



**Erwan v Republic (Miscellaneous Criminal Appeal E135 of 2023)
[2024] KEHC 668 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E135 OF 2023
RN NYAKUNDI, J
FEBRUARY 1, 2024**

BETWEEN

LOMAI LONGOLEI ERWAN APPLICANT

AND

REPUBLIC RESPONDENT

(Being an appeal for review of sentence in Cr. Case No. 149 of 2019)

RULING

1. The applicant was convicted with the offence of stealing stock contrary to section 278 of the penal code and was sentenced to 7 years imprisonment.
2. The particulars of the charge were that on the 13th day of July, 2018 at Nitira sub-location in Turkana West Sub- County within Turkana County, the accused person jointly with others not before court stole one (1) camel valued at Kshs. 40,000/= the property of Nawoi Eragai.
3. The applicant sought review of the sentence pursuant to Section 333(2) of the *Criminal Procedure Code* and article 27(1) of the *constitution* of Kenya. I take note that the applicant has not challenged neither the conviction nor the sentence meted but seeks the court to apply the provisions of section 333(2) of the *CPC* and take into account the time he has been in custody.

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.
6. In *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, which the applicant urged this court to rely on, 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. The Applicant was convicted on 11th September, 2019 when judgment was read out and after mitigation, he was sentenced to serve 7 years imprisonment. The court in sentencing the accused person highlighted that the probation report in respect of the accused person was considered and the same was unfavorable. In my view, the court in meting out the sentence, did not take into account the provisions of section 333(2). I share the same thoughts as the court in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR that the trial court should have directed the applicant’s sentence of imprisonment to run from the date of arrest on 16th May, 2019.
8. Therefore, in compliance with Section 333(2) *Criminal Procedure Code*; computation of the sentence ought to include the period the Accused person was in custody during hearing and determination of the case before sentence was meted out.
9. The Accused was placed in custody on 16th May, 2019 and sentenced on 11th September, 2019. The 7 years sentence ought to start running from May 2019 when he was placed in custody to September 2019 when he was sentenced to serve 7 years imprisonment.
10. The sentencing process and its outcome are within the mandate of the trial court. However, since circumstances vary from a case to another, this court shall intervene in exercise of revision pursuant to Article 165(3) *CoK* where mandatory provisions of the law have not been complied with.



11. In conformity to Section 333(2) *Criminal Procedure Code*, and considering the period he has been in custody. The 7 years imprisonment sentence shall be computed to include the period in pretrial detention
12. The Applicant's Miscellaneous Application is allowed as follows;
13.
 - a. Section 333(2) *CPC* mandates the 7 years imprisonment sentence granted by the Trial Court on 11th September, 2019 served by the Applicant shall be computed to include the period the Applicant was in custody before sentence, to commence from 16/5/2019.

Orders accordingly

DATED AND SIGNED AT LODWAR THIS 1ST DAY OF FEBRUARY, 2024

In the Presence of:

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R. NYAKUNDI
JUDGE

