



**Kimani v Republic (Criminal Petition E021 of 2022)
[2024] KEHC 7465 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7465 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E021 OF 2022
JRA WANANDA, J
JUNE 21, 2024**

BETWEEN

AYUB KIMANI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was charged in Eldoret Magistrate’s Criminal Court Case No. 522 of 2017 with two Counts of the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#).
2. In Count I, the particulars were that on 05/02/2017, at California Estate, within Uasin Gishu County, jointly with others not before the Court, while armed with offensive weapons namely, pangas, Somali swords, arrows and bows, he robbed one Leah Chepchirchir Chumba of assorted household, electrical and personal items all valued at Kshs 116,995/- and immediately before the time of such robbery, threatened to use actual violence on her. The Petitioner also faced the alternative charge of handling stolen goods.
3. In Count II, the particulars were that on the same 05/02/2017, at Sinai Estate, within Uasin Gishu County, jointly with others not before the Court, while armed with offensive weapons namely, pangas, Somali swords, arrows and bows, he robbed one Hillary Kipkogei Tanui of a mobile phone valued at Kshs 21,000/- and cash at Kshs 58,000/- and immediately before the time of such robbery, threatened to use actual violence against the complainant.
4. The Petitioner pleaded not guilty and the matter proceeded to full trial. Upon considering the evidence and the testimonies tendered in Court, the trial Court convicted the Petitioner on both counts and sentenced him to death which according to the trail Magistrate, was the mandatory sentence for conviction for the offence of robbery with violence.



5. The Petitioner appealed against the conviction and sentence vide Eldoret High Court Criminal Appeal No. 33 of 2018. He however later limited the Appeal to only sentence. Upon considering the circumstances under which the offence was committed, and the fact that the mandatory death sentence was declared unconstitutional by the Supreme Court in the case of *Francis Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015 [2017] eKLR, the Court (Majanja J) substituted the sentence of death with one of 10 years' imprisonment on each count, to run concurrently.
6. The Petitioner has now approached this Court with the Notice of Motion dated 05/10/2022 seeking re-sentencing under the proviso to Section 333(2) of the *Criminal Procedure Code*. The Petitioner seeks to have his sentence computed to run from the date of 05/02/2017 when he was arrested, instead of 17/05/2018 when he was sentenced.

Determination

7. The sole issue for determination is “whether the Petitioner is entitled to review of sentence under the proviso to Section 333(2) of the *Criminal Procedure Code*”.
8. Section 333(2) of the *Criminal Procedure Code* provides as follows:

“Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”
9. On the above provision, the Court of Appeal in the case of *Bethwel Wilson Kibor vs. Republic* [2009] eKLR, stated as follows:

“By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.
10. The *Judiciary Sentencing Policy Guidelines* (2014) also provides as follows:

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
11. A perusal of the Charge Sheet contained in the trial Court record reveals that the Petitioner was arrested on 5/02/2017 and arraigned on 06/02/2017 when he took plea and was granted a bond of Kshs. 200,000/-. There is however no evidence that the Petitioner posted the bond and got released. On the contrary, the record appears to indicate that, despite being granted bond, he remained in custody



throughout the trial. He was then sentenced on 17/05/2018. The period spent by the Petitioner in custody was therefore about 14 months.

12. On the issue of whether, in meting out sentence, the trial Court considered the period spent by the Petitioner in remand custody, I note that the trial Magistrate did not mention whether he took the same into account as required by law. In the circumstances, I find that the Petitioner has established a case for review of the sentence but limited to the taking into account of the time spent in custody by the Petitioner. Majanja J having in Eldoret High Court Criminal Appeal No. 33 of 2018 reduced the sentence of death to one of 10 years for each of the two counts, to run concurrently, the period spent in custody ought to “be taken into account” in computing the new sentence.

Final Order

13. In the circumstances, I make the following Orders:
- i. The period that the Petitioner spent in remand custody between the date of arrest, namely, 5/02/2017, and the date of sentencing, namely, 17/05/2018, shall be subtracted in the computation of the sentence of 10 years imprisonment.
 - ii. For avoidance of doubt therefore, the sentence or prison term of 10 years to be served by the Petitioner shall be computed as from the date of arrest, namely, 5/02/2017.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JUNE 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Mr. Mugun for the State

Petitioner in person

