



REPUBLIC OF KENYA



**Erukudi v Republic (Criminal Application E115 of 2023)
[2024] KEHC 731 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 731 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPLICATION E115 OF 2023
RN NYAKUNDI, J
FEBRUARY 2, 2024**

BETWEEN

JOSEPH ETIIR ERUKUDI APPLICANT

AND

REPUBLIC PROSECUTOR

RULING

Coram : Before Justice R. Nyakundi

Mr. Kakoi for the State

1. The petitioner was charged of grievous harm contrary to section 234 of the *Penal Code*. The brief facts are that on the 8th day of February, 2021 at IOM Area in Turkana West sub County within Turkana County accused unlawfully did grievous harm to Muya Hamadi. In a full trial before Hon. Wekesa the petitioner was found guilty, convicted and sentenced to serve 4 years imprisonment. From the record he preferred not to challenge conviction but review on sentence.
2. In support of the petition for review, it's a notice of motion which structured the prayers along these grounds.
 1. That: My Lord I was arrested charged and sentenced to 4 years for an offence of Grievous harm c/s 234 of the *Penal Code*.
 2. That: My Lordship, the time I spent in custody was not considered during my resentencing. Hence section 333(2) of the *Criminal Procedure Code* requires a sentencing court to take into account the period that a convicted person has spent custody prior to the sentence.
 3. That I the applicant was on custody since the time of arrest I had not been released on bond up to conviction.



4. That the applicant relies in the case of *Abmad Abolfathi Mohammed and another vs Rep* (2018) eKLR and *Lotesiro Ekuwam and another vs Rep* (2023) where the applicants were resented from the date of arrest.
 5. That section 333(2) of the *CPC* requires a sentencing court to convict an accused person from the date of arrest.
 6. That Your honour, invoke article 27(1) of the *Constitution* of Kenya 2010
 7. That I believe I will receive equal protection and equal benefit of the law like any other Kenyan whose rights were not violated.
3. The central issue is whether the petitioner is entitled to the remedy under Section 333(2) of the *CPC* in so far as the period spent in remand custody before the conclusion of his trial.

Analysis And Determination

4. I have considered the application and the court's mandate is to determine the application of section 333(2) of the *Criminal procedure code*. The section provides as follows:
 - (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) 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.
5. The Judiciary Sentencing Policy Guidelines are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

In *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR 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



6. On the face of the record these requirements of the law Under Section 333(2) of the CPC seems not to have been complied with by the trial court. The category above, comprise evidence that only came into existence and knowledge of the petitioner after conviction and sentence. That provision existed at the time of the original trial but was never factored in the final sentence by the learned trial magistrate. It appears therefore that the evidence is admissible at this stage of the proceedings under art. 50(6)(a) & (b) of the Constitution. This interpretation is perfectly clear from the reading of section 382 of the Criminal Procedure Code which provides that an order of the court can be reviewed if it is considered that its retention will occasion prejudice or injustice to the applicant. Ultimately, the cumulative effect is to have the 4 years custodial sentence committal warrant be amended to incorporate the commencement date of February 9, 2021 to satisfy the criteria under section 333(2) of the CPC.
7. Orders accordingly

DATED, SIGNED AND DELIVERED AT LODWAR THIS 2ND DAY OF FEBRUARY, 2024

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In the presence of;

Mr. Yusuf for the state

Applicant in person

R. NYAKUNDI

JUDGE

