



**Ekai v Republic (Miscellaneous Application E015 of 2022)
[2023] KEHC 18109 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS APPLICATION E015 OF 2022
RN NYAKUNDI, J
JUNE 5, 2023**

BETWEEN

SHADRACK EKAI PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner was convicted for the offence of murder contrary to section 203 as read with section 204 of the *penal code* on March 15, 2011 and subsequently sentenced to life imprisonment. Thereafter he lodged a petition for resentencing on October 1, 2020 in terms of the Supreme Court of Kenya decision in the case of *Francis Muruatete & Another* Petition No 16 Of 2015
2. This is a second petition expressed by way of notice of motion seeking the following orders;
 1. That the petitioner was arrested, charged, tried and sentenced to life imprisonment for an offence of Murder contrary to section 203 as read with 204 on a criminal No 12 of 2009 and judgment dated March 15, 2011 at Kakuma mobile High Court.
 2. That he wrote a petition resentencing and he was resentenced to twenty years imprisonment (petition number 16/2018)
 3. That the time he spent in custody was not considered during the resentencing hence section 333(2) of the *criminal procedure code* requires a sentencing court to take into account the period that a convicted person has spent in custody prior to the sentence.
 4. That the applicant is serving excessive sentence since Article 27 (1) was violated. Relying on the case of *Bernard Muulwa Musyoka v Republic* CA 26/01/2018 at Mombasa and *Abdul Hussein Gholi Safe And Another v Republic* 2018 eKLR where the court of appeal at Nairobi resentenced the applicant from date of arrest.



5. That the applicant had never been released on bond upto conviction.
3. The petitioner has faulted the review of sentence dated 1st day of October, 2020 which did not take into account the period spent in remand by subtracting it from the final sentence imposed of 20 years imprisonment. I am alive to the fact that Article 50 (6) (a) (b) of the constitution clothes this court with jurisdiction to consider such issues as raised by the petitioner. For purposes of clarity the Article provides as follows;
 5. A person who is convicted of a criminal offence may petition the High Court for a new trial if--
 - (a) the person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
 - (b) new and compelling evidence has become available.
 6. What the petitioner is essentially asking this court to do is to revisit the decision on resentencing handled by the session judge on the October 1, 2020. The record is clear that the petitioner was initially serving a life sentence which was reviewed a terminable term of 20 years imprisonment with effect from March 15, 2011. It is significant to note that the March 15, 2011 capping denotes the delivery of judgment by the trial court at Kitale which imposed life imprisonment sentence. To make more consistent the petitioner has urged this court to rely on the provision of section 333(2) of the criminal procedure code to factor the period spent in remand custody. The essence of the section gives effect to the law as follows;

“That where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of that offence before final judgment that period be taken into account in imposing the term of imprisonment”.

7. In construing this provision the sentencing court shall cause to be stated in the record and on the warrant of committal to prison the amount of the time spent in custody, the term of imprisonment that would have been imposed before any credit was granted to be in consonant with the spirit of this code. My understanding therefore is that failure to comply with section 333 (2) of the CPC may not affect the validity of the sentence imposed by the court. Notwithstanding that position it is an error on the face of the record to decline to grant credit where remand custody of an accused or a defendant was directly as a consequence of the indictment or charges that were ultimately tried by the prosecution to occasion a conviction. In the same breadth where a statute prescribes a mandatory minimum sentence the court in applying section 333(2) of the CPC may exercise discretion before final verdict to take into account the period served in remand before completion of a trial which has the effect of reducing the sentence below the mandatory minimum enacted by parliament. The comparative case by the Supreme Court of Canada with similar provisions on giving credit on account of time spent in custody when accused person had this to say in R v Rezaie [1996] 31 OR (3d)

“That a judge should not deny credit without good reason. To do so offends one’s sense of fairness. Incarceration at any stage of the criminal process is a denial of an accused’s liberty”.

In furtherance to the objectives of sentencing in our criminal justice system the governing policy of 2016 is expressed as follows *Inter-alia*: “That the fundamental purpose of sentencing is to contribute towards punishing, preventing crime, maintenance of a just and safe society. Therefore imposition of sentences is a matter of law exercised by judges at various levels of adjudication. The objectives in the policy are grounded coherently and consistently as herein under”;



- a) to denounce unlawful conduct;
- b) to deter the offender and other persons from committing offences;
- c) to separate offenders from society, where necessary;
- d) to assist in rehabilitating offenders;
- e) to provide reparations for harm done to victims or to the community; and
- f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

8. These principles forms the cornerstone upon which exercise of discretion in sentencing is mirrored. However, to achieve, uniformity, consistency, proportionality, equity, equality, fairness and a just sentence by different adjudicating courts in the eyes of the public seems to be elusive. What I can say the system is not perfect but the imperfection remains a continuum task of the courts to apply the discretion on a case to case basis to avoid unfair discrimination. The current sentencing system provides different tools and jurisprudence that can be used to underpin the exercise of the court’s sentencing discretion.

9. In the instant case from the record there is prima facie evidence that before imposition of the 20 years imprisonment in lieu of the initial life imprisonment section 333(2) of the CPC was not incorporated as part of the petitioner’s circumstances during this phase of the trial. It is a feature that advocates for the notion of giving credit to the defendant or accused for the period spent in remand custody. I consider this to be one of the individualisation process about a particular offender or petitioner for that matter. It is for this reason I find merit in the application to strike a balance on the past sentencing pattern and the matrix provided for under section 333(2) of the CPC. The rationale of factoring the pre-trial retention to the final prison sentence is grounded in Article 50(2)(a) which provides that every accused person is to presumed innocent until the contrary is proved. Pre-trial detention of an accused person may as well be taken to infringe Article 25(a), on freedom from torture and cruel, inhuman or degrading treatment or punishment, Article 28 on Human dignity and Article 29 of the constitution on Freedom and security of the person.

10. As a consequence, to the above legal framework I find merit in the application by the petitioner to exercise discretion for a declaration that the committal warrants to prison be reviewed and varied to factor the period spent in remand custody. The Deputy Registrar Lodwar High Court to act accordingly in consonant with this order.

It is so ordered.

DELIVERED SINGED AND DATED AT ELDORET THIS 5TH DAY OF JUNE 2023

In the Presence of:

Mr. Mark Mugun for the State

Accused Present

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R. NYAKUNDI

JUDGE

