



**Onwon'ga v Republic (Application E052 of 2023)
[2024] KEHC 16671 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 16671 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
APPLICATION E052 OF 2023
JL TAMAR, J
SEPTEMBER 23, 2024**

BETWEEN

JEPHER ONCHIRI ONWON'GA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant by a Notice of Motion filed on 06th December 2023 sought for review of sentence arising from Original Criminal case number E1414 of 2021 Ngong Law Court in which the applicant was convicted and sentenced to serve two (2) years imprisonment for the offence of house breaking and stealing contrary to section 304(1)(b) and 279(b) of the penal code respectively.
2. The main ground upon which the application is premised is that the learned magistrate did not consider in imposing the sentence of 2 years, the period the applicant had spent in remand custody prior sentence.

It is not in dispute that the applicant was arrested on 9th November 2021 tried, convicted and sentenced to serve 2 years imprisonment according to the committal warrants on 8th June 2023.
3. The learned state prosecutor opposed the application for review of the sentence primarily on the grounds that the sentence meted out by the court was a matter of discretion which should not be interfered with and further that the same was lenient considering the sentences provided for in sections 304(1)(b) and 279(b) of the penal code.
4. The state also argues that the jurisdiction of this court has not been invoked properly as the sentence imposed by the trial court was legal.



Issue for determination

5. I have considered the application and the submissions by both the state and counsel for the applicant which I have found helpful.
6. The main issue for determination herein is whether the applicant has properly invoked the jurisdiction of this court as to be entitled to review of sentence under Section 333(2) of the Criminal Procedure Code.
7. The legal basis for the exercise of the revisionary jurisdiction of this court is in Article 165(6) which provides: -

‘The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.’
8. Section 333(2) of the Criminal Procedure Code provides: -

“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. As stated in the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR, the court is required 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.
10. The court proceeded to state that “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.”
12. The same court in *Bethwel Wilson Kibor vs Republic* [2009]eKLR expressed itself as follows:-

“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into 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 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant



has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

13. According to The Judiciary Sentencing Policy Guidelines:

”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. In the instant case, and notwithstanding the nature of the charges the applicants faced and the sentence imposed by the magistrate, it is clear that the court did not take into consideration the period the accused spent in custody before conviction and sentence. The state contend that the sentence meted on the accused person is very lenient. That may be so but there is no appeal by the state against sentence.
12. Consequently, the application dated 24th day of November 2023 and filed in court on 06th December is hereby allowed. The sentence of 2 years imposed by the learned magistrate on 8th June 2023 is thus reviewed and the same shall run from November 9, 2021.
13. The Deputy registrar of this court to serve the order on the officer in-charge G.K Prison where the accused is being held if he is still serving sentence for compliance.
14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 23RD DAY OF SEPTEMBER 2024

JOHN.T. LOLWATAN

JUDGE

