



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kabulit v DPP (Miscellaneous Application E065 of 2022)  
[2023] KEHC 17497 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17497 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E065 OF 2022**

**TA ODERA, J**

**MAY 11, 2023**

**BETWEEN**

**NAK/434/017/LS MILTON KABULIT ..... APPLICANT**

**AND**

**DPP ..... RESPONDENT**

**RULING**

1. Milton Kabulit the applicant herein and 5 others were charged with Murder contrary to section 203 as read with Section 204 in High Court Criminal case no 115 of 2008 Nakuru. The case was heard and determined by Hon Justice Emukhule 1<sup>st</sup> to 4<sup>th</sup> accused were convicted and sentence to 56 years imprisonment on January 26, 2012.
2. The applicant later filed the instant undated application on July 12, 2022 seeking that he court invokes provisions of Section 333 of the *Criminal procedure Code* in High Court Criminal case number 115 of 2008 Nakuru and order that the sentence to run from the date he was remanded in custody . He deponed that he was charged convicted and sentenced by the High court in the said case. Further the period he spent in remand was not considered in his sentencing and now seeks that the same be taken into account and he be resentenced accordingly.
3. The state filed replying affidavit of James Kihara who is the learned prosecution Counsel handling this case. He deponed that the applicant moved the court of appeal against the judgment of the High court in the case, the said High Court Criminal Case No 115 of 2008 Nakuru but the same was upheld .
4. Further that the applicant did not seek the intervention of the Court of Appeal in the Court of appeal to review the sentence to run from the date of the remand and thus this court is *functus officio*.
5. Also that the trial court in the sentencing proceedings gave a rider that the sentence can only be reviewed upon completion of a 30 year terms and that the applicant has only served 14 years imprisonment. He deponed that applicant will be eligible for parole after serving a total of 30 years.



6. Counsel told that court that he opposes the application as it should be made after the required jail term has been served.
7. I have carefully considered the application and the response by prosecution. The application is premised on Section 333 (2) of the *Criminal Procedure Code*.
8. Section 333 (2) of the *Criminal Procedure Code* which provides that;-

“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. Prosecution opposed the application saying application had his time in the court of appeal never made the application and that the trial court was clear that the convicts were not eligible for parole before serving of 30 years of the prison term.
10. The court of appeal pronounced itself on the issue of consideration of remand period in the case of *Abamad Abolfathi Mohammed & Another v Republic* [2018]eKLR and 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.”

11. Section 46 (1) of the *prisons Act* provides that ;-“

“Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.”

“Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.”



12. There is thus a clear distinction between that remand period and parole as consideration of remand period is provided for under section 333(2) of the criminal procedure code while parole is the release of a prisoner before the end of the jail term for good behaviour while in prison under section 46 of the Prisons Act. What the trial court barred was remission of the sentence of the applicant and the 3 other convict herein before completion of a period 30 years in prison.
13. The fact that the applicant appealed in the court of appeal does not bar him from raising the issue of consideration of remand period under section 333(2) of the CPC. It is trite law that the remand period must be considered in sentencing a convict as was held by the court of appeal in the case of (supra). This court is thus not *functus officio* as submitted by prosecution. The application is merited and I allow it under Section 333(2) of the Criminal Procedure Code. I have noted from the proceedings of High court criminal case 115 of 2008 that he was arraigned in court for the first time on November 18, 2008 and he remained in custody throughout the trial.
14. I order the sentence of the applicant to run from November 18, 2008 till completion of the same.

**T. A. ODERA - JUDGE**

**11.5.2023**

**RULING DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;**

**Applicant present in person.**

**Mburu for the Respondent.**

**Court Assistant; BOR.**

**T. A. ODERA - JUDGE**

**11.5.2023**

