



**Kipkuna v Republic (Criminal Miscellaneous Application
E037 of 2023) [2024] KEHC 2369 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL MISCELLANEOUS APPLICATION E037 OF 2023**

RB NGETICH, J

MARCH 6, 2024

BETWEEN

HERMATON KIPKUNA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged in court with the offence of threatening to kill contrary to section 223(1) of the [Penal Code](#). The particulars of the charge were that the accused on the 17th day of July, 2022 at around 1700Hrs at Kipcherere Sub-location in Baringo North Sub- County within Baringo County together with another before court while armed with arrows, bows and pangas without lawful excuse threatened to kill Joshua Kiptoo Chepkonga.
2. The case proceeded for hearing and by judgment delivered on the 24th March, 2023, the applicant was convicted and sentenced to 4 years imprisonment in each count which sentence was to run concurrently.
3. The applicant sought review of sentence. He stated that he has served 8 months in prison. He prayed period served in remand be computed in sentence as provided under section 333(2) of the [Criminal Procedure Code](#) and he be placed on a non-custodial sentence for the remaining part of the sentence on the ground that he has young family which depend on him and if given non-custodial sentence, he will be able to help them.
4. The prosecution informed the court that they have no objection for time spent in remand being reduced from the sentence but on being released on a non-custodial sentence, the prosecution urged the court to call for social inquiry report. The social inquiry report was filed on the 7th day of February, 2024. From the report, there is no known history of criminality within the applicant's family and the applicant had normal upbringing. The report further indicate that the applicant had formal



- education at Kabarnet High school up to form 3 where he dropped out on his own accord. He went to Muchongoi to engage in farming before returning home in the year 2018. From that point he was engaging in casual labor and construction work until the time of his arrest and subsequent incarceration.
5. Brief facts of the case are that the applicant and his co-accused's were in a drinking den when the local administration led by the area assistant chief and village elders carried out a raid. They were found in the drinking den and it is during this raid that they threatened to kill the victims in this matter. His offence is attributed to alcoholism.
 6. The area local administration opposed the applicant being released to serve a non-custodial sentence on ground that the applicant and his co-accused persons attacked members of Nyumba Kumi and village elders while they were conducting patrols at drinking dens and the offence should not be taken lightly considering that in 2015, a chief from Ossen was stabbed to death while on duty conducting the same of raid of illicit brew dens. The Assistant chief says the applicant should serve custodial sentence to serve as deterrent to would be offenders in the community.
 7. The Applicant stated that he has served 8 months and prayed to serve the remaining on probation. He indicates that he was under the influence of alcohol when he committed the offence and he has since learnt his lesson during the period he has been in remand and incarceration. In prison he has been learning building and construction and states that this has improved his skills in construction and if he is released, he plans to continue working in the construction sector.
 8. The victims who were members of Nyumba kumi and village elders held a meeting and included the assistant chief in the meeting. They discussed the inmate and his co-accused and the circumstances of the offence and in unison they informed the assistant chief that they resolved to oppose having the inmate released from prison at this point in time. They added that the main reason is for the sentence to act as a deterrent for other members of the community.
 9. The probation officer concludes by stating that the applicant was sentenced to serve 4 years on the 3rd of April, 2023 and is expected to be released on the 6th of December 2025. That the family of the inmate pray that the court be lenient to him and allow him to serve a non-custodial sentence indicating that they are ready to support.
 10. Upon considering the sentiments of the local administration and the victims who are the village elders and members of Nyumba Kumi, the probation he concurs that there is need for deterrence so that members of the community understand they should not attack them when they are on official duty. He therefore finds the inmate not suitable for release to serve a non-custodial sentence. However, the period the inmate stayed in remand which is 8 months can be calculated as part of his sentence in accordance to section 333 (2) of the *criminal procedure code*. This is subject to the discretion of the honorable court.

Determination

11. I have considered the application. I find that the application invokes the revisional jurisdiction of this court which gives the court powers, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial court if the court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. If the court was so satisfied, the law mandated it to make appropriate orders to correct the impugned order, decision or sentence and align it with the law. The above is the import of Section 362 as read with Section 364 of the *Criminal Procedure Code*.



12. In this case, the applicant has maintained that he is remorseful, reformed and that he has a family that he is taking care of. His prayer is that he be granted a non-custodial sentence for the remainder of his term and his term that he was in prison be reduced from the sentence.
13. I have considered the mitigation by the Applicant together with the oral submissions by the state. The Applicant has pleaded upon this court to grant him a non-custodial sentence for the remainder of his sentence. I have considered the social inquiry report filed in court, the report is not favourable to the accused. I find that the accused is not suitable for a non-custodial and I thus decline his application for review.
14. The applicant further argues that the trial court failed to consider the period spent in custody at the time of passing the sentence contrary to the provisions of Section 333 (2) of the Criminal Procedure Code and he does request this court to consider his prayer to have the 8 months he was in custody. Section 333 (2) is in the following terms:
- “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.”
15. The above provision has been the subject of interpretation by both the High Court and the Court of Appeal. In Abamad Abolfathi Mohammed & Another V Republic, [2018] eKLR, the Court of Appeal when dealing with an appeal in which the High Court was faulted for, *inter alia*, substituting the sentence imposed on the appellants by the trial court and ordering that it shall take effect from the date of conviction by the trial court stated as follows:-
- “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. 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 19th June 2012.”
16. I have read the record of the trial court. It reveals that the Applicant was in custody pending trial for a period of 8 months. The record confirms the Applicant’s contention that in his pre-sentence notes, the learned trial magistrate did not indicate that he had taken into account the period the Applicant had spent in custody during the trial and that he did not order that the said period will form part of his sentence. Since section 333(2) of the Criminal Procedure Code is couched in mandatory terms, then the issue raised by the Applicant has been satisfied by the applicant and hence the period spent in custody must be factored in his sentence.



17. The application is partly successful and is hereby allowed to the extent that the period the Applicant was in custody be reduced from his sentence.
18. Final Orders:-
 1. Prayer for review for sentence is hereby dismissed.
 2. Period served in remand to be considered in computing sentence.
19. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 6TH DAY OF MARCH 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Applicant present.

Ms Ratemo for State.

Kibet, Court Assistant.

