



REPUBLIC OF KENYA



KENYA LAW
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**Gumo v Republic (Criminal Petition E012 of 2023)
[2025] KEHC 8645 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8645 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E012 OF 2023**

JRA WANANDA, J

JUNE 20, 2025

BETWEEN

DANIEL GUMO PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner, together with others, was charged in Eldoret Chief Magistrate's Court Criminal Case No. 2178 of 2017 with 3 counts of criminal offences. In Count I, the charge was for the offence of vandalism of electrical apparatus contrary to Section 64(4)(b) of the *Energy Act*. In Count II, the charge was for stealing contrary to Section 268(1) as read with Section 275 of the *Penal Code*, and in Count III, the charge was for sabotage contrary to Section 343 of the *Penal Code*. They also faced the alternative charge of handing stolen goods contrary to Section 322(2) of the *Penal Code*.
2. The accused persons were all acquitted of the main charges but the Petitioner was, alone, convicted of the alternative charge of handing stolen goods for which he was on 18/01/2023, sentenced to serve 7 years imprisonment.
3. The Petitioner has now approached this Court with the Notice of Motion dated 13/04/2023 seeking re-sentencing under the proviso to Section 333(2) of the *Criminal Procedure Code*. He alleges that he spent a period 5 years and 7 months in remand custody before he was sentenced and prays that this period be taken into account in computing the sentence.
4. When this matter came up for directions before me, the Petitioner informed the Court that he would not be filing any written Submissions. On his part, Prosecution Counsel Mr. Okaka Leonard filed the Submissions dated 22/01/2025.
5. In his Submissions, Mr. Okaka urged that the trial Court made no pronouncement as to when the prison term was to commence and that in view thereof, the same should commence on 18/01/2023,



the day when it was meted. He however pointed out that the Petitioner raised bond at the trial Court on 29/05/2017 and thus only spent 2 months in remand custody, which is therefore all that should be credited.

6. Mr. Okaka also pointed out that when out on bond, the Petitioner was convicted elsewhere over other transactions under Eldoret Chief Magistrate's Court Criminal Case No. 150 of 2020 and that the provisions of Section 37 of the *Penal Code* should therefore apply. He submitted that since the trial Court did not direct that the sentences should run concurrently, the sentence passed in the subsequent conviction(s) ought to be executed after the expiration of the former sentence.

Determination

7. The issues for determination herein are evidently the following:
 - i. Whether the period spent by the Petitioner in remand custody before he was sentenced, should be deducted from the prison term of 7 years meted out against him”.
 - ii. Whether the sentence meted out against the Petitioner by the trial Court in the case the subject hereof should take effect, or be executed, only after expiration of an earlier but separate sentence meted out upon the same Petitioner in a different criminal case.
8. Regarding the time spent in custody during trial, Section 333(2) of the *Criminal Procedure Code* provides as follows:

“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, been held in custody, the sentence shall take account of the period spent in custody.”

9. The Judiciary Sentencing Policy Guidelines, Clause 7.10 also contains a similar principle.
10. A perusal of the Charge Sheet before the trial Court reveals that the Petitioner was arrested on 26/05/2017 and arraigned on 29/05/2017 when he took plea. He was then granted bond on 27/07/2017 and secured release almost immediately. He was then sentenced on 18/01/2023. The period spent by the Petitioner in remand custody was therefore only about 2 months, and not 5 years and 7 months as he alleged. 5 years and 7 months was the estimate duration that the entire case took to completion, not the period spent in custody by the Petitioner.
11. I note that the trial Magistrate did not mention whether she took the time spent in custody into account. She only observed that the Petitioner is not a 1st offender, having been convicted, and at that time, was serving a separate sentence under Eldoret Chief Magistrate's Court Criminal Case No. 150 of 2020 for a similar offence.
12. On the issue of period spent in custody, the Court of Appeal, in the case of Bethwel Wilson Kibor vs Republic [2009] eKLR stated 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 22nd 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. The Court of Appeal also advanced the same holding in the case of Ahmad Abolfathi Mohammed & Another vs Republic (2018) eKLR.
14. It follows therefore that it was mandatory for the trial Court to have taken into account the time spent in custody by the Petitioner as aforesaid, but which it failed to do.
15. On the issue of the Petitioner’s earlier but separate conviction and sentence in Eldoret Chief Magistrate’s Court Criminal Case No. 150 of 2020 (which coincidentally also gave rise to a separate Petition, namely Eldoret High Court Criminal Petition No. E016 of 2023 which incidentally I have also determined today by a separate Judgment), as correctly observed by Mr. Okaka, the Petitioner, while out on bond in the case the subject of this Petition, committed a similar offence to the one the subject hereof, for which he was separately convicted and on 29/06/2022, sentenced to serve a prison term of 5 years.
16. In regard thereto, Section 37 of the Penal Code provides as follows:

“ 37. Sentences when cumulative:

Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

.....”

17. Applying the above provision, the sentence of 7 years imposed in the separate case, namely, Eldoret Chief Magistrate’s Court Criminal Case No. 150 of 2020, having been meted out earlier on 29/06/2022, and the sentence of 5 years imprisonment meted out in Eldoret Chief Magistrate’s Court Criminal Case No. 2178 of 2017, the subject hereof, having been read out subsequently on 18/01/2023, it follows that the Petitioner shall start serving the sentence of 7 years herein, upon expiry of the sentence of 5 years imprisonment imposed in the separate case.

Final Orders

18. In the circumstances, I make the following Orders:
 - i. The period that the Petitioner spent in remand custody during the duration of the trial in Eldoret Chief Magistrate’s Court Criminal Case No. 2178 of 2017, between the date of arrest, namely, 26/05/2017, and the date when he was released on bond namely, 27/07/2017, shall be subtracted in the computation of the sentence of 7 years imprisonment imposed against him therein on 18/01/2023.
 - ii. However, applying the provisions of Section 37 of the Penal Code, the Petitioner shall only start serving the said sentence of 7 years imposed in Eldoret Chief Magistrate’s Court Criminal Case No. 2178 of 2017, upon, or after, the date of expiry of the earlier sentence of 5 years



imprisonment meted out against him in the separate case, namely, Eldoret Chief Magistrate's Court Criminal Case No. 150 of 2020, on 29/06/2022.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF JUNE 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

