



REPUBLIC OF KENYA



KENYA LAW
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**Kilel v Director of Public Prosecutions (Miscellaneous Criminal Application
E131 of 2023) [2023] KEHC 23136 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E131 OF 2023**

HM NYAGA, J

OCTOBER 5, 2023

BETWEEN

DAVID KIPKORIR KILEL APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(High Court Nakuru Criminal Case Number 85 of 2012)

RULING

1. By an undated Notice of Motion filed on May 23, 2023, the applicant has sought the following orders;-
 - a. That the honourable court be pleased to order that my sentence in High Court Nakuru Criminal Case Number 85 of 2012 to run from the date I was remanded.
 - b. That the honourable court be pleased to invoke the provisions of Section 333 of the *Criminal Procedure Code* and all other enabling provisions in the interest of justice.
 - c. That the honourable court of law be pleased to make order that it will deem fit in the interest of justice.
 - d. That the application is supported by the annexed affidavit of NAK/1039/019/LS David Kipkorir Kilel and such other grounds that will be adduced at the hearing of this application.
2. The Application is supported by the Affidavit of the Applicant. In a nutshell, he states that he was charged with the offence of murder, contrary to Section 203 as read with Section 204 of the *Penal Code*, in High Court (Nakuru) Criminal Case Number 85 of 2012. That all through the trial he was



in custody. He further avers that during the passing of the sentence the remand period was not taken into account by the court.

3. The applicant thus asks this court to invoke Section 333 of the *Criminal Procedure Code*.
4. In the course of hearing the Application, it emerged that the applicant did not file an appeal to the Court of Appeal. He thus states that this court has the jurisdiction to hear this application.
5. The state counsel, representing the ODPP left the matter to the court for determination.
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 is easier said than done as can be seen from the following authorities.
9. In *Abamad Abolfathi Mobammed & Another vs Republic* [2018] eKLR 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 June 19, 2012."

10. The same court in *Bethwel Wilson Kibor vs Republic* [2009]eKLR also 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. The *Judiciary Sentencing Policy 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."

12. It is thus upon this court to determine if the application is merited or not.

13. Though the original court record was not availed, the court was able to access the Judgment and Sentence in the case. The Ruling on Sentence was delivered by my elder brother J. Ngugi (J) (as he then was) on March 28, 2019. The court stated as follows;

"Consequently, in my view, a fit sentence that properly balances the mitigating circumstances with the aggravating circumstances is a sentence of seven (7) years imprisonment. Accordingly, I sentence the Accused Person to seven (7) years imprisonment. In coming up with this sentence, I have taken into consideration the period the Accused Person has been in custody."

14. In my view, the trial court duly considered the remand period and expressed itself very clearly. It is thus not true that the provisions of Section 333(2) *Criminal Procedure Code* were not adhered to.

15. In my opinion, if the applicant feels that the trial court did not apply the said provisions of the law, then the correct avenue is to appeal to the Court of Appeal, not this court. I cannot sit on review of a decision of a court of concurrent jurisdiction.

16. In the circumstances, I find that this application lacks merit and it is dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH OF OCTOBER, 2023.



H. M. NYAGA

JUDGE

In the presence of;

C/A Jennifer

For state Ms Murunga

Applicant present (*Given a copy of the Ruling as he is deaf but can read*)

H. M. NYAGA

JUDGE

5/10/2023

