



**Lobuin v Republic (Miscellaneous Criminal Appeal E097 of 2023)
[2023] KEHC 23620 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E097 OF 2023
RN NYAKUNDI, J
OCTOBER 17, 2023**

BETWEEN

EWOI ELAAR LOBUIN APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant was charged in the lower court with three counts of the offence of attempted rape contrary to section 4 of the *Sexual Offences Act* No 3 of 2006. The said count had an alternative charge which is committing indecent act with an adult contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. In Count II, the applicant was charged with being in possession of a specified firearm without a firearm certificate contrary to section 4 A (1) a as read with section 4A (2) of the *Firearms Act* chapter 114 laws of Kenya. In count III, the applicant was charged with being in possession of ammunitions without a firearm certificate contrary to section 4(2) (a) as read with section 4(3) (a) of the *Firearms Act* Cap 114 laws of Kenya. The applicant was convicted of the said charges and a sentence of 12 years was imposed on both counts.
2. Prior to the close of the prosecution's case, the prosecution moved the trial court under section 87 (a) of the *CPC* to have the 1st count withdrawn. The court allowed the application and the pending charges against the accused person were count II and III.
3. The applicant sought review of the sentence pursuant to Section 332 of the *Criminal Procedure code*. The applicant prays that the court considers the provisions of section 333(2) of the *CPC* and take into account the time he has been in custody.

Analysis And Determination

4. I have considered the application and the court's mandate is to determine the application of section 333(2) of the *Criminal Procedure code*. The section provides 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.
5. The Judiciary *Sentencing Policy Guidelines* are also clear in this respect. They require that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.
6. In *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR where 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.”
7. The punishment prescribed by the law for the offence of being in possession of a specified firearm without a firearm certificate is a maximum sentence of fifteen (15) years and a minimum of seven (7) years and the same applies to the offence of being in possession of ammunitions without a firearm certificate. I therefore find the sentence meted to be commensurate to the charges.
8. The Applicant was convicted on 3rd October, 2022 when judgment was read out and after mitigation, he was sentenced to serve 12 years imprisonment for both counts. The court in sentencing the accused person stated that the time he had served in custody was considered. However, in my view the trial court should have been clear on when the sentence would start running. I share the same thoughts as the court in *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR that the trial court should have directed the applicant’s sentence of imprisonment to run from the date of arrest on December 22, 2021.
9. Therefore, in compliance with Section 333(2) *Criminal Procedure code*; computation of the sentence ought to include the period the Accused person was in custody during hearing and determination of the case before sentence was meted out.



10. The Accused was placed in custody on December 22, 2021 and sentenced on October 3, 2022. The 12 years ought to start running from December 2021 when he was placed in custody to October 2022 when he was sentenced to serve 12 years imprisonment for the two counts.
11. The sentencing process and its outcome are within the mandate of the trial court. However, since circumstances vary from a case to another, this court shall intervene in exercise of revision pursuant to Article 165(3)CoK where mandatory provisions of the law have not been complied with.
12. In conformity with Section 333(2) Criminal Procedure code, and considering the period he has been in custody. The sentence shall be computed to include the period running from December 2021-October 2022 when he was sentenced to serve 12 years imprisonment.
13. The Applicant's Miscellaneous Application is allowed as follows;
 - a. Section 333(2) CPC mandates the 12 years imprisonment sentence granted by the trial court on October 3, 2022, served by the applicant shall be computed to include the period the Applicant was in custody before sentence, to commence from January 4, 2022.

DATED AND SIGNED AT ELDORET THIS 17TH DAY OF OCTOBER, 2023

In the presence of

Mr. Yusuf for the state

Appellant

R. NYAKUNDI

JUDGE

