



**Musembi v Republic (Criminal Petition E021 of 2021)  
[2021] KEHC 319 (KLR) (6 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 319 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL PETITION E021 OF 2021  
MW MUIGAI, J  
DECEMBER 6, 2021**

**BETWEEN**

**JUSTUS MUSAU MUSEMBI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant together with another person were charged with two counts. The first count was the offence of Vandalism of electrical apparatus contrary to Section 64(4) of the Energy Act No.2012 with an alternative charge of Handling Stolen Goods contrary to Section 322(1) as read with Section 322(2) of the *Penal Code*.
2. The second count was the offence of Entering into a National Park with a livestock contrary to Section 102(1) (a) of the *Wildlife Conservation and Management Act*, 2013.

**TRIAL COURT'S JUDGMENT**

3. Before the Principal Magistrate Courts at Mavoko in PMC Criminal No.14 of 2016, the Trial Magistrate P.O.Ooko PM convicted Applicant and the other person on the first count and acquitted them on the second count.
4. The Trial Magistrate considered the Applicant and the other person mitigation and sentenced each to a fine of Kshs. 5 Million in default to serve 10 years imprisonment.

**APPEAL**

5. Aggrieved by the conviction and sentence, Applicant together with the other person appealed before this court vide High Court Criminal Appeal No.54 of 2017.

**HIGH COURT JUDGMENT**



6. The appeal was determined by Honourable Justice D.K Kemei vide his Judgment dated 17<sup>th</sup> September, 2018 whereby the Learned Judge dismissed the appeal. The conviction and sentence were upheld.

#### TIME SPENT IN CUSTODY NOT TAKEN INTO ACCOUNT

##### Applicant's submissions

7. The Applicant is back to this court vide the application filed in court on 26<sup>th</sup> January, 2021 claiming that the time he spent in custody was not taken into consideration by Hon. Justice D.K Kemei as required under Section 333(2) of the *Criminal Procedure Code* (CPC). Reliance was placed on the cases of *Ahamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR and in *Bethwel Wilson Kibor vs. Republic, CA at Eldoret Cri. Appeal No. 78 of 2009* as well as The Sentencing Policy Guidelines Para.7.10 and The Judiciary Criminal Procedure Bench Book (2018) Para.45 on the proposition that the time spent in custody must be taken into account before sentencing.

##### Respondent's submissions

8. The Respondent has opposed the application and submitted that this court is functus officio hence the application should be directed to the Court of Appeal. Reliance was placed on cases of *Telkom Kenya Limited vs. John Ochanda (Suing on own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR and in the case of *Jersey Evening Post Ltd vs. Al Thani* [2002] JLR 542 at 550 cited and applied by the Supreme Court in *Raila Odinga & 2 Others vs IEBC & 3 Others* [2013] eKLR.

#### DETERMINATION

9. I have considered the application and written submissions filed on behalf of respective parties.
10. The Applicant contends that Section 333(2) of the CPC in respect of the time spent in custody was not adhered to by this court.
11. Section 333(2) of the Criminal Procedure Code provides that:

“(2) Subject to the provisions of section 38 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.”
12. It is clear from the decisions of *Ahamad Abolfathi Mohammed & Another vs. Republic* (supra) and in *Bethwel Wilson Kibor vs. Republic, CA at Eldoret Cri. Appeal No. 78 of 2009* that the period spent in custody must be taken into account before sentencing.

#### WAS THE TIME SPENT IN CUSTODY CONSIDERED\*

13. What was placed before the High Court was an appeal against conviction and sentence of the Trial Court's judgment of 28<sup>th</sup> April 2017. The issue of computation of sentence under Section 333(2) CPC was not a ground of appeal or raised. Consequently, in the Appeal Court Judgment at pages 11 and 12, Honourable Justice D.K Kemei held;

“..I am unable to find that the Prosecution case was not proved beyond reasonable doubt. The defence case does not cast doubt to the Prosecution case. In the end I find no merit



in this appeal and it is hereby dismissed. The conviction and sentence by the Trial Court is upheld.”

14. This Holding by the High Court remains a regular, legal and lawful order by this Court until successfully appealed against in the Court of Appeal. This Court being of equal, competent and concurrent jurisdiction cannot reopen the same.
15. In the instant application, the Applicant sought for computation of the sentence upheld to include the period in custody during hearing and pending judgment as required under Section 333(2) CPC only.
16. The Court also notes that in the Trial Court Judgment the court did not indicate whether the time spent in custody was taken into account.
17. The penalty under Section 64(4) (b) of the Energy Act (supra) is payment of a fine of not less than Kshs.5 Million or serve a term of not less than 10 years to imprisonment or both.
18. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs. Republic* (supra) held that:-

“..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...”
19. It is clear in the Judgment that the time spent in custody by the Applicant was not taken into account by both the Trial Court and Appeal Court.
20. The Applicant is serving the 10 years imprisonment imposed by the Trial Court as opposed to paying the fine of Kshs.5 Million.
21. The charge sheet shows that the date of arrest was on 10<sup>th</sup> January, 2016 and the Applicant was arraigned in court on 11<sup>th</sup> January, 2016. The Applicant remained in custody until he was sentenced on 28<sup>th</sup> April, 2017 after a period of 1 year and 3 months.

#### DISPOSITION

- a. Pursuant to Section 333(2) of the Criminal Procedure Code, the 10 year imprisonment sentence will be computed to take into account the 1 year and 3 months and to run from 10<sup>th</sup> January, 2016, the date of the arrest.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 6<sup>TH</sup> DAY OF DECEMBER, 2021.**

**M.W MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

Justus Musau Musembi – applicant – present (virtual)

Geoffrey- Court Assistant

