



**Ragiogi & another v Republic (Miscellaneous Criminal Application
14 of 2022) [2023] KEHC 3441 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION 14 OF 2022**

PN GICHOHI, J

APRIL 20, 2023

BETWEEN

JOSEPH GWARO RAGIOGI 1ST APPLICANT

JOSEPH MIRORO GWARO 2ND APPLICANT

AND

REPUBLIC RESPONDENT

*(From Kisii High Court Criminal Appeal No. 110 and 112 of 2018
Consolidated -judgment at Kisii delivered by R.E. Ougo J on 8th August 2019)*

RULING

1. The subject of this ruling is an undated Notice of Motion filed on June 3, 2022 by the Applicants in person and brought under Articles 229 (1) , 23 (1), 24 (1) , 27 (1) , 40 , 50 (2) (p) (q), 159 (2) ABC & 165 (3) (5) of the Constitution and Section 215 , 216, 354 of the Criminal Procedure Code and section 26 (2) of the Penal Code seeking orders:
 1. That this application be certified as urgent and heard on priority basis.
 2. That the applicants are approaching this Hon Court in regard to section 333 (1) (2) of the CPC.
 3. That the applicants sentence without prejudice of the court’s discretion be reduced to lenient term or the remaining term be served on a non- custodial term.
2. The grounds are that the two Applicants were arrested , charged and convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to serve 20 years imprisonment on November 6, 2018 at Kisii Magistrates Court. Further, they appealed to the High Court in Kisii and their sentenced was reduced to 15 years imprisonment.



3. They further state that that they seek leniency of sentence and in particular, in regard to section 333(1), (2) of the *Criminal Procedure Code* and the period of 1 year and 7 months spent in custody before sentence be considered that is from May 10, 2017 to date.
4. That application is supported by the Applicants' joint affidavit and they state that they are remorseful and will not repeat.
5. When the Applicants appeared in court for the hearing of that application, Joseph Gwaro Ragiogi urged the court to reduce his current sentence of 5 years to a lesser sentence as he has been in custody since 2018.
6. On his part, Joseph Miroro Gwaro urged the court to give him the least severe sentence considering his mitigating factors that he has reformed since he was put in prison. He had enrolled for Kenya Certificate of Primary Education and attained 314 marks and later enrolled for in Form 1 to form 4 and sat for KCSE where he attained a B- .
7. He states that he is now attending Bible classes and he is planning to go for higher studies and therefore seeks non- custodial sentence. He states that he is very remorseful and it is his first time to come into conflict with the law and that if given a chance he will not go back to criminal activities . That his family needs him and they are ready to support him.
8. Mr Ayondo for the State opposed that application on the grounds that after being sentenced to 20 years by the lower court, the Applicants appealed against the sentence and were given a chance to mitigate where upon their sentence was reduced to 15 years which was very lenient. He therefore stated that he was only conceding to the period spent in custody being considered subject to this Court confirming the court record.

Determination

9. After hearing the parties, the issues for determination are :
 1. Whether the period spent in custody should be considered in the sentence passed.
 2. Whether this court can reduce a sentence passed by a court of concurrent jurisdiction.
10. On the first issue, there is no doubt that while passing sentence, courts are bound to consider period spent by a person in custody as provided for by Section 333 (1) and (2) of the *Criminal Procedure Code* thus;
 - "(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
 - (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."



11. This Court has perused the lower court record that is Cr 977 of 2017 and indeed, the accused persons were arrested on May 10, 2017 and were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code in count 1. Joseph Gwaro Ragogi also separately faced a second count of robbery with violence contrary to section 296 (2) of the Penal Code in count 2 and a third count of rape contrary to section 3 (1) (a) (c), (3) of the Sexual Offences Act No 3 of 2006.
12. After conclusion of the case, the learned trial magistrate Hon SN Makila SRM convicted them accordingly as charged. That was on September 14, 2018. After hearing their mitigation, the court sought a presentence report. In her ruling while sentencing them on November 6, 2018, the court stated;

“The presentence reports are unfavourable to both the accused persons. I have considered the nature of the offence and gravity of the same. The accused persons are both a risk to their local communities and the report indicates that their respective communities would be hostile if the accuseds are given non- custodial sentence.

The 1st accused is reportedly a member of a gang that had been terrorising the community in Kiamabundu sub location . He is convicted of the charges in count 1 and I hereby sentence him to twenty (20) years imprisonment.

The 2nd accused was found guilty in count 2 and 3.

For count 2 he is sentenced to twenty (20) years imprisonment and for count 3 he is sentenced to ten (10) years imprisonment. Sentences to run concurrently. The right of appeal within 14 days is explained.”
13. The lower court record shows that the accused persons have been in custody since their date of arrest on May 10, 2017 to November 6, 2018 when they were sentenced. There is nothing to show that the trial magistrate took custody period during sentencing.
14. Aggrieved by sentence and conviction by the lower court, the accused persons separately filed an appeal to High Court being HCCRA No 110 of 2018 and 112 of 2018. In a consolidated judgment dated August 8, 2019, RE Ougo J upheld the conviction and held:

“I recognise that the mandatory death sentence was declared unconstitutional....In this case the trial court sentenced the 1st appellant to 20 years imprisonment on count 1, while the 2nd appellant was sentenced to 20 years for count 2 and 10 years for count 3. I note that the 2nd appellant was convicted on count 1 but not sentenced and hereby sentence him to 15 years imprisonment on count 1. In *Samson Boyii Nkulet v Republic* [2019] eKLR the court reduced the sentence of 20 years imprisonment for the offence of robbery with violence to 10 years. I therefore reduce the 1st Appellant’s sentence on count 1 to 15 years imprisonment and 2nd appellant’s sentence on count 2 to 15 years imprisonment, while I affirm the 2nd appellant’s sentence on count the 3rd count . The sentences shall run concurrently from the date of sentence.”
15. From the above, there is nothing to show that the Honourable judge took into consideration the period spent by the accused persons before sentence. While discussing Section 333 (2) of the Criminal



Procedure Code, the Court of Appeal in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR had this to say in an appeal from High Court decision in HCCRA Nos 106 and 107 of 2013;

“The appellants have been in custody from the date of their arrest on June 19, 2012. 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(s) 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.”

16. The words “The sentences shall run concurrently from the date of sentence” appear seems clear. The sentences were not running from the date the accused persons were in custody. In that judgment dated August 8, 2019, failure by the Honourable Judge to consider the period spent by accused persons in custody before sentence may have been inadvertent.
17. Though the learned Prosecution counsel has conceded that Court does consider the period spent in custody, this Court does not intend or purport to correct the error or irregularity by a Court of concurrent jurisdiction. I believe recourse lies in an appeal to Court of Appeal if the accused persons so desire to pursue the issue.
18. On the second issue seeking that this court reduces the sentence and give the less severe sentence, the court record shows that the Honourable Judge did reduce the sentences passed by the lower court. In any event, accused persons are asking this court to review the sentences passed by a Court of concurrent jurisdiction which this Court cannot do. In the circumstances, the application filed by the accused persons herein on June 3, 2022 herein is hereby dismissed.

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

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A by 1st Applicant and 2nd Applicant

Mr. Ochiengo for Respondent

Kevin Isindu, Court Assistant

