REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL REVISION NO. 27 OF 2020

BETWEEN

JONNES WAITA KASYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos

Chief Magistrate Criminal Case No. 137 of 2020 made on 25th May, 2020)

REPUBLIC.....PROSECUTOR

VERSUS

JONNES WAITA KASYOKI.....ACCUSED

JUDGEMENT

1. The appellant herein, **Jonnes Waita Kasyoki,** was charged before **Machakos Chief Magistrate Criminal Case No. 137 of 2020** and was convicted of the offence of threatening to kill contrary to section 223(1) of the ***Penal Code***. The said conviction arose from his own plea of guilty. He was sentenced to two years in prison.

2. The only issue before this court in this appeal is whether in meting the sentence against the appellant the period when the appellant was in custody ought to have been taken into account.

3. The proviso to 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.***

4. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. However, where no reasons are given as to why that benefit ought not to inure to an accused person, the presumption must be in favour of the accused that the same will be computed inclusive of the period spent in custody.

5. I associate myself with 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 19th June 2012."**

6. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** 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. 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 22nd September, 2009 he had been in custody for ten 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."**

7. 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.***

8. In my view, this Court in the exercise of its powers under Article 23 of the Constitution may correct a patently unjust decision such as where the failure to do so would amount to subjecting an accused to serve a sentence which is clearly unlawful or legally excessive.

9. From the charge sheet, the appellant was arrested on 20th February, 2020. Though he was admitted to bail, there was no evidence that he was in fact released on bail. He was sentenced on 15th May, 2020. In sentencing the appellant, there was no mention of the period the appellant was in custody. By omitting to do so the learned trial magistrate failed to take into account statutory provisions guiding the imposition of sentences and that is a legal justification warranting interference with the exercise of the discretion on sentencing.

10. Consequently, I allow the appeal as regards the sentence and direct that the Appellant's sentence shall run from 20th February, 2020.

11. It is so ordered.

12. This Judgement is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

Read, signed and delivered in open Court at Machakos this 29th day of June, 2020.

G V ODUNGA

JUDGE

In the presence of:

The Appellant via Skype

Mr ngetich for the Respondent

CA Geoffrey