



**Njagi v Republic (Criminal Review E276 of 2023)  
[2023] KEHC 20187 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20187 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL REVIEW E276 OF 2023  
DO CHEPKWONY, J  
JULY 11, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19,20,22,23,25,27,28,  
29,50,51,159 OF 165 OF THE CONSTITUTION OF KENYA  
IN THE MATTER OF APPLICATION AND ENFORCEMENT OF  
SECTION 333 (2) OF THE CRIMINAL PROCEDURE CODE IN  
RELATION TO SENTENCES THAT HAVE NOT FACTORED IN THE  
TIME SPENT IN CUSTODY**

**BETWEEN**

**MAUREEN KARIMI NJAGI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before me is an undated Notice of Motion application filed on May 12, 2023 by Maureen Karimi Njagi the Applicant herein. The Applicant who was charged, tried and convicted for the offence of Manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*, was sentenced to serve Six (6) years imprisonment with directions that she served Three (3) years custodial sentence and the other Three (3) years be served on Probation on August 4, 2022.
2. The Applicant prays for the court to consider computing the sentence meted against her to include time spent in remand during trial pursuant to Section 333 (2) of the *Criminal Procedure Code*.
3. The application is founded and supported by the grounds set out on its face and Supporting Affidavit sworn by the Applicant. The gist of all the grounds is that by failing to take into account the period



spent in custody during trial the Applicant's rights and fundamental freedom has been violated contrary to the provisionary Articles 19, 20, 22, 23(3), 25(c), 27 and 29(f) of the Constitution and hence seeks redress *vide* Article 50(2)(p), 52(1), 159(2) and 165(3)(b) all of the Constitution and Section 336(2) of the Criminal Procedure Code.

4. According to the Applicant, she was arrested in 2016 and spent 11 months in custody since incarceration and 6 months awaiting sentence. She seeks to have period of 1 year 5 months which she spent in custody to be taken into account as interpreted in the case of *Ahmad Abolfathi -vs- Republic* (2016). She states that if the period is not considered, she will serve an excessive sentence which will be in contravention of her constitutional rights and fundamental freedoms. The Applicant therefore seeks revision of the sentence for computation of the sentence to start from the date of arrest.

### **Analysis and Determination**

5. The power to determine an application of this nature is made in exercise of the supervisory jurisdiction of the High Court in criminal cases as provided for under Sections 362 to 366 of the Criminal Procedure Code. Section 362 provides that:-

[362]. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”

Section 364 states as follows:-

[364]. Powers of High Court on revision (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
  - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.



(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

6. It is trite law that 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.”

7. According to *The Judiciary Sentencing Policy Guidelines*:-

“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.”

8. In this case, the trial Court’s record, the Applicant was charged on June 10, 2016 and was released on bond in March 14, 2017. The Applicant was tried, found guilty and convicted on May 23, 2022. She was sentenced on August 4, 2022. It is therefore evident that she had spent 11 months in custody during trial which period ought to be taken into consideration when sentence was meted against the Applicant, a result of which the Applicant will have served a higher sentence than the prescribed one.

9. The upshot is that the Notice of Motion application filed on May 12, 2023 is hereby allowed with the following orders:-

a. The term of sentence meted against the Applicant to be calculated from the May 6, 2020 when the Applicant was arraigned in court.

b. No orders as to costs.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 11<sup>TH</sup> DAY OF JULY   , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Applicant in person – present

M/S Ngesa for Respondent

Court Assistant - Nancy

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