



REPUBLIC OF KENYA



KENYA LAW
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**Tanui v Republic (Criminal Petition E062 of 2023)
[2025] KEHC 4384 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E062 OF 2023
RN NYAKUNDI, J
APRIL 4, 2025**

BETWEEN

EZEKIEL KIBET TANUI PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner approached this court vide a Notice of motion dated 24th August, 2023 seeking reliefs under section 333(2) of the Criminal Procedure Code. He seeks that his sentence commences from the time he was placed in pre-trial custody.
2. In his supporting affidavit, he deposed that he was charged with an offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and was convicted and sentenced to serve 12 years by this court on 4th April, 2019. He contends that since his arrest he been in custody and that is from 18th September, 2016 to 4th April, 2019. He seeks a consideration of the time served in custody.
3. The litigation history from the record demonstrates that the applicant was arraigned in court on 22nd August, 2016 charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The same was later reduced to manslaughter contrary to section 202 as read with section 205 of the Penal Code as a consequence of which he pleaded guilty to the charge, convicted and sentenced to 12 years imprisonment on the 4th day of April, 2019.
4. In the latest application, the applicant has invoked the provisions of section 333(2) of the Criminal Procedure Code on pre-trial detention period which was never incorporated in the final sentencing verdict by the session judge. That means that the applicant in his affidavit has gone into greater details to demonstrate that he was not on bail as provided for under Art. 49(1)(h) of the Constitution and therefore deserved to receive credit for the period spent in pre-trial detention before his case was finally heard and determined.



5. In the case of *Vincent Sila Jona & 87 Others v Kenya Prison Service & 2 Others* [2021] eKLR which I fully associate myself with. The Court held as follows;

“A declaration that Trial Courts are enjoined by Section 333(2) of the *Criminal Procedure Code*, in imposing sentences, other than sentence of death to take into account of the period spent in custody. A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences. A declaration that Section 333(2) *CPC* applies to the original sentence as well as sentence imposed during resentencing...”

6. Additionally, in *Abamad Abolfathi Mohammed & another v 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 June 19, 2012.”

7. It is not lost to this court that pre-trial detention critically undermines the constitutional right to presumption of innocence until the contrary is proved under Art. 50(2)(a) of the *Constitution*. This arbitrary detention for reasons of the remandees not affording the bail terms granted by trial courts under Art. 49(1)(h) of the *Constitution* has disproportionate effect on the individuals of fundamental rights and freedoms outlined in Chapter four of the *Constitution* which essentially denies them any recourse of compensation in the event they are acquitted of any wrong-doing or the allegations alleged in the information by the prosecution. When a suspect or an offender is remanded in custody during the pendency of the trial and determination of his case, he/she can lose his job, support for his/her family, experience psychological trauma and stress associated with incarceration. There is even little public sympathy during the period a suspect or an offender is remanded in custody and even after release, the stigma rarely goes away and some of this deplorable circumstances, the positive rights based approach was taken by the legislature in enacting section 333(2) of the *Criminal Procedure Code* for the trial court to consider on conviction to give credit to the period served in pre-trial detention as a mitigation measure to the extent that the period provides some kind of remission during the imposition of a custodial sentence. In addition, for the Kenyan context, Art. 2(5) and (6) of the *Constitution* provides for international law as being part of our sources of law and some of the key instruments provide extensively on the rights of pre-trial detention and its implication in the criminal justice system.



8. For those reasons, the application succeeds to the extent that the 12 years custodial sentence imposed shall take effect from the 22nd August, 2016 in consonant with the provisions of section 333(2) of the *Criminal Procedure Code*. The committal warrants shall therefore be amended to give credit of that period which the accused was held in custody during the pendency of this trial.

9. It is so ordered.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 4TH DAY OF APRIL 2025.

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R. NYAKUNDI

JUDGE

