



**Chirchir v Director of Public Prosecution (Miscellaneous Application  
E009 of 2021) [2023] KEHC 19047 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19047 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E009 OF 2021**

**HM NYAGA, J  
JUNE 20, 2023**

**BETWEEN**

**ALEX KIPRONO CHIRCHIR ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. The applicant was charged vide High Court Criminal case No. 86 of 2014 with the offence of murder, contrary to section 203 as read with section 204 of the [Penal Code](#).
2. After a full trial the court found him guilty of the offence of manslaughter contrary to section 202(1) as read with section 205 of the [Penal Code](#). He was convicted accordingly and was sentenced to 12 years imprisonment, on February 23, 2018.
3. The issue of the time of the commencement of the sentence was not canvassed during the trial .
4. The Applicant has now filed the instant undated Application pursuant to Section 333 (2) of the [Criminal Procedure Code](#) seeking for an order that his 12 years' prison sentence be deemed to have commenced on the day he was first remanded.
5. The state does not oppose the Application.
6. 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".



7. 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 vs. 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.”

8. 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.
9. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & Another vs 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 19<sup>th</sup> June 2012.”

10. The same court in *Bethwel Wilson Kibor vs 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 September 22, 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.”

11. I have perused the trial court record and I note that the court meted the sentence against the Applicant without specifically stating the period which it was to commence. This means that the applicant’s term commenced on the day he was sentenced, on February 23, 2018. This left out the period that he had spent in remand custody, prior to his conviction and sentencing.
12. The trial court record shows that the Applicant was first arraigned in Court on August 15, 2014. He was in remand custody throughout the trial.
13. I therefore allow the application and order that the applicant’s sentence of 12 years be deemed to have commenced from August 15, 2014. It is so ordered.

**DATED, SIGNED & DELIVERED AT NAKURU THIS 20<sup>TH</sup> DAY OF JUNE, 2023.**

**H.M. NYAGA**

**JUDGE**

**In the presence of:**

C/A Jeniffer

Ms Murunga for state

Applicant

