention, pursuant to Section 333(2) of the Criminal Procedure Code. In the premises, it is hereby ordered that the Petitioners’ sentence of 20 years’ imprisonment be reduced by the one year and three months’ of pre-conviction detention that they were subjected to before imprisonment. Therefore, it is ordered that the sentence be reckoned from 17/6/2007, which was the date of the Petitioners’ arrest.

That is the Judgment of the Court.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021.**

**E. K. O. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for DPP

Ms. Peris Court Assistant