



REPUBLIC OF KENYA



KENYA LAW
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**Salaito v Republic (Criminal Petition E030 of 2021)
[2023] KEHC 20291 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E030 OF 2021
F GIKONYO, J
JULY 10, 2023**

BETWEEN

TIMOI SALAITO PETITIONER

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence in Criminal Case
No. 1175 of 2018 of the Chief Magistrate's Court at Narok)*

JUDGMENT

Time Spent in Custody

1. Before the court is an undated application on December 9, 2021 in which the petitioner is seeking for time he spent in custody to be considered in the sentence imposed on him. The application is premised on Articles 2, 10, 19(3), 22(1) & (3), 23, 25 (c), 27(1)(2), 28, 29(f), 50(2)(q), 159(1), 160(1), 165(3) (b), 258(1), 259 and sixth schedule (article 262) rule 7(1) of the Constitution, Section 333(2) of the Criminal Procedure Code, and Section 38 of the Penal Code.

Petitioner's submissions

2. The petitioner orally submitted that he is seeking the 3 years spent in remand to be taken into account. That he has never filed any appeal. He also stated that he was convicted for handling stolen property.

Prosecution's submissions.

3. Ms Torosi, the prosecution counsel submitted that their office was only served with the petition. She stated that they have tried to trace the trial court record, and appeal record to no avail; and even a visit to the Kenya Law Report portal bore no fruits. Therefore, they were unable to make their submissions on the request for consideration of time spent in custody prior to the sentence.



Analysis And Determination

Original trial court's file traced

4. The court has traced the original trial court's file and availed itself of its content for purposes of determining whether time spent in custody prior to the sentence herein was taken account of by the trial court.

Start date of sentence: the law

5. 'Every sentence shall be deemed to commence from, ... the date on which it was pronounced, except where otherwise provided in this Code.' Section 333(2) of the *Criminal Procedure Code*.
6. But; 'Provided that where the person...has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.' Proviso to *ibid*.
7. The purport of the proviso to section 333(2) of the *CPC* is to avoid '...an excessive punishment that is not proportional to the offence committed.'. See explanation in Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11¹).
8. Therefore, section 333(2) of the *CPC* pertains to fair trial, and courts should give it real effect in sentencing (*Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR, and *Bethwel Wilson Kibor v Republic* [2009] eKLR).

Facts of Case

9. The applicant herein was convicted of the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The maximum penalty provided for robbery with violence in section 296(2) of the *Penal Code* is death.
10. The trial court (Hon G N Wakahiu (CM) in sentencing the applicant considered the report filed by the probation officer which recommended non-custodial sentence, mitigation by the accused, the fact that death is provided as the maximum sentence for robbery with violence, and that the petitioner had been in custody since his bond was cancelled after he had absconded; and consequently sentenced the petitioner to 10 years' imprisonment for robbery with violence.
11. Upon consideration of all relevant factors, the trial court concluded; 'In the circumstances of this case, I sentence the 2nd accused person Timoi Salaito to serve ten (10) years imprisonment.'
12. In sentencing the petitioner, the trial court considered all relevant factors including time spent in custody after cancellation of his bond for absconding.
13. In any event, this court notes that the sentence of 10 years' imprisonment in the circumstances of this case was too lenient. It is only fair and just that it commenced from the date it was pronounced; on November 18, 2021, as provided in law.
14. Accordingly, although section 333(2) of the *CPC* does not tell how the court should take account of time spent in custody prior to the sentence, the circumstances of the case show that, the trial court, in sentencing the petitioner, took account of the period spent in custody prior to the sentence.

¹ The provision 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.



Conclusion and Orders

15. In light thereof, I make the following specific orders;

- i. This petition is dismissed.
- ii. Just as a matter of clarity, the sentence of 10 years' imprisonment imposed upon the petitioner shall commence from the date on which it was pronounced by the trial court, i.e. November 18, 2021.

16. Orders accordingly.

Dated, Signed and Delivered at Narok through Microsoft Teams Online Application, This 10th Day of July, 2023

F. Gikonyo M.

Judge

In the presence of

Ms. Mwaniki for DPP

Petitioner

Muraguri - CA

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