



**Evereste v Republic (Revision Case E155 of 2023)
[2024] KEHC 4543 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
REVISION CASE E155 OF 2023
RN NYAKUNDI, J**

MAY 3, 2024

BETWEEN

MOSES LUCKY EVERESTE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This case has a long history of litigation dating back to 20th December, 2017 when the petitioner took plea for the offence of murder contrary to section 203 as read with section 204 of the [penal code](#). The petitioner pleaded not guilty and the trial started in earnest before the trial court. Following the assessment of both the prosecution and the defence case the petitioner was found guilty, convicted and sentenced to 20 years imprisonment for the offence of murder contrary to section 203 as punishable under section 204 of the penal code on the 8th of July, 2021. It appears from the record that a memorandum of appeal to the court of appeal was preferred by the petitioner but the outcome of it remains unknown as far as the pleadings by the petitioner are concerned. Notwithstanding that position the petitioner has approached the court pursuant to certificate of urgency dated 15th December, 2023 accompanied with an affidavit of the petitioner deponing as follows:
 1. That I was arrested on 12th November, 2017 and charged with murder contrary to section 203 as read with section 204 of the penal code.
 2. That I was in remand during the entire trial based on the recommendation of the bail assessment Report dated 7th November, 2018.
 3. That at the conclusion of the trial, I was convicted of the offence of murder on 5th May, 2023 and sentenced to serve an imprisonment term of twenty (20) years vide a ruling dated 7th July, 2021.



4. That during my arraignment for plea-taking on 14th February 2018, I pleaded not guilty to the charge and the matter proceeded for a full trial that ran from 14th February, 2018 to 7th July, 2021.
 5. That I was not granted bail/bond and I was therefore in remand for the entire period of trial from 12th November, 2017 when I was arrested to 7th July, 2021 when the court rendered its sentence, a period of approximately four (4) years.
 6. That pursuant to the said ruling, the court proceeded to issue a committal warrant and the signal directed to the officer-in-charge Lodwar GK Prison
 7. That during the sentencing, the trial court failed to consider the period I was in remand contrary to the provisions of Article 50 of the constitution Of Kenya section 333(2) of the Criminal Procedure code and clauses 7. 10 and 7.11 of the Judiciary Sentencing Guidelines of 2016.
2. The gist of this affidavit is based on the notice of motion dated the same day expressed to be brought pursuant to Articles 25 (c), 48, 50, 51(1) and 159(2) (a), (b), (d) & (e) of the constitution, section 333(2) of the criminal procedure code and all enabling provisions of the law). All what the petitioner is asking is for this honourable court to review its sentence afresh to include the period the petitioner served in remand during the penance of the trial.
 3. Essentially, the Petitioner's application is squarely seeking a remedy under section 333(2) of the CPC on review of sentence for this court to take into account the period spent in remand custody. It is true that the safeguards on the rights of arrested persons is provided for in article 49 of the constitution. Thereafter on being indicted of any known offence an offender is prosecuted by the state bearing in mind fair trial rights in article 50 of the same constitution. Practically, many suspects are not able to enjoy right to bail in article 49 (1) (h) of the constitution for reasons they cannot afford the bond terms imposed by the various courts in our legal system. The consequence therefore they remain in remand custody pending trial and conclusion of the respective cases. Kenya has a member of the United Nations also experiences its citizens being arrested and detained on suspicion of having committed an offence. Often these suspects are held in our prisons for weeks, months or even years before a court passes judgment on their case. The tragedy is some end up being found not guilty despite the enormous and lengthy periods of time spent in pretrial detention. Some of this concerns became a subject of discussion by the World Conference on Human Rights on 25th June, 1993 in which the following communique was issued that;

Every state should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programs of advisory services on a priority basis for the achievement of a strong and independent administration of justice”.

4. The basic fundamental rights and freedoms of prisoners in remand custody are also enshrined in our constitution 2010 which guarantees all persons right to life Art 26 right to equality Art. 27 right



to human dignity Art. 28, right to freedom and security of the person Art. 29 and then right to a fair trial and to be tried within a reasonable time Art. 50. Every citizen or individual within our borders shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present *constitution* without discrimination of any kind as defined in Article 27 (4) such as color, sex, language, social, economic, birth or other status. Unconvicted persons in our criminal justice system are presumed to be innocent and shall be treated as such until a final judgment has been pronounced by a court of law as the verdict of guilty, conviction and sentence. Therefore the regime of giving credit to a convicted person to the period spent in pretrial detention is under pinned around these principles. I echo the position of the court in *Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others* [2021]eKLR in a decision Odunga J as he then was held as follows in upholding the provisions of section 333(2) of the *CPC* Thus;

A declaration that Trial Courts are enjoined by Section 333(2) of the *Criminal Procedure Code*, in imposing sentences, other than sentence of death to take into account of the period spent in custody.

