



Wachira v Director of Public Prosecution (Miscellaneous Application E072 of 2022) [2023] KEHC 3834 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEHC 3834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E072 OF 2022**

HM NYAGA, J

MAY 4, 2023

BETWEEN

ANTONY GACHIGU WACHIRA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. The applicant with his co accused one David Kariuki Wachira were charged with several offences. Namely: -

Count I Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code

Particulars: On the September 24, 2013 at [Particulars withheld] area in Nakuru North District within Nakuru County, jointly with others not before court, while armed with crude & Co weapons namely axes and pangas robbed Ann Ksh 2,100/=, one sack of dry maize, 3 debes of beans, and 1 phone make Nokia all valued at Ksh 12,100/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Ann .

Count II Robbery with Violence contrary to Section 295 as read with section 296(2) of the Penal Code

Particulars: on the 24th day at [Particulars withheld] area in Nakuru North District within Nakuru County, jointly with others not before court, while armed with crude weapons namely & Co axes and pangas robbed LWN of, 1 mobile phone make Samsung valued at Ksh 4,000/=, and accused): at or immediately after the time of such robbery used actual violence to the said LWN

Count III is a charge of rape and indecent act with an adult respectively against only the Applicant's co &accused.

Count IV Defilement contrary to Section 8(1) of the Sexual Offences Act.
alternative
Charge:
IV (Applicant):



Particulars: On the September 24, 2013 at [Particulars withheld] area in Nakuru North District within Nakuru County, unlawfully and intentionally committed an act by inserting a male genital organ namely penis into the female genital organ namely Vagina of LWN a child aged 17 years which caused penetration.

Alternative Charge (Applicant): Indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).

Particulars: On September 24, 2013 at [Particulars withheld] area in Nakuru North District within Nakuru County, unlawfully and intentionally committed an indecent act with a child namely LWN a child aged 17 years old by touching the Private parts namely Vagina.

Count v (Applicant & Co-accused): Assault causing actual bodily harm contrary to Section 251 of the [Penal Code](#)

Particulars: On the September 24, 2013 at [Particulars withheld] area in Nakuru North District within Nakuru County, jointly unlawfully assaulted LWN thereby occasioning her actual bodily harm.

2. He was convicted on counts 1 and 2 and sentenced to serve 40 years' imprisonment. He appealed to this court through Criminal Appeal No76 of 2018 and his Appeal on conviction was dismissed for lack of merit but his Appeal on sentence was sustained and reduced to imprisonment for a period of 25 years on February 25, 2021. The issue of the time of the commencement of the sentence was not canvassed during the appeal.
3. The Applicant has now filed the instant Application pursuant to Section 333 (2) of the [Criminal Procedure Code](#) seeking for an order that his 25 years' prison sentence be deemed to have commenced on the day he was first remanded.
4. The state does not oppose the Application.
5. Section 333(2) of the [Criminal Procedure Code](#), states 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".
6. It has been stated that in invoking section 333(2) of the Criminal Procedure Code, the court is not required to embark on an arithmetic journey to calculate time to be spent in custody. In the case of *Bukenya v Uganda* (Criminal Appeal No 17 of 2010) [2012] UGSC 3 (29 January 2013) it was stated that;

"Taking the remand period into acCount is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into acCount specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into acCount should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement."



7. It is my understanding of the above decision that the court is only required to take account of the time spent in remand custody. This can be done by simply stating when the sentence will commence and the period to include the time spent in custody.

8. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & Another v 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.”

9. The same court in *Bethwel Wilson Kibor v Republic* [2009]eKLR 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.”

10. The *Judiciary Sentencing Policy Guidelines* provide as follows:

“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.”



11. I have perused the trial court record and I note that the court meted the sentence against the Appellant without specifically stating the period which it was to commence. This means that the applicant's term commenced on the day he was sentenced. This left out the period that he had spent in remand custody, prior to his conviction and sentencing.
12. In the case of *Osman Mohamed Balagha v Republic* [2021] eKLR Aroni J. noted that;

“It was not for the accused to remind the trial Court while sentencing to consider the time he spent in custody, the law obligates the court to consider the time the convict was incarcerated before conviction. From the record it appears that the trial court failed to consider the same.”
13. I am therefore of the view that the trial court failed to comply with the mandatory provisions of the said section 333(2) of the *CPC*.
14. The trial court record shows that the Applicant was first arraigned in Court on September 26, 2013. He was in remand custody throughout the trial.
15. I therefore allow the application and order that the applicant's sentence of 25 years be deemed to have commenced from September 26, 2013. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of;

Ms Murunga for state

C/A Jeniffer

Appellant present

