



REPUBLIC OF KENYA



**Njoru v Republic (Miscellaneous Criminal Appeal E005 of 2023)
[2024] KEHC 735 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E005 OF 2023
RN NYAKUNDI, J
FEBRUARY 2, 2024**

BETWEEN

NGORIA TAMAN NJORU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant underwent trial for the offence of murder contrary to section 203 as read with section 204 of the penal code and was convicted and a sentence of 20 years was imposed by this court. The applicant being aggrieved preferred an application challenging the impugned judgment on the basis of section 333(2) of the Criminal Procedure Code.
2. The applicant now seeks review of the sentence pursuant to Section 333(2) of the Criminal Procedure code. The applicant prays that the court considers the said provision and take into account the time he has been in custody.
3. The notice of motion filed in court on 9th January, 2023 is expressed to be brought under Articles 50(1)(2)(Q) 51 (1),(2), 165(7) and section 333(2) of the CPC of cap 75 of the laws of Kenya. It is premised on the following;
 1. That I was charged and convicted for the offence of Murder of 203 ARW section 204 of the penal code and sentenced to serve twenty (20) years imprisonment on 18/11/2021 by Hon. J Sergon (Judge) at high court of Lodwar.
 2. That I do apply to the Honourable High Court to grant me pre-trial period and the sentence to start from the date of arrest on 13/5/2018 pursuant to section 333(2) of the CPC CAP 75 of the Laws of Kenya



3. That I do not dispute with the sentence imposed upon me but only the fact that section 333 (2) of the CPC CAP 75 was not put into consideration.

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 the case of 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 follows then that the court should state in its decision that it indeed the time spent by the accused in custody has been considered and that it has factored it in the final sentence. Failure to do so means that the period has not taken into consideration.

8. The punishment prescribed by the law for the offence of murder is death sentence under section 204 of the Penal Code. I note that this court considered the accused's mitigation and meted an appropriate custodial sentence of 20 years. Given the period one should serve for such an offence, I believe this court considered the provisions of section 333(2) of the Criminal Procedure Code. I find it mischievous that the applicant who is enjoying a rather lenient sentence decided to seek refuge in the provisions of section 333(2) of the Criminal Procedure Code.



9. In the end, I believe this court considered the bounds of section 333(2) of the *Criminal Procedure Code* in issuing the custodial sentence and proper directions were so issued. It is not competent for the court to exercise jurisdiction in the case of the same question arising between the same parties to review a previous decision not open to appeal. If the applicant thought the decision was wrong he ought to have filed an appeal in due time. The second bite at the cherry fails. For clarity purposes, the sentence meted upon the applicant shall run from 13/6/2018.

Orders accordingly.

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

In the presence of;

Yusuf for the state

Appellant present

.....

R. NYAKUNDI

JUDGE

