



**Cheruiyot v Republic (Criminal Revision E245 of 2022)  
[2023] KEHC 1905 (KLR) (Crim) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1905 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL REVISION E245 OF 2022**

**PM MULWA, J**

**MARCH 3, 2023**

**BETWEEN**

**WESLEY KIPKEMOI CHERUIYOT ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant Wesley Kipkemoi Cheruiyot was convicted for the offence of stealing goods in transit contrary to section 268(1) as read with section 279 (c) of the [Penal Code](#) at Kibera Criminal Case No. 157 of 2017 and sentenced to serve 5 years' imprisonment.
2. He has approached this court *vide* the instant application filed in court on 25<sup>th</sup> August 2022 wherein he basically seeks review of the five (5) years' sentence he is currently serving and substitute it with a non-custodial sentence.
3. The application was canvassed by way of oral submissions. In his submissions, the applicant prayed for this court to reduce his sentence and grant him a non-custodial sentence by taking into account the time he spent in custody during trial. This submission was grounded on the claim that he was his family's sole provider.
4. The application is not contested by the state. In her submissions, the learned prosecuting counsel Ms. Odhiambo clarified that the applicant was seeking a review on the time spent in custody.
5. I have considered the application and the oral submissions made by both parties and I find that, the only issue to determine is whether the sentence should be revised.



6. This being an application invoking the court’s revisionary jurisdiction, it is important to set out the law that governs the exercise of the court’s power of revision in criminal cases is donated by Section 362 as read with Section 364 of the *Criminal Procedure Code*. Section 362 states as follows:

“The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court.”

7. From a reading of the above provision, it is clear that the court can only revise or interfere with an order or sentence passed by the trial court if it was satisfied that there was an illegality, error, or irregularity in the proceedings that gave rise to the challenged order or sentence.

8. As submitted by the Applicant he seeks to have the period spent in custody taken into account.

9. Section 333(2) of the *Criminal Procedure Code* provides as follows;

“(2) Subject 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

10. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

11. The above provision has been the subject of interpretation by both the High Court and the Court of Appeal. In *Ahamad Abolfathi Mohammed & Another v Republic*, [2018] eKLR, the Court of Appeal stated that:

“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.”



12. Additionally, the Court of Appeal in *Bethwel Wilson Kibor v Republic* expressed itself 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 22<sup>nd</sup> 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. 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. Finally, the Judiciary Sentencing Policy Guidelines state that: -

“7.10: 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.

7.11. 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.”

14. When passing the sentence, the learned trial magistrate stated as follows;

“...He deserves a custodial sentence and being a first offender not for many years. He is sentenced to serve five (5) years imprisonment. Right of appeal 14 days.”

15. From the above, it is clear that the learned trial magistrate did not take into account the time the applicant spent in custody during sentencing.

16. A perusal of the trial court record shows that the applicant took plea on 18<sup>th</sup> January 2017 and was admitted to bond on the same day the surety was approved which was 17<sup>th</sup> February 2017. On 28<sup>th</sup> October, 2005 he absconded and a warrant for his arrest was issued. He resurfaced on 8<sup>th</sup> November 2021 whereupon his bond terms were cancelled after his surety withdrew. The record shows he remained in custody for the remainder of his trial.

17. By virtue of Section 333(2) of the *Criminal Procedure Code*, this duration ought to have been considered during sentencing. Having failed to take into account the period the applicant had spent in custody during the trial, the learned trial magistrate violated the proviso to section 333 (2) of the *Criminal Procedure Code*. This omission amounted to an error of law which if not corrected by this court may infringe on the applicant’s constitutional right to a fair trial. Failure to take account of time spent in custody subjects a person to a more severe sentence which infringes the right to fair trial. The right to fair trial includes the right to less severe sentence.

#### **Final Orders:**

18. From the foregoing;

- i. The Applicant’s application is merited.



- ii. The sentence meted against the accused is revised and shall be recalculated so as to take into account the period the applicant had spent in custody during the trial.
- iii. The sentence shall run from the date of his arrest on 16<sup>th</sup> January, 2017, and not from the date of conviction.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MILIMANI THIS 3<sup>RD</sup> DAY OF MARCH, 2023**

.....

**P.M. MULWA**

**JUDGE**

**In the presence of:**

Kinyua: Court Assistant

Accused: Present

For State: Ms. Chege

