



**Msaghui v Director of Public Prosecutions (Petition 49 of 2021)  
[2024] KEHC 6189 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION 49 OF 2021**

**OA SEWE, J**

**MAY 23, 2024**

**BETWEEN**

**JOSAM MWANGOKO MSAGHUI ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**JUDGMENT**

- 1 The petitioner, Josam Mwangoko Msaghui, was the accused person in Mombasa High Court Criminal Case No 43 of 2012 in which he was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63 of the Laws of Kenya. In his affidavit filed in Support of his Petition, he averred that he was arrested, charged, tried, convicted and sentenced to 14 years' imprisonment and now prays that the 3 years and 4 months spent by him in pre-conviction custody be taken into consideration as part of his sentence, pursuant to Section 333(2) of the Criminal Procedure Code.
- 2 He anchored his Petition on Articles 22(1), 23(1), 25(c), 27(1), 48, 50(2)(p) and 165(3) of the Constitution and prayed that his prayer be allowed.
- 3 The proceedings herein show that although the record of the primary file was immediately called for on 10<sup>th</sup> November 2021, the same could not be traced. It took the intervention of the County Criminal Investigations Officer, by way of targeted investigations, to have the file traced. It emerged that the file was lying at the Court of Appeal Registry with no particular action in view. The file was accordingly called for on 3<sup>rd</sup> May 2024 and has now been availed for perusal.
- 4 The original record confirms that indeed the petitioner was charged with the offence of murder. The particulars were that on the 8<sup>th</sup> day of August 2012 at Mkengereny village in Mwachabo Location of Taita Taveta County, he murdered Chola Mwandawa. He denied those allegations and, having been taken through the trial process, he was found guilty and convicted of the lesser offence of manslaughter



under Section 202 of the [Penal Code](#) by dint of the provisions of Section 179 of the [Criminal Procedure Code](#). He was consequently sentenced on 2<sup>nd</sup> December 2015 to serve 14 years' imprisonment.

5 He has now approached the Court contending that his pre-sentence detention was not taken into account as required by Section 333(2) of the [Criminal Procedure Code](#). The petitioner further averred that the omission resulted in infringements of his rights and fundamental freedoms under Articles 25(c), 27, 48, and 50(2) of the [Constitution](#). He relied on his written missions filed on 15<sup>th</sup> March 2021 alongside his Petition. He reiterated the contents of his Petition and cited the case of *Cosma Akeya Don alias Mogaka v Republic*, Mombasa High Court Criminal Petition No 240 of 2018 to buttress his assertions.

6 The respondent, the Director of Public Prosecutions, had no objection to the Petition in so far as it was brought under Section 333(2) of the [Criminal Procedure Code](#).

7 Accordingly, the issue for determination in this Petition is whether the petitioner has made out a good case to warrant reconsideration of his sentence for purposes of Section 333(2) of the [Criminal Procedure Code](#). That provision states:

ject 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 section (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody. (emphasis supplied)

8 Accordingly, in [Ahmad Abolfathi Mohammed & another](#) Criminal 2018 eKLR, the Court of Appeal held:

...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 19th June 2012..."

9 Similarly, in the [Judiciary Sentencing Guidelines, 2023](#), it is stated, under Clauses 2.3.18 and 2.3.19, that:

2.3.18 Section 333 (2) of the [Criminal Procedure Code](#) obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence



committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

- 2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders – for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.
- 10 There appears to be no indication that the period spent by the petitioner in remand, prior to his conviction and sentence, was ever taken into consideration for purposes of Section 333(2) of the Criminal Procedure Code. In the premises, I am satisfied that the petitioner is entitled to a sentence review on that account; the failure being a violation of the petitioner’s constitutional right to fair trial and equal treatment as envisaged under Articles 27 and 50(2) of the Constitution. In this regard, I am persuaded by the position taken by Hon. Odunga, J. (as he then was) in Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) that:

A holistic consideration of the above provisions clearly show that this court has the power to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and one such violation is the denial or threat of denial of freedom without a just cause such as where the sentence that a person risks serving is in excess of the lawfully prescribed one by failing to comply with section 333(2) of the Criminal Procedure Code.”

- 11 The Court further held in Jona & others v Kenya Prison Service & 2 others (*supra*), and I entirely agree with the position that:

...unless the sentence was stituted by the appellate court, the same position applies. Where the appellate court considered the appeal and disallowed the same without interfering with the sentence, it is clear that the decision on sentencing remains that of the trial court and if that sentence was imposed in contravention of the provisions of section 333(2) of the Criminal Procedure Code, nothing bars this court in the exercise of its constitutional mandate pursuant to article 165 of the Constitution from redressing the situation. Accordingly, notwithstanding a dismissal of an appeal, a person sentenced in disregard of section 333(2) aforesaid is not thereby disentitled from invoking this court’s supervisory jurisdiction to consider whether or not the sentence imposed was lawful. While it may be argued that in so doing this court would be interfering with the decision of the appellate court which in effect affirmed the decision of the trial court, in my respectful view that would not be the position where an appeal is simply dismissed without the sentence being reviewed. Even if the same was reviewed, the jurisprudence in this country holds to the contrary...”

- 12 Accordingly, I find merit in the petitioner’s petition filed herein on 15<sup>th</sup> March 2021. The same is hereby allowed and an order granted that the period of the petitioner’s detention between the date of his arrest on 9<sup>th</sup> August 2012 and the date of his sentence on 2<sup>nd</sup> December 2015 be taken into account in reckoning his sentence, as provided for in Section 333(2) of the Criminal Procedure Code.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23<sup>RD</sup> DAY OF MAY 2024**



**OLGA SEWE**  
**JUDGE**

