



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CR. APPL. NO. 27 OF 2020

JARED OCHIENG JURA 1ST APPLICANT

RICHARD OLOO OTIENO2ND APPLICANT

-VERSUS-

REPUBLIC RESPONDENT

RULING

The Applicants, **JARED OCHIENG JURA** and **RICHARD OLOO OTIENO** have invoked the provisions of **Section 333 (2)** of the **Criminal Procedure Code**.

1. They have asked this court to review the order which was made on 27th November 2018, when they were re-sentenced to 30 Years Imprisonment, each.
2. Originally, the Applicants, together with **RICHARD ORICHO ONYANGO** were convicted for the offence of **Robbery with Violence** Contrary to **Section 296 (2)** of the **Penal Code**.
3. The trial court then sentenced each of them to suffer death as by law prescribed.
4. Following the declaration made by the Supreme Court, that the mandatory death sentence is unconstitutional, the Applicants successfully urged the court to review the original penalty. It is then that the High Court re-sentenced them to 30 Years Imprisonment, each.
5. On 24th October 2019 the Applicants and Richard Oricho Onyango filed an application for review of the sentence of 30 Years Imprisonment.
6. In particular, the Applicants asked the court to reduce the sentence of 30 Years Imprisonment.
7. On 19th February 2020 this court rejected the application for further review. In the Ruling dated 19th February 2020 I stated as follows;

“In this case, the court already gave due consideration to all the factors which each of the Applicants had placed before me. Having undertaken the requisite evaluation of the Applicants’ respective circumstances, the court re-sentenced each of them to 30 years imprisonment.

There is no basis in law or in fact, to warrant a further review of the sentence that was handed down during re-sentencing.”

8. Notwithstanding the said Ruling, the Applicants have filed the current application.
9. It is their case that the sentence ought to run from the date when they were arrested, as opposed to running from the date when the trial court handed down the sentence.
10. **Section 333 (2)** of the **Criminal Procedure Code** reads as follows;

“Subject to the provisions of Section 39 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

11. It is settled that when the court is required to “take account” of the period spent in custody, that means that the court is under an obligation to give consideration to the said period.
12. The duty imposed upon the court is to give due consideration to the period which the accused had spent in custody during the process of trial.
13. The statutory provision does not state that the period is to be automatically deducted from the sentence which the court is minded to give.
14. Provided that the court exercises its mind in a judicious manner, the court may, nonetheless, impose an appropriate sentence, without necessarily deducting therefrom the period spent in custody.
15. In this case the learned trial magistrate had sentenced the Applicants to death. In effect, the period which the Applicants had spent in custody whilst they were on trial could not conceivably have been deducted from the death penalty.
16. After the Applicants had exhausted their respective appeals, they sought for re-sentencing.
17. On 27th November 2018 I re-sentenced the Applicants to 30 Years Imprisonment. I did expressly order that the said sentence would run from 7th October 2004. My understanding is that it is the order made on 27th November 2018 that the Applicants wish to have reviewed.
18. As already pointed out herein, the Applicants already sought the reduction of the sentence of 30 Years imprisonment.
19. In rejecting the application dated 24th October 2019, I stated, inter alia, that I had given due consideration to all the factors which each of the Applicants had placed before the court, when they were seeking a reduction of the sentence of 30 Years imprisonment.
20. I expressed the considered opinion that there was no legal basis that could warrant a further review of the said sentence.
21. I have asked myself whether or not the present application can be said to constitute a request for a downward review of the sentence.
22. I find that, in a strict sense, the current application does not seek the reduction of the sentence. The Applicants’ request is that although the sentence would remain, it is the date from which the sentence should run, which ought to take into account the provisions of **Section 333 (2)** of the **Criminal Procedure Code**.
23. I have taken into account the fact that at all times material to this case, all accused persons who were on trial for the offence of **Robbery with Violence** were not eligible to Bond or Bail.
24. It was not until 27th August 2010 that the current Constitution of the Republic of Kenya was promulgated.
25. **Article 49 (1) (h)** of the **2010 Constitution** stipulated that an Arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.
26. A perusal of the Record of the proceedings before the trial court verified that all the accused persons were in custody throughout their trial.
27. When I was re-sentencing the Applicants herein, I did not take into account the period of 4 years which they had spent in custody, during the trial.
28. Having perused the proceedings once again, I did not find any reason that would warrant a disregard of the provisions of **Section 333 (2)** of the **Criminal Procedure Code**.
29. Ordinarily, every sentence shall be deemed to commence from the date it is pronounced. However, pursuant to **Section 333 (2)** of the **Criminal Procedure Code**, when the accused had been in custody during trial, the sentence shall take into account the period spent in custody.
30. I reiterate that that does not imply that the period should be automatically deducted from the sentence.
31. My understanding is that if a court was minded to sentence the accused to 10 years imprisonment, the court may impose a sentence of say, 8 years imprisonment, if the accused had remained in custody for 2 years during trial.
32. In this case, as already indicated, I did not take into account the 4 years which the Applicants had spent in custody during their trial. In the circumstances, and in compliance with the requirement of the provisions of **333 (2)** of the **Criminal Procedure Code**, I hereby order that the 30 Years Imprisonment for each of the Applicants should run from the date when they were first charged. For the avoidance of any doubt it is now hereby ordered that the sentence should run from 17th July 2000.

DATED, SIGNED and DELIVERED at KISUMU This 2nd day of February 2021

FRED A. OCHIENG

JUDGE