**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**MISC. CRIMINAL APPLICATION NO. 18 OF 2019**

**JOSEPH NJENGA NG'ETHE.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**R U L I N G**

**A. Introduction**

**1.** This is a ruling for the application dated 9th July 2019 in which the applicant seeks a declaration that his sentence commences from the time he was taken into custody, that he is entitled to remission and that the sentence of twenty-five (25) years given on resentencing is harsh and ought to be revised.

**2.** The applicant and others not before this court were jointly charged in Siakago Criminal Case 1039 of 2007 with the offence of robbery with violence, convicted and sentenced to death. He subsequently appealed to the High Court vide Criminal Appeal No. 172 of 2008 which was dismissed prompting him to file a second appeal to the Court of Appeal in Nyeri Criminal Appeal No. 20 of 2010 which was also dismissed on the 18th September 2013.

**3.** The applicant then sought rehearing on sentencing in Siakago Criminal Case 1039 of 2007 and his death sentence was set aside and replaced with a sentence of 25 years to run from the 19th September 2008 in the ruling of Hon. Nzioki delivered on 12th June 2019.

**4.** Ms. Mati for the respondent did not oppose the application for the applicant's sentence to run from the date of being taken into custody. She said that the prayer was grounded in law specifically Section 333 (2) of the Criminal Procedure Code. Reliance was placed on the cases of **Ahmed Abolfathi Mohamed v Republic [2018] eKLR.**

**B. Analysis & Determination**

**5.** I have considered the application, the relevant law herein as well as the submissions by both the applicants and the respondent.

**6.** Section 333(2) of the ***Criminal Procedure Code*** provides that:

> ***"(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."***

**7.** 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 since the decision not to include the period spent in custody is an exception to the statutory provision that can only be justifiable upon reasonable grounds and as I have stated above, the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence.

**8.** I associate myself with the decision of **Ahamad Abolfathi Mohammed [supra]** 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 19th June 2012."***

**9.** 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."***

**10.** The record herein consists of the Siakago trial court typed proceedings and the resentencing application proceedings. It is discernible that the accused was arrested on or about the 13th June 2007 and convicted on 19th September 2008. The applicant is thus entitled to have his sentence computed starting from the date of their arrest.

**11.** In terms of sentence, it is noteworthy that the applicant applied for and was granted orders for resentence with the death sentence being commuted to twenty five (25) years imprisonment. I am of the view that if the applicant was dissatisfied with that decision, he ought to have appealed against the decision of he court.

**12.** In the instant case, it is worth noting that the applicant with others not before this court were armed with pistols and pangas when they robbed the complainant. Further to this, the gang also cut the complainant causing him actual body harm.

**13.** In **Benjamin Kemboi Kipkone v Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of Ksh. 250,000/= and a mobile phone, Chemitei J. substituted the death sentence with 20 years imprisonment.

**14.** In **Paul Ouma Otieno v Republic (2018) eKLR** where the accused being armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones. Majanja J. substituted the death sentence with 20 years imprisonment.

**15.** In **Wycliffe Wangugi Mafura v Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

**16.** In **Benson Ochieng & France Kibe v Republic (2018) eKLR,** Joel Ngugi J. re-sentenced the petitioners to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery.

**17.** I reach a conclusion that the sentence of twenty-five (25) years imprisonment given was reasonable and within the law. Consequently, I find no reason to interfere with the trial court's discretion in the decision.

**18.** Regarding the prayer for remission I do note that the power to remit sentence as provided by Section 46 of the Prisons Act, Cap 90 as follows: -

***"(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.***

***Provided that in no case shall -***

***(i) any remission granted result in the release of a prisoner until he has served one calendar month;***

***(ii)any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.***

***(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.***

***(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period-***

***(a) spent in hospital through his own fault; or***

***(b) while undergoing confinement as a punishment in a separate cell.***

***(4) A prisoner may be deprived of remission -***

***(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;***

***(b) where the Cabinet Secretary for the time being responsible for Internal security considers that it is in the interests of public security or public order.***

***(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground. [Act No. 25 of 2015, Sch.]."***

**19.** As such this court is not vested with the power to grant remission. The same lies with the Commissioner of Prisons who will exercise his discretion when called upon to do so.

**20.** Accordingly, the instant application is meritorious only in respect of the prayer that sentence do run from the date of arrest. From the record, the date of accused's apprehension was 29/06/2007 while that of conviction was 18/09/2008. The record is clear that the period spent in custody was not taken into account by the trial court.

**21.** I therefore allow the application as follows: -

v ***That computation of twenty-five (25) years imposed on 12th June 2019 shall run from 29th June 2007 being the date of arrest.***

**22.** It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF DECEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Lokorio for Respondent**

**Applicant present**