



**Maina v Director of Public Prosecution (Miscellaneous Criminal Application
E065 of 2023) [2023] KEHC 23135 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E065 OF 2023**

**HM NYAGA, J
OCTOBER 5, 2023**

BETWEEN

JOHN NDERITU MAINA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. The applicant was charged vide High Court Criminal Case No. 90 of 2012 with the offence of murder, contrary to section 203 as read with section 204 of the *Penal Code*.
2. After a full trial the court found him guilty of the offence of Murder contrary to section 203 of the *Penal Code*. He was convicted accordingly and was sentenced to 10 years' imprisonment, on January 20, 2018.
3. The Applicant has now filed the instant undated Application pursuant to Section 333 (2) of the *Criminal Procedure Code* seeking for an order that his 10 years' prison sentence be deemed to have commenced on the day he was first remanded.
4. The state does not oppose the Application.
5. 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”.



6. 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 v 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.”

7. 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 can be done by simply stating when the sentence will commence and the period to include the time spent in custody.

8. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision 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.”

9. The same court in *Bethwel Wilson Kibor v Republic* [2009] eKLR 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.”

10. As can be seen, there is no consensus on how the taking into account is to be applied. In Ahmad Abolfathi’s case (supra), the court seem to suggest that the time in custody ought to be deducted while in *Bethwel Wilson Kibor’s case*(supra) the court states that the sentencing court ought to specifically state that it had taken account of the period spent in remand custody.
11. I have perused the trial court record and I note that the court stated as follows;

“I have noted the mitigation. I have also noted from the affidavit filed that the families are willing to reconcile. The accused has been in custody since 2012. Nevertheless due to actions of the accused a human life was lost. I therefore sentence accused to serve ten(10) years imprisonment.”
12. In my view, the trial court duly considered the remand period and expressed itself very clearly. It did not need to commence a mathematical journey and make deductions of the time spent in remand custody. It is enough that it took account of the time spent in custody.
13. It is thus not true that the provisions of Section 333(2) *Criminal Procedure Code* were not adhered to.
14. 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.
15. In the circumstances, I find that this application lacks merit and it is dismissed.

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

H.M. NYAGA

JUDGE

In the presence of:

C/A Jeniffer

Ms Murunga for state

Applicant