A declaration that those who were sentenced in violation of the said section are entitled to have their sentences reviewed by the High Court in order to determine their appropriate sentences.

A declaration that Section 333(2) *CPC* applies to the original sentence as well as sentence imposed during resentencing.....

5. The requirement to comply with Section 333(2) *CPC* is mandatory in computation of the sentence to be served by the Convict upon sentencing.
6. This is what the court had in mind 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 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 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 provision 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 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” (Underlined of the wide aspects of the code as an important part of the guiding principles is mine).

7. In addition the structure of section 333(2) is consisted with rationale for the existence of the sentence credit on account of the constitutional imperatives in Articles 20, 22, 24, 25, 27,28,29,47,48 and 50 of the *constitution* . The legislature is presumed to have created a coherent, consistent and harmonious statutory scheme on sentencing to be compatible with the principles of parity of proportionality.



When an accused person is not granted bail under Article 49(1) (h) of the [constitution](#) he or she must be remanded in chain awaiting trial. That time spent in pretrial detention ought to be considered in the computation of the final order of custodial sentence. It is imperative to note that in our legal system the legislature never imposed a cap on enhanced credit to the convict whose record shows justification of granting the maximum amount of credit for the period spent in remand custody. There is no rationale therefore for any trial judge to deny credit in favour of the convict or the offender without good reason. To do so offends one's sense of fairness for incarceration at any stage of the criminal process is a denial of an accused right to human dignity in Article 28 and right to liberty at Article 29 of the [constitution](#) .

8. The fundamental purpose of sentencing has set out in the various statutes, [sentencing policy guidelines of the Judiciary 2023](#) and jurisprudential decisions by the superior courts are in consonant with the following objectives;
 - a. To denounce unlawful conduct;
 - b. To deter the offender and other persons from committing offences;
 - c. To separate offenders from society, where necessary
 - d. To assist in rehabilitating offenders;
 - e. To provide reparations for harm done to victims or to the community; and
 - f. To promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community
 - g. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender
 - h. A court that imposes a sentence shall also take into consideration the following principles
 - i. A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
9. One must not lose sight on the applicability of the scope of parity and proportionality principles on sentencing. In practice the cases before various courts constitute individualized circumstances and any comparison of similar offenders and offences might not be mathematically correct. This means that two offenders charged of the same offence and convicted as a consequence of the evidence proven by the prosecution are unlikely to be sanctioned with identical sentences. So the courts in exercising discretion must evaluate, the qualitative, quantitative, approaches to sentencing, aggravating and mitigation factors together with personal antecedents to arrive at a fair, just, and proportionate sentence for the offence.
10. By reference to this application by the petitioner the record indicates that the petitioner was in remand custody from the time he took plea on 20th December, 2017 the final judgment of the trial court was delivered on 5th day of 2021. The pronouncement of the decision of the court was to the effect that the petitioner was to serve 20 years imprisonment and upon completion of his sentence he was to be repatriated back to his home for resettlement. Largely the pre-trial detention period was not incorporated with the final sentencing verdict of 20 years imprisonment. As a consequence under Article 50 (2) (p) (q) and 6 (a) and (b) of the [constitution](#) as read with section 333(2) of the CPC entitles the petitioner credit for the period in pre-trial detention pending hearing and determination of this case. The legitimacy of limitation of rights in Article 24 of the [constitution](#) as characterized would find any violation of section 333(2) of the [CPC](#) as having the potential to impair the fundamentals of the equality clause, right to human dignity and right to liberty.



11. The upshot of it is to grant the remedy of giving enhanced credit to the petitioner for the sentence of 20 years imprisonment to discount the period spent in trial detention. The committal warrant to prison dated 8th July, 2021 be amended in compliance with section 333(2) of the *criminal procedure code*.

DATED AND SIGNED AT LODWAR THIS 3RD DAY OF MAY, 2024

R NYAKUNDI

JUDGE

And in the presence of;

Mr. Kakoi Lead counsel for the state

Applicant in person

