



**Wekhanya & another v Republic (Criminal Petition E007 of 2022)
[2023] KEHC 18540 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E007 OF 2022
JRA WANANDA, J
JUNE 16, 2023**

BETWEEN

BONIFACE WEKHANYA 1ST PETITIONER

JOHN KIPYEGO ROTICH 2ND PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioners were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in Eldoret High Court Criminal Case No 46 of 2017. The matter proceeded to full hearing and upon considering the evidence before it and the testimonies of the witnesses, the Court convicted them of the lesser offence of manslaughter contrary to section to Section 202 as read with Section 205 of the *Penal Code*. They were convicted on May 11, 2022 and each sentenced to terms of 5 years imprisonment. The Judgment is dated November 28, 2022 and was delivered on March 28, 2022.
2. The Petitioners have now approached this Court vide their respective undated Notices of Motion expressed to be brought under Section 333(2) of the *Criminal Procedure Code* seeking that this Court reviews the sentences in consideration of the time spent in custody during the pendency of the hearing. The Petitioners deponed that they were arrested on August 22, 2017 and were sentenced on March 28, 2022. They urged the Court to review the sentences to run from the date that they were arrested. In their written submissions, they stated that they were first offenders and prayed that the Court be lenient and consider the time spent in custody pre-trial. They reiterated the contents of their Affidavits in support of the Applications and sought that the Applications be allowed.
3. In response to the Application, Learned counsel for the State, Ms. Emma Okok, filed her Submissions and stated that as per the provisions of section 333(2) of the Criminal Procedure Code, it is mandatory that the period which an accused person has been held in custody prior to being sentence be considered



while computing the period of the sentence, the Petitioners were arraigned in Court for plea taking on September 4, 2017, they were admitted to bond terms of Kshs 200,000/- with a sureties of similar amount, the 1st Petitioner was in remand until November 18, 2019, 2nd Petitioner was in remand until November 8, 2018. The 1st Petitioner spent 2 years and 2 months in remand custody while the 2nd Petitioner spent 1 year and 2 months in remand custody. She therefore conceded that the trial Judge did not factor in this period before sentencing the Petitioners. She agreed with the Petitioners that the sentences be reviewed.

Analysis & Determination

4. On perusal of the application and the submissions, I find that the issue that arises for determination to be “whether the Petitioners’ sentence should be reviewed under Section 333(2) of the Criminal Procedure Code”.

5. Section 333(2) of the Criminal Procedure Code provides as follows:

“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.”

6. A reading of the said provisions reveals that during sentencing, the Courts are required to take into account the period a convict has spent in custody. Further, the Judiciary [Sentencing 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.”

7. The provisions of section 333(2) of the Criminal Procedure Code was also the subject of the decision in [Abamad Abolfathi Mohammed & Another vs Republic](#) [2018]eKLR where the Court of Appeal held as follows:

“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.”

8. From the record, it is evident that the Petitioners were in remand from September 4, 2017 when they were arraigned in Court for plea taking. The 1st Petitioner was remanded in custody until November 18, 2019 and the 2nd Petitioner until November 8, 2018 when their respective sureties were approved. The 1st Petitioner therefore spent 2 years and 2 months in custody while the 2nd Petitioner spent 1 year and 2 months. I have perused the Judgment and have noted that the Court did not indicate whether it had taken into account the time spent in custody. It would therefore be a miscarriage of justice if I do not factor the said period as it is an express provision of the law.

Final Orders

9. I therefore order as follows:
- i. With due regard to Section 333 (2) of the Criminal Procedure Code I find that the Application has merit and allow in the following terms:
 - ii. With respect to the 1st Petitioner Boniface Wekhaya therefore, the period of 2 years and 2 months spent by him in custody during trial, before sentence, shall be taken into account in computing the sentence period served or to be served in prison by him.
 - iii. With respect to the 2nd Petitioner John Kipyegon Rotich, the period of 1 year and 2 months spent by him in custody during trial before sentence, shall be taken into account in computing the sentence period served or to be served in prison by him.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

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WANANDA J.R. ANURO

JUDGE

Eldoret High Court Criminal Petition No. E007 of 2022

