



**Mulai v Republic (Criminal Revision E043 of 2024)
[2024] KEHC 12157 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL REVISION E043 OF 2024
JN ONYIEGO, J
OCTOBER 9, 2024**

BETWEEN

SAMMY MULAI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *penal code*. Particulars were that on 9th February 2012 at Nzalae sub-location of Migwani district within Kitui County, he murdered Mwanzia Nyeki (the deceased).
2. After denying the charge, he was tried and finally found guilty and sentenced to 30 years imprisonment on 11-03-2014. Dissatisfied with both the conviction and sentence, he appealed to the court of appeal where his appeal was dismissed on 4th December 2020.
3. Undeterred, he moved to this court again vide a notice of motion dated 10-04-24 seeking the court to consider computing the period spent in remand custody in his sentence pursuant to section 333(2) of the *CPC*. Mr. Okemwa for the state conceded the application.
4. I have considered the application herein and the concession by the state. It is trite that under section 333(2) of the *CPC*, a trial court when pronouncing sentence is duty bound to consider Section 333(2) of the *CPC*.
5. The provision of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & Another vs Republic* [2018]eKLR where 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 333(2) 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 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.”

6. Similarly, in Bethwel Wilson Kibor vs Republic [2009] eKLR the court 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.”

7. Guided by the above quoted statutory provision and case law, it is apparent that the applicant is entitled to the right provided under section 333(2) of the CPC. Accused having been arrested on 10-02-2012 and sentenced on 11-03-2014, he had lawfully spent two years and one month in remand custody. To that extent, the application is allowed. Accordingly, when computing his 30 years sentence, he shall serve less two years and one month in prison.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER 2024.

J. N. ONYIEGO

JUDGE

