



**Ilema v Republic (Criminal Application E114 of 2023)
[2024] KEHC 664 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPLICATION E114 OF 2023
RN NYAKUNDI, J
FEBRUARY 1, 2024**

BETWEEN

LOKITOE CHARU ILEMA PLAINTIFF

AND

REPUBLIC RESPONDENT

(Being a Review on Re-Sentencing in Cr. Case No. 05 of 2018)

RULING

1. The petitioner was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. In brief on the 15.9.2018 at Oluguse village in Liman sub-county within Turkana County unlawfully killed Amoit Esuban. The petitioner pleaded not guilty necessitating the prosecution to adduce evidence of 8 witnesses in support of the charge. Thereafter the petitioner was placed on his defence. In a full trial deliberations the petitioner was found guilty, convicted and sentenced to ten years imprisonment. From the record the petitioner seems not to have preferred and appeal to the court of Appeal, instead he elected to file a Notice of Motion dated 20.7.2023. The motion is couched with the following grounds for consideration by this court to grant the remedy.
 1. That the petitioner was arrested charged and tried for the offence of murder and sentenced to ten years imprisonment
 2. That the petitioner seeks re-computation of the five years spent in custody under Section 333(2) of the CPC.
2. That the Respondent did not file any replying affidavit or written submissions as a rejoinder with a Notice of Motion. Therefore, at the heart of this petition is whether from the record the petitioner spent five years in remand custody before the conclusion of his case in which the judgement was delivered on 30.3. 2023. The second limb is whether the record and the judgment justifies the remedy in the aforesaid provisions of the code.



Analysis and Determination

3. 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.
4. 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.
5. In [Abamad 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. The basic protections of the rights of detained persons are found in the [Universal Declaration of Human rights](#) and the [International Covenant Civil and Political Rights](#). These instruments were adopted to promote the dignity of all human beings, including persons accused of crime. Indeed, persons accused of crime are provided specific protection, they are guaranteed the rights to a fair trial, to the presumption of innocence and to appeal of any conviction. They are also protected by the prohibition of torture and other cruel inhuman or degrading treatment or punishment, the right to equal protection of the law, and the right to freedom from arbitrary arrest or detention. These guarantees were adopted and given force of International Law in the [International Covenant of Civil and Political Rights](#), which as of 31.1.1993 had been ratified by 113 States. The rationale of these basic rights is underpinned in the scope of the principles Pre-trial detention may not be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are left free. The thematic rights



on re-trial detention in 2010 the drafters of a constitution in Art. 2(5) & (6) provided as follows: The general rules of international law shall form part of the law of Kenya, Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. In Kenya a remand prisoner is any person charged with a criminal offence who has been ordered by the court to be retained in custody while awaiting trial or sentencing. It is that period in detention or remand custody which is being alluded to in Section 333(2) of the CPC. It is a period considered by the law during which individuals are deprived of their liberty pending the conclusion of their criminal trials. As it relates to Section 333(2) of the CPC pre-trial detention has a nexus with Art 52(a) of the Constitution which states that an accused person has a right to be presumed innocent until the contrary is proved. Generally, in criminal justice administration remand detention or custody in Kenya is acknowledged as a legitimate exception to the right to liberty and human dignity in Art. 28 & 29 of the Constitution. To fully contextualize the ramification the period spent in pre-trial detention Section 333(2) of the CPC provides a saving clause in which that period spent in custody ought to be credited to the accused persons in computing the final verdict on sentence.

7. The current petition focuses on this issue. Properly interpreted Section 333(2) of the code requires the court to impose a total sentence and have it reduced by granting credit for the period spent in remand custody. Where an enactment in a statute prescribes a custodial punishment in respect of an offence, the punishment to be imposed is subject to the provisions of Section 333(2) of the code. That a court is obligated to take into account any time spent in custody by the accused person as a result of the offence. The interaction between the legislation describing the offence and the provisions of Section 333(2) of the code is therefore at the heart of this petition. In essence the principle behind this provision that credit ought to be granted for pre-trial detention serves to mitigate certain injustices arising from the period of incarceration which the accused person has already undergone between the date of his or her arrest and the date of the final judgment on conviction and sentence. Here the view I take of this matter is that the accused person was arrested on 16.9.2018 for the offence of murder contrary to Section 203 & 204 of the Penal Code. Having pleaded not guilty he was prosecuted in a full trial in which the prosecution summoned eight witnesses to discharge the burden of proof of beyond reasonable doubt. The final judgement on conviction and sentence of ten years imprisonment was delivered on 14.6.2023. Therefore, his petition falls within the ambit of Section 333(2) deserving of credit for the period spent in Remand Custody. In light of the foregoing, the committal warrant of 14.6.2023 be reviewed and subsequently amended for the custodial sentence to take effect from 16.9.2018.
8. Orders Accordingly.

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

R. NYAKUNDI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

And in the presence of'

Mr. Yusuf for the state

Applicant in person

