



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. E001 OF 2021**

**BONIFACE MUGO MAINGI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Brief Facts**

1. The application for determination is dated 8/1/2021 in which the applicant seeks to have his sentence reviewed under **Section 333(2) of the Criminal Procedure Code**.
2. The applicant was convicted by Mukurweini Senior Resident Magistrate in Criminal case No. 16 of 2017 with the offence of robbery contrary to **Section 296(1) of the Penal Code** and was sentenced to serve fourteen years imprisonment.
3. The applicant herein seeks for review of sentence and urges the court to invoke **section 333(2) of the Criminal Procedure Code** and consider the period he served in remand custody pending the hearing and disposal of the trial. He states that he was arrested on 11<sup>th</sup> January 2017 and convicted on 5<sup>th</sup> July 2017 and that the period of six (6) months ought to have been taken into consideration.
4. Parties disposed of the application by way of written submissions.

**The Applicant's Submissions**

5. The applicant reiterates what he stated in his application that he is remorseful and prays for a second chance to rebuild his life. He states that he has undertaken several rehabilitative courses while in prison which will help him in re-integrating into the society. He further submits that he is a first offender and he prays to be accorded the least severe punishment. He states that fourteen years imprisonment is long and punitive and it is the maximum possible sentence for the offence of robbery. As such, he seeks to be granted a non-custodial sentence to be able to assist his family during this hard economic hardship caused by the covid 19 pandemic.

**The Respondent's Submissions**

6. The respondent submits that the applicant withdrew his appeal on conviction and sentence to enable him pursue the current application. The respondent argues that the trial court was well within its mandate in imposing the sentence which is in line with **Section 296(1) of the Penal Code** that provides for a sentence of fourteen years. Further, the applicant was given a chance to mitigate and the same was recorded and considered upon by the trial court.
7. The respondent further submits that although the trial court never recorded the time the applicant spent in custody, since it was guided by the gravity of the offence and the aggravating factors of the case. The act of the assault was unprovoked and an innocent man lost his hard earned money to people he knew very well. Although the applicant was charged with robbery contrary to Section 296(1) of the Penal Code the evidence and particulars of the charge reveal the offence of robbery with violence contrary to Section 296(2) of the same code. As such, the applicant got off easy with a sentence of 14 years as opposed to the mandatory sentence for the offence of robbery with violence. The respondent further argues that the applicant is not entitled to a review of the sentence as his sentence is commensurate to the charges. In any event, the respondent states that the applicant is not serving an excessive sentence even if the time spent in remand has not been taken into account as required under **Section 333(2) of the Criminal Procedure Code**. As such, the respondent prays that this honourable court dismisses this application.

**Issues for determination**

8. On perusal of the application and the submissions, the main issue for determination herein is whether the applicant is entitled to review of

sentence under Section 333(2) of the Criminal Procedure Code.

## **The Law**

9. Section 333(2) of the Criminal Procedure Code provides:-

**“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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”**

10. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

11. The provisions of **section 333(2) of the Criminal Procedure Code** was the subject of the decision in **Ahamad Abolfathi Mohammed & Another vs 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 19<sup>th</sup> June 2012.”**

12. The same court in **Bethwel Wilson Kibor vs Republic [2009]eKLR** expressed itself as follows:-

**“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22<sup>nd</sup> September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”**

13. 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.”**

14. This court is empowered by **Article 165(6) of the Constitution of Kenya** to review a decision by a subordinate court. **Article 165(6)** provides:-

**The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

15. The applicant was arrested on 11<sup>th</sup> January 2017 and convicted on 5<sup>th</sup> July 2017. By virtue of **Section 333(2) of the Criminal Procedure Code**, this duration ought to have been considered during sentencing. Notably, as submitted by the respondent, the applicant has not contested the sentence, he only seeks to have the duration he spent in custody be taken into account which is his legal entitlement in my considered view.

16. The applicant seems to be arguing intertwined applications being:-

- i. An application brought under Section 333(2) of the Criminal Procedure Code, and
- ii. An application for review of sentence under Section 362 and 364 of the Criminal Procedure Code.

17. In his application dated 8/1/2021 and filed on 18/1/2021, the applicant only petitions this court under **Section 333(2)** to review his

sentence. It is in his submissions that the applicant ropes in the 2<sup>nd</sup> application. It is trite law that an application cannot be made at submissions stage. The purpose of submissions is to support the application already on record and as such, a new prayer cannot be entertained at submissions stage. In my considered view, the said submissions on review under **Section 362 and 364 of the Criminal Procedure Code** are misplaced the applicant having been accorded a chance to mitigate before sentencing. He cannot be allowed to re-open the case before the trial court at this stage. The submissions on review under Section 362 of the Criminal Procedure Code are hereby disregarded.

18. The applicant was sentenced on 05/07/2017 having spent a period of six (6) months in prison custody during the pendency of his trial.

19. I find that this application under **Section 333(2)** has merit and it is hereby allowed.

20. The applicant will therefore serve fourteen years imprisonment with effect from the date of arrest 11<sup>th</sup> January 2017.

21. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEOLINK THIS 16TH DAY OF DECEMBER, 2021.**