



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISC. APPLICATION NO. E033 OF 2021

VINCENT KIPLANGAT NGENO.....APPLICANT

- V E R S U S -

REPUBLIC.....RESPONDENT

R U L I N G

1. The Applicant filed an Application on 27/4/2021 seeking inclusion of the duration spent in remand in computation of his sentence.
2. The Applicant was charged in court on 10/07/2012 with murder contrary to section 203 as read with section 204 of the Penal Code.
3. He was found guilty and sentenced to twenty one (21) years imprisonment on 25/5/2018 after a period of five (5) years and eight (8) months of being incarcerated.
4. The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already spent in custody. Section 333 of the Criminal Procedure Code states as follows;

Warrant in case of sentence of imprisonment

"(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 (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"

5. This duty is also contained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided 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. The duty to take in account the period an accused person had remained in custody in sentencing under the proviso to section 333(2) of the Criminal Procedure Code which is couched in mandatory terms was acknowledged by the Court of Appeal in ***Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR and Bethwel Wilson Kibor vs. Republic [2009] eKLR*** and more recently in the High Court case of ***Vincent Sila Jona & 87 others vs Kenya Prison Service & 2 others [2021] eKLR***.

7. In ***AHAMAD ABOLFADHI MOHAMMED & ANOR VS. REPUBLIC [2018] eKLR*** the Court of Appeal stated that the courts should take into account in a meaningful way the period spent in custody as required by the proviso to section 332 (2) of the Criminal Procedure Code and the Court stated as follows;

***“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.*”**

8. Similarly, in the case of **BETHWEL WILSON KIBOR VS. REPUBLIC [2009] eKLR** the Court of Appeal allowed the appeal and reduced the sentence to the period that the appellant had already served, the court expressed itself as follows:

“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody.”

9. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be taken into account in meting out the sentence where it is not hindered by other provisions of the law.

10. I have perused the original record and I find the trial court only took into account the mitigation on behalf of the Applicant before sentencing the Accused person to twenty one (21) years imprisonment.

11. I allow the Application filed in this court on 27/4/2021 and direct that the sentence starts to run from the date the Applicant first remanded in custody and not from 25/3/2018 when the sentence was meted.

12. Orders to issue accordingly.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 20TH DAY OF DECEMBER 2021.

A. N. ONGERI

JUDGE