



**Hare v Republic (Criminal Petition 97 of 2020)
[2023] KEHC 3242 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL PETITION 97 OF 2020**

OA SEWE, J

APRIL 20, 2023

BETWEEN

RASHID KOMBE HARE PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was the accused person in Mombasa High Court Criminal Case No 50 of 2017 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. It was alleged that on the April 6, 2017 at Nakol area within Jomvu Sub-county in the County of Mombasa, he murdered Shida Kadzo Masha. He denied the allegations and after trial was convicted of the offence of murder and sentenced to 7 years' imprisonment.
2. The petitioner thereafter filed this Petition on September 7, 2020 complaining that his pre-trial detention period was not taken into account by the trial judge. In his Supporting Affidavit, he averred that he was arrested on April 6, 2017 and was held in custody until February 6, 2020 when he was imprisoned. The record of these proceedings show that the petitioner opted not to appeal the decision of the trial court. One such confirmation is discernible in the proceedings held herein on November 8, 2019. Accordingly, the only issue for consideration is whether the petitioner has made a good case for the intervention sought by him.
3. The Petition is hinged on Section 333(2) of the *Criminal Procedure Code*, which provision states:

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

4. In the same vein The Judiciary Sentencing Policy Guidelines provide thus at Paragraph 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. 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.'

5. The Court of appeal had occasion to consider the import of Section 333(2) in *Abamad Abolfatbi Mohammed & Another v Republic [2018] eKLR* and had the following to say:

' 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 June 19, 2012.'

6. With the foregoing in mind, I have perused the proceedings in High Court Criminal Case No 50 of 2017 and confirmed from the proceedings of February 6, 2020 that the petitioner's pre-trial detention period was not taken into account. The record further shows that the information was filed on December 1, 2017 and that the appellant had prior thereto been incarcerated at Shimo La Tewa vide Criminal Case No 572 of 2017. In his Judgment, Hon Otieno, J noted as a matter of fact that, although the deceased died on August 9, 2017, the crime was committed on April 6, 2017. Hence, the assertion by the petitioner that he was incarcerated between April 6, 2017 and February 6, 2020 when he was sentenced, is correct. Indeed, in response to the Petition, Ms Anyumba for the Respondent expressed no objection to the grant of the prayers sought by the petitioner.

7. In the result, I find merit in the petitioner's petition filed herein on September 7, 2020. The same is hereby allowed and orders granted as hereunder:

- (a) That the period of pre-trial detention of 2 years and 10 months between the date of the petitioner's arrest on April 6, 2017 and the date of his conviction on February 6, 2020 be taken into account for purposes of Section 333(2) of the Criminal Procedure Code.



- (b) In reckoning the applicant's imprisonment term of 7 years, the period aforementioned be included accordingly.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF APRIL 2023

OLGA SEWE

JUDGE

